EXTRA-JUDICIAL ADMINISTRATION OF JUSTICE IN CROSS-BORDER FAMILY AND SUCCESSION MATTERS

Comparative and Policy Perspectives

Edited by
Elena Bargelli, Anatol Dutta, and François Trémosa

in cooperation with
Paul Patreider and Elisa Stracqualursi

Lefebvre Giuffrè

EXTRA-JUDICIAL ADMINISTRATION OF JUSTICE IN CROSS-BORDER FAMILY AND SUCCESSION MATTERS

Comparative and Policy Perspectives

Edited by
Elena Bargelli, Anatol Dutta, and François Trémosa

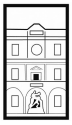
in cooperation with
Paul Patreider and Elisa Stracqualursi

Lefebvre Giuffrè

ISBN 9788828873938

This book is an output of the project "The concept and role of 'court' in the age of dejudicialization. Reinforcing EU Family and Succession Law" (CODE.FS) which was funded by the EU under the JUST-2021-JCOO call (project ID: 101046578).

An open access version of this book is available online, thanks to funding from the LMU Open Access Fund.



Università di Pisa
Dipartimento di Giurisprudenza

ELI
European Law Institute

LMU Ludwig-Maximilians-Universität München

FSC

© Copyright Giuffrè Francis Lefebvre S.p.A. Milano - 2025
Via Monte Rosa, 91 - 20149 MILANO - www.lefebvregiuffre.it

The total or partial translation, adaptation, or reproduction by any means (including photocopying and microfilm) and electronic storage, is reserved for all countries.
An online version of this work is published under a Creative Commons Open Access License (CC-BYNC-ND 4.0), which permits re-use, distribution and reproduction in any medium for non-commercial purposes, provided appropriate credit to the original work is given. If you create a derivative work by remixing, transforming or building upon the material, you may not distribute this without permission.
To view a copy of this license, visit https://creativecommons.org/licenses/by-nc-nd/4.0/.

Printed by LegoDigit s.r.l. - Lavis (TN)

FOREWORD

It is a long-standing prejudice among lawyers, but also among society as a whole, that the administration of justice is primarily a matter for the courts and that other authorities are called upon only in exceptional cases or for ancillary measures. However, this is nowadays no longer true in many Member States of the European Union. In family and succession law in particular, the administration of justice has, in numerous cases, been transferred in whole or in part to non-judicial bodies – notaries, civil status officers, child protection agencies, etc – to an extent that it is appropriate to speak of a 'de-judicialisation' of the administration of justice. The extent of this development varies greatly between Member States, and there is no uniform situation. These differences, which have left their mark on the case-law of the Court of Justice of the European Union, raise two fundamental questions. On the one hand, it is often unclear whether and to what extent existing European Union instruments on judicial cooperation in family and succession matters apply to proceedings and measures ('acts') of extra-judicial administration of justice in cross-border cases, and secondly, the question arises as to whether the EU should not make use of its competences to adopt legislation in order to create uniform rules or at least guidelines for this area of the administration of justice.

Answering these questions requires precise knowledge and a thorough analysis of the legal situation in the Member States of the Union. The European Law Institute's project 'Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters' (2020–2025), which has resulted in this book and was co-funded by the European Union, provides the foundation for this. Based on country reports that describe the legal situation in 16 Member States on the basis of a questionnaire, a Comparative Report analyses convergences and divergences in the course of the 'de-judicialisation' of the administration of justice, while at the same time providing a comparative overview of the main features of current family and succession law in representative Member States of the Union.

On this basis, policy recommendations have been formulated by the Project Group as the core element and pioneering achievement of the Project. They are addressed to the EU and the Member States and contain guidelines for the development of Union law and Member States' law when acts in family and succession matters are reserved to courts in at least one Member State but fall within the competence of other authorities, or the parties themselves, in other Member States. The proposals aim, *inter alia*, to strengthen non-judicial bodies, provide for compliance with minimum pro-

cedural standards and call for the extension of EU principles on jurisdiction and the recognition of effects between Member States. Also pointing to the future is the proposal to extend the jurisdiction of the Court of Justice of the European Union so that an authority of a Member State that participates in an act in family and succession matters is considered as a 'court or tribunal' for the purposes of Article 267 of the Treaty on the Functioning of the European Union. Indeed, the involvement of the Luxembourg Court would ensure the uniform application and interpretation of EU law provisions on the extra-judicial administration of justice and strengthen their constitutional safeguards. Thus, the outcome of the Project has the potential to give a new dimension to the administration of justice in family and succession matters in the EU.

CHRISTIAN KOHLER
Former Director General at the Court of Justice of the European Union, *Honorarprofessor*, Saarland University, Germany

PREFACE

This volume collects the results of a collaborative research project on the extra-judicial administration of justice in cross-border family and succession matters led by the editors. The Project was conducted by the University of Pisa and the Ludwig Maximilian University of Munich under the auspices of the European Law Institute (between 2020 and 2025) and was funded by the European Union (between 2023 and 2025). Cornerstones of the Project were workshops in Pisa (July 2023) and Munich (September 2024) and a conference in Vienna (February 2025), where the results of the Project were presented and discussed. The main outcomes of the Project, 16 country reports, a comparative report and our policy recommendations, are published in this book.

We are indebted to many individuals and institutions for their support: the European Law Institute, in particular, Christiane Wendehorst for her valuable input as the Institute's Scientific Director; the members of the Council of the European Law Institute for their feedback on the drafts; Tomasz Dudek for guiding us smoothly through the jungle of the Institute's processes as the Senior Legal Officer in charge of our Project; our country reporters (1) for their insights into a dynamic and broad area of the law; the members of our Advisory (2) and our Consultative Committee (3) as well as the participants of our workshops for their ideas; Donna Stockenhuber for the language revision of the text; and our universities – the University of Pisa

---

(1) Stéphane Berre, Katarzyna Bogdziewicz, Nicola Chiricallo, Nataša Erjavec, Laura Esteve Alguacil, Aron Johanson, Merel Jonker, Katarzyna Kamińska, Tiina Karm, Kathryn O'Sullivan, Paul Patreider, Rute Teixeira Pedro, Frank Høgholm Pedersen, Wendy Schrama, Elisa Stracqualursi, Lars Thøgersen, Laima Vaigė, Ioan Luca Vlad, Eleni Zervogianni.

(2) Frédérique Ferrand, José-Maria Gomez-Riesco Tabernero de Paz, Tobias Helms, Costanza Honorati, Matthias Neumayr (Assessor), Pascal Pichonnaz (Assessor), Walter Pintens, Ilaria Pretelli (Assessor), Jens Martin Scherpe (Assessor, until March 2024), Andrea Schulz, Maciej Szpunar, Camelia Toader, and Ilaria Viarengo.

(3) The Association of Notaries of the Republic of Poland (represented by Wiktor Karpowicz), Marina Androulaki, Arvind Babajee, Małgorzata Balwicka-Szczyrba, Joaquín Bayo Delgado, Yurii Bilousov, Mircea Bob-Bocsan, Robert Bray, Tomasz Chmielewski, Gregor Christandl, CORPME (represented by Marta Hernández), Olga Cvejić Jančić, Elena D'Alessandro, Irina Dikovska, Giulia Donadio, Christiana Fountoulakis (Chair), Cristina González Beilfuss, Lukas Heckendorn Urscheler, Francisco Javier Jiménez Muñoz, Jens Kleinschmidt, Thalia Kruger, Antonio Legerén Molina, Elena Marinică, Giuseppe Marino, Lineke Minkjan, Daniele Muritano, Jose Pau, Natalia Rueda, Carlo Rusconi, Sharon Shakargy, Stacie Stong, and Irina Zlatescu.

and the Ludwig Maximilian University of Munich – as well as the European Commission for their financial support.

Munich, Pisa, and Toulouse

THE EDITORS

LIST OF CONTRIBUTORS

EDITORS

Elena Bargelli *(University of Pisa, Italy)*
Anatol Dutta *(Ludwig Maximilian University of Munich, Germany)*
François Trémosa *(Notary, France)*

in collaboration with

Paul Patreider *(Ludwig Maximilian University of Munich, Germany)*
Elisa Stracqualursi *(University of Pisa, Italy)*

CONTRIBUTORS

Stéphane Berre *(Université Jean Moulin Lyon 3, France)*
Katarzyna Bogdziewicz *(Mykolas Romeris University, Lithuania)*
Nicola Chiricallo *(University of Ferrara, Italy)*
Nataša Erjavec *(Notary, Slovenia)*
Laura Esteve Alguacil *(Universitat de València, Spain)*
Aron Johanson *(Ludwig Maximilian University of Munich, Germany)*
Merel Jonker *(Utrecht University, the Netherlands)*
Katarzyna Kamińska *(University of Silesia in Katowice, Poland)*
Tiina Karm *(University of Tartu, Estonia)*
Kathryn o'Sullivan *(University of Limerick, Ireland)*
Paul Patreider *(Ludwig Maximilian University of Munich, Germany)*
Frank Høgholm Pedersen *(University of Copenhagen, Denmark)*
Rute Teixeira Pedro *(University of Porto, Portugal)*
Wendy Schrama *(Utrecht University, the Netherlands)*
Elisa Stracqualursi *(University of Pisa, Italy)*
Lars Thøgersen *(Ministry of Social Affairs and Housing, Denmark)*
Laima Vaigė *(Uppsala University, Sweden)*
Ioan-luca Vlad *(Lawyer, Romania)*
Eleni Zervogianni *(Aristotle University of Thessaloniki, Greece)*

ABBREVIATIONS

Abbreviations and citations in the present volume follow the OSCOLA standards and references (<www.law.ox.ac.uk/oscola> accessed 1 June 2025). Any additional abbreviations are highlighted within the contributions.

TABLE OF CONTENTS

Foreword V
Preface VII
List of Contributors IX
Abbreviations XI

Part I
INTRODUCTION AND COMPARATIVE REPORT

ANATOL DUTTA, PAUL PATREIDER, *De-judicialisation in family and succession matters – an introduction and comparative report* 3

Part II
NATIONAL REPORTS

PAUL PATREIDER, *Austria* 57
FRANK H PEDERSEN, LARS THØGERSEN, *Denmark* 181
TIINA KARM, *Estonia* 213
STÉPHANE BERRE, *France* 301
ARON JOHANSON, *Germany* 327
ELENI ZERVOGIANNI, *Greece* 431
KATHRYN O'SULLIVAN, *Ireland* 511
NICOLA CHIRICALLO, ELISA STRACQUALURSI, *Italy* 545
KATARZYNA BOGDZIEWICZ, *Lithuania* 601
MEREL JONKER, WENDY SCHRAMA, *The Netherlands* 645
KATARZYNA KAMIŃSKA, *Poland* 681
RUTE TEIXEIRA PEDRO, *Portugal* 725
IOAN-LUCA VLAD, *Romania* 799
NATAŠA ERJAVEC, *Slovenia* 851
LAURA ESTEVE ALGUACIL, *Spain* 929
LAIMA VAIGĖ, *Sweden* 993

Part III
POLICY RECOMMENDATIONS

ELENA BARGELLI, NICOLA CHIRICALLO, ANATOL DUTTA, PAUL PATREIDER, ELISA STRACQUALURSI, FRANÇOIS TRÉMOSA, *The extra-judicial administration of justice in cross-border family and succession matters — policy recommendations* 1047

PART I
INTRODUCTION AND COMPARATIVE REPORT

DE-JUDICIALISATION IN FAMILY AND SUCCESSION MATTERS – AN INTRODUCTION AND COMPARATIVE REPORT

by *Anatol Dutta and Paul Patreider* (*)

I. Introduction

A. *The need for comparative research*

Judicial cooperation in family and succession matters in the European Union is faced with an increasing shift in the administration of justice from courts to other authorities, such as notaries, (1) civil status officers, child protection agencies, judicial officers, advocates, lawyers, or even the private parties themselves. In particular, divorces, the establishment and termination of parenthood, matters of parental responsibility, the administration and division of estates, and the certification of the position as heir, legatee, executor, or administrator as well as the changes in a person's gender marker are often effected by institutions that cannot be regarded as 'courts' in the traditional sense. In most Member States, these developments did, however, not occur systematically. Rather, this trend – that could be defined as an increasing de-judicialisation of family and succession law – developed gradually in different areas, generally without being based on a coherent (premeditated) concept. (2) Most private international law instruments of the European Union, however, still presuppose that justice in the area of family and succession law is mainly administered by courts. (3) This causes regulatory **1**

(*) Anatol Dutta drafted the family law aspects of this report, whereas Paul Patreider was the author of the parts on succession law and the law of natural persons.

Throughout the present volume, national reports are cited as follows: *Author*, Country, para(s). The Comparative Report itself is cited as *Dutta/Patreider*, Comparative Report, para(s). References to the Policy Recommendations are made as follows: Principle X, para(s).

(1) Concerning notaries, cf the results of two recent research projects: Brigitta Lurger and Karl Stöger (eds), *Justice without litigation. Non-contentious proceedings by notaries in the European Union* (Manz 2022); Jens Bormann and Philip M Bender, *Judge without lawsuit. The notary in civil law countries* (C.H.Beck 2024).

(2) For example, *Zervogianni*, Greece, para 190.

(3) The Project focuses on the following instruments: the Brussels IIb Regulation (Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1), the Brussels IIa Regulation (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 [2003] OJ L338/1, the

gaps and inconsistencies, in particular, in cross-border cases. It remains unclear if the respective provisions on jurisdiction, applicable law, recognition, and enforcement of foreign judgments are fit to deal with an increasingly extra-judicial administration of justice in family and succession matters.

2 The main goal of the present Project was to contribute to the effective and harmonious application of the European Union *acquis* by identifying needs for reform in the current regimes, originally developed for judicial activities (and at the same time establishing minimum standards for the Member States' family and succession laws). The findings that were based on the comparative analysis were summarised in policy recommendations with principles and comments addressed at the European Union and the Member States' legislators, which are also published in this volume. (4)

3 So far, the discussion on the implications of a de-judicialised administration of justice in family and succession matters for the application of the private international law *acquis* have not focused on the analysis of the (new) rules in the Member State laws. For example, in the *TB* case, the Court of Justice

---

Hague Child Protection Convention (Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children), the Maintenance Regulation (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), the Hague Maintenance Protocol (Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations), the Rome III Regulation (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), the Succession Regulation (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) and the Matrimonial Property Regulations for Spouses (Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1) and Registered Partners (Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30) but also future instruments such as the planned Parenthood Regulation (Commission, 'Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood' COM [2022] 695 final) and on the International Protection of Adults (Commission, 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults' COM [2023] 280 final).

(4) See Part III of the present volume.

of the European Union came to the conclusion that a divorce in which an Italian civil status officer participated in shall circulate as a 'judgment' or 'decision' in matrimonial matters under the Brussels IIa and IIb Regulation. (5) The Court of Justice states that an Italian civil status officer acts as 'a legally established authority which, under the law of that Member State, has jurisdiction to pronounce the divorce in a legally binding manner by recording, in writing, the divorce agreement drawn up by the spouses'. (6) From a private law perspective, this reasoning of the Court of Justice gives rise to doctrinal concerns: How can an authority pronounce a divorce, hence, dissolve the marital bond, if this authority 'only' records the agreement drawn up by the spouses? Is the participation of the Italian civil status officer in the divorce process not closer to the role of a notary public who – when notarising a contract or other private declarations – has to check their legality and the consent of the parties? Can the European Union's provisions on the recognition of decisions be applied to private declarations of the parties if, under the law of the Member State, the recording by a civil status officer is a mere matter of formalities and does not entail any *res judicata* effect regarding the admissibility, existence and validity of the declaration?

4 Similar issues with the definition of 'court' and 'decision' have already surfaced with regard to the Succession Regulation. The latter does not only take judicial authorities into account, but also those exercising judicial functions or acting by delegation of power by a judicial authority or under its control (Article 3(2) of the Succession Regulation). Furthermore, non-judicial authorities and professionals – in many countries, notaries – are allowed to issue national certificates of succession and, since Article 64 of the Succession Regulation entered into force, the European Certificate of Succession.

5 The Court of Justice had, however, held in its *WB* and *E.E.* decisions (7) regarding the Succession Regulation that for there to be a 'court', the authority involved in the process would need to 'have jurisdiction to hear and determine disputes in matters of succession', (8) thus *de facto* excluding most non-judicial actors active in succession matters from the definition in

(5) Brussels IIa Regulation: 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 [2003] OJ L338/1.

(6) Case C–646/20 *Senatsverwaltung für Inneres und Sport v TB* [2022] ECLI :EU:C:2022:879, para 63.

(7) Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444; Case C–80/19 *E.E.* [2020] ECLI:EU:C:2020:230.

(8) Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444, para 56.

Article 3(2) of the Succession Regulation and their acts from circulating under the regime established for courts. While the conclusion might be justifiable when considering a traditional and institutional conception of 'court', both judgments seem to have lost sight of the original intention of the European Union legislator when drafting the European Succession Regulation: introducing a functional definition of court that covered both the authorities carrying out the traditional, contentious tasks in succession matters as well as those authorities entrusted with non-contentious proceedings in the Member States. Requiring non-judicial actors to exercise functions originally ascribed to judicial authorities (in particular, establishing facts in contentious cases) thus seems questionable.

6 In order to assess the consequences of the de-judicialisation trend on European private international law, a deeper understanding of how precisely the Member States shifted tasks from courts to other authorities or the private parties concerned is necessary. The Project aims at contributing to this understanding by collecting information not only on the present extent of the de-judicialised administration of justice in family and succession matters in the Member States' laws but also by focussing on the details of this trend, from a doctrinal, substantive, procedural, and private international law perspective.

B. *Methodology*

7 The heart of the comparative part of the Project are 16 country reports (9) which give an in-depth insight into the administration of justice in family and succession matters and highlight which, and how, procedures have so far been de-judicialised. The Member States were chosen to represent the diversity of the legal systems within the European Union. The selection of the countries was also limited by the obstacle of finding suitable researchers, as the Project crosses disciplinary borders by dealing with family and succession law – two distinct areas of law in most Member States' systems, focussing additionally on the substantive, procedural, and private international law

(9) From Austria, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, and Sweden. The selection was also intended to reflect civil law, common law, and Scandinavian jurisdictions within the European Union as well as Member States still adhering to a more traditional (purely institutional) concept of court and Member States that have started to delegate certain tasks to non-judicial actors. While all of the aforementioned jurisdictions are Member States of the European Union, not all apply the European private law instruments governing cross-border family and succession cases. This was a further factor considered when choosing the jurisdictions to be compared.

rules relevant in these fields. In order to gather the relevant information, the Project team drafted a questionnaire which was intended to inspire the country reporters. An early version of the – rather extensive – questionnaire was presented and discussed with some of the country reporters at a workshop in Pisa in July 2023, where first findings were presented.

The main part of the questionnaire for the country reporters was dedicated to the issues the reports should address: **8**

I. Introduction and overall considerations	**1.** Please provide a **brief** general description of your country's legal system, succinct but covering any matters particularly relevant to the purpose of the Project, which may include sources of law; overall structure of your legal system; structure of legislature(s), courts, and other legal professions entrusted with the extra-judicial administration of justice; any other notable general features relevant to the purpose of the Project. **2.** State areas of family and succession law in which the administration of justice has in recent years been delegated to non-judicial authorities. Provide an overview of your country's relevant law, and provide a succinct account of the formal requirements, safeguards, and requirements to achieve the operability of the respective procedures. **3.** Report on past and/or ongoing policy discussions/legislative proposals regarding de-judicialisation. What were the policy reasons behind the decision to introduce (or to not introduce) out-of-court proceedings (eg speeding up proceedings, reducing their costs, etc)? Are there any law reforms, or significant proposals for law reform (potentially relevant to the Project) currently under way? Are there any perceived weaknesses in safeguards or other aspects of the regime which could usefully be addressed in future reforms? **4.** Does your national law (and/or legal scholarship, case-law in your country) provide definitions of the concepts of 'court', 'decision', 'judicial function' or other concepts relevant for the Project? If so, please specify. **5.** Is statistical data regarding non-judicial proceedings in family and succession matters available (eg by ministries, bar associations, notaries, associations of registrars, judicial officers, etc)?

II. Family law	This subsection deals with the role and function of non-judicial authorities in family matters: **6.** Please provide a **brief** overview of the family law system in your country, only highlighting matters particularly relevant to the purpose of the Project, which may include sources of substantive and procedural law in family matters; any notable general features; procedural principles; the authorities involved. NB: **(a)** The questions under this subsection generally refer to proceedings before non-judicial authorities but should be addressed even if they are currently administered by judicial authorities in your Member State (MS). Should this be the case, describe these judicial proceedings.

	(b) If your MS provides for out-of-court proceedings, the issue of judicial proceedings should nevertheless be addressed. Highlight potential differences between judicial and non-judicial proceedings. In particular, refer to the tasks, functions, and powers of the competent judicial authorities, considering the aspects of a case which are examined, verified, and reviewed. Further, take differences regarding *lis pendens*, formal and substantive requirements, and the effects of a decision (*res judicata*) into account.

A. Divorce and legal separation	**7.** What out-of-court procedures can be accessed by spouses and civil partners to obtain legal separation, the annulment of marriage, or divorce? The focus should lie on the marriage bond. Which authorities are involved? **8.** How is the (international) jurisdiction of the MS or the authority established? Which procedural law applies? Does the *lis pendens* principle apply? Are there rules on how to proceed if a case is pending both before a judicial and a non-judicial authority? What if one of the procedures is pending abroad? Are authorities bound by or do they apply national rules regarding notification/the serving of documents (eg to ensure inter partes proceedings). Do they notify judicial authorities of proceedings pending before them, as well as of their outcome? **9.** Please comment on formal and substantive requirements (eg grounds for divorce, parties, legal counsel), exclusions in scope, and other conditions which may have to be met in order to access proceedings. Specify whether out-of-court authorities are competent in matters of maintenance obligations and parental responsibility. **10.** Describe the relevant procedural steps. What are the authorities' functions, tasks, and powers? How are relevant facts established? How is evidence obtained? Are the parties and children heard and, if so, to what extent? How is the authorities' impartiality guaranteed (recusal, withdrawal, supervision, and review by judicial authorities)? **11.** Describe the legal consequences of separation, the annulment of marriage, and divorce (names, property regimes, parental responsibility, maintenance obligations, succession rights, social security/pension rights). Do they differ from the legal consequences in the case of judicial proceedings? Are they dealt with in the proceeding or separately? Are the respective decisions enforceable? **12.** Do general rules on declarations of intent and/or legal acts (eg for contracts) apply to the separation, annulment of marriage, divorce and/or their legal consequences? What effects are connected to declarations and acts in matters of legal separation, the annulment of marriage, and divorce? Do they differ from those established under the law of obligations? Consider: binding effects (*inter partes/erga omnes* [also regarding other proceedings, eg a change of name following divorce]), receipt of the declaration, representation, vitiating factors (undue influence, induced error, misrepresentation, force, fraud, fear, incapacity, *contra legem*, *contra bonos mores*), conditions and time limits, etc. **13.** Describe the effects of decisions taken by non-judicial authorities (consider if they are declaratory, or constitutive in nature). Are they

	functionally equivalent to those of a judicial decision? To what extent can the parties shape the decision? Is the decision binding and, if so, which part thereof? When does the decision take effect? Is it reviewed by other authorities before it takes effect? Does it eventually become a *res judicata*? Are declarations and/or decisions registered or otherwise made public? If so, where and how? **14.** How and on what grounds can a decision be challenged? Are there limitations as to who may initiate such actions or procedures? If applicable, specify the procedure and the judicial or non-judicial authorities involved in the review process. **15.** In cross-border cases: Does your Member State apply the rules on jurisdiction, applicable law and recognition set out in the European Union's private law instruments mentioned under section (A) to non-judicial authorities? If not, please refer to the applicable conflict of law rules. Are there provisions that would clearly indicate how a foreign non-judicial decision would be treated? If so, please specify. Do courts and authorities only participate if the MS has jurisdiction in the respective case? Does your Member State issue certificates based on Art 36(1)(a) or Art 66(1)(a) of the Brussels IIb Regulation?

B. Parenthood	**16.** Describe the concepts of parenthood in your Member State. Is parenthood beyond the traditional concepts of motherhood and fatherhood (eg co-motherhood or multi-parenthood ie more than two legal parents) recognised? **17.** How can parenthood be established, and terminated (eg court decisions, declarations [eg acknowledgment of paternity], agreements, operation of law)? Which authorities are involved? Are there limitations as to who may initiate such actions or procedures? Please also refer to assisted reproduction techniques (to the extent relevant to the Project). **18.** How is the (international) jurisdiction of the Member State or the authority established? Which procedural law applies? Does the *lis pendens* principle apply? Are there rules on how to proceed if a case is pending both before a judicial and a non-judicial authority? Are there differences if one of the procedures is pending abroad? **19.** Provide comments on formal and substantive requirements (eg grounds, parties, legal counsel), exclusions in scope, and other preconditions which may have to be met. **20.** Please describe the steps of the relevant procedures in parenthood matters. What are the authorities' functions, tasks, and powers? How is impartiality guaranteed? How are relevant facts established (consider: relevant facts may be disputed between the parties)? How is evidence obtained? Are the parties involved (legal mother, father, child, etc) heard by the non-judicial authority and, if so, to what extent? **21.** Do general rules on declarations of intent and/or legal acts apply? What effects are connected to declarations in matters of parenthood? Do they differ from those established under the law of obligations? Consider: binding effects (*inter partes/erga omnes* [also regarding other proceedings, eg a change of name following divorce]), receipt of the declaration, representation, vitiating factors (undue influence, in

	duced error, misrepresentation, force, fraud, fear, incapacity, *contra legem*, *contra bonos mores*), conditions and time limits, etc. **22.** Describe the effects of the decision and/or declarations of intent (eg declaratory, constitutive). Are they functionally equivalent to those of a judicial decision? Is the decision or declaration binding and, if so, which part thereof? When does the decision take effect? Can declarations be challenged and, if so, on what grounds? If declarations are challenged, what are the consequences for the declaration/decision? Are there special review procedures set in place for non-judicial decisions/declarations?

C. Adoption	**23.** What procedures are available for the adoption of minors and adults? Which authorities are involved? Where relevant in this subsection, highlight differences between cases of full adoption (family ties to the family of origin are removed) and cases of simple adoption (family ties to the family of origin are not removed). **24.** How is the (international) jurisdiction of the Member State or the authority established? Which procedural law applies? Does the *lis pendens* principle apply? Are there rules on how to proceed if a case is pending both before a judicial and a non-judicial authority? What if one of the procedures is pending abroad? **25.** Describe the formal and substantive requirements (including parties, legal counsel, etc) for adoptions in your Member State, and other preconditions which may have to be met. Refer both to the adoption of adults and the adoption of minors. What are potential consequences if requirements are not complied with? **26.** Please describe the steps of the procedure. What are the authorities' functions, tasks, and powers? How is impartiality guaranteed? How are relevant facts established (consider: relevant facts might be disputed between the parties)? How is evidence obtained? Are the parties involved (legal mother, father, child, etc) heard by the non-judicial authority and, if so, to what extent? How are the interests of the adoptee, the adopting parents, and/or other family members guaranteed? **27.** Do general rules on declarations of intent and/or legal acts (relevant for agreements) apply? What are the effects of declarations and agreements in adoption matters? Do they differ from those established under the law of obligations? Consider: binding effects (*inter partes/erga omnes* [also regarding other proceedings, eg a change of name following divorce]), receipt of the declaration, representation, vitiating factors (undue influence, induced error, misrepresentation, force, fraud, fear, incapacity, *contra legem*, *contra bonos mores*), conditions and time limits, etc. Can declarations and agreements be challenged if they are vitiated. If so, what are the consequences for the adoption? **28.** What are the effects of decisions/agreements in adoption matters? Is the decision or agreement binding and, if so, which part thereof? When does the decision take effect? How are these decisions registered? Can decisions be challenged or otherwise modified? On what grounds and which aspects of a decision can be reviewed? If a review process takes place, what are the consequences for the decision/

	agreement? Are there special review procedures set in place for non-judicial decisions/agreements? **29.** In cross-border cases: How is the law applicable to a private adoption determined? Do the courts and authorities involved only act if the Member State has jurisdiction regarding the adoption? If so, which rules apply?

D. Parental responsibility	**30.** Which authorities are involved in matters of parental responsibility (including matters regarding the abduction of children, the placement of a child in foster care, custody)? Can, and, if so, to what extent, matters falling within the area of parental responsibility be administered by non-judicial authorities or the parties involved? What measures/agreements can be taken/reached? **31.** How is the (international) jurisdiction of the Member State or authority established? Which procedural law applies? Does the *lis pendens* principle apply? Are there rules on how to proceed if a case is pending both before a judicial and a non-judicial authority? Are there differences if one of the procedures is pending abroad? **32.** Describe the steps of the procedure. What are the authorities' functions, tasks, and powers? How is their impartiality guaranteed (eg recusal, withdrawal)? How is evidence obtained? How are relevant facts established? What aspects can be dealt with? What procedural safeguards are in place? Are the parties involved heard (eg children) and, if so, to what extent? **33.** Can the attribution or exercise of parental responsibility be modified by agreement or by a unilateral declaration? Can different areas of parental responsibility be assigned to different parties? Can parental responsibility be attributed to a third party by agreement or a unilateral act? If so, how are the interests of other parties (children, family members, the State) considered? Can the exercise of parental responsibility (purchasing, selling assets, accepting an inheritance, etc) be subject to authorisations by judicial bodies? What is the outcome if parents do not agree on the exercise of parental responsibility? **34.** Do general rules on declarations of intent and/or legal acts apply? What are the effects of declarations and acts in matters of parental responsibility? Do declarations and acts differ from those established under the law of obligations? Consider: binding effects (*inter partes/erga omnes* [also regarding other proceedings, eg a change of name following divorce]), receipt of the declaration, representation, vitiating factors (undue influence, induced error, misrepresentation, force, fraud, fear, incapacity, *contra legem*, *contra bonos mores*), conditions and time limits, etc. Can declarations be challenged if they are vitiated? If so, what are the consequences for the declaration/decision? Are there special review procedures in place for non-judicial decisions? **35.** Describe the effects of the decision (eg declaratory, constitutive). Are they functionally equivalent to those of a judicial decision? To what extent can the parties influence the decision? Is the decision binding and, if so, which part thereof? When does the decision take effect? Is it reviewed by other authorities before it takes effect? Does it eventually become a *res judicata*? Are declarations and/or decisions registered or otherwise made public? If so, where and how?

	36. Is the decision enforceable? What are the consequences if the decision is not complied with? How and on what grounds can a decision be challenged? Are there limitations as to who may initiate such actions or procedures? If applicable, specify the procedure and the judicial or non-judicial authorities involved in the review process. **37.** In cross-border cases: How is the law applicable to such an agreement or unilateral declaration on the attribution or exercise of parental responsibility determined? Do the courts and authorities involved only act if their Member State has jurisdiction for the attribution of parental responsibility? Does your Member State issue certificates based on Art 36(1)(b) or Art 66(1)(b) of the Brussels IIb Regulation?

E. Matrimonial property regimes	**38.** Does the concept of matrimonial property regime exist in your jurisdiction? If not, how are relationships between spouses governed in matters relating to their estate? If applicable, include references to property consequences of registered partnerships and cohabitants. **39.** Provide a general overview of the matrimonial property regimes of your country, covering matters particularly relevant to the purpose of the Project; any notable general features; procedural principles; the authorities involved and at which stage they are involved (establishment, change, dissolution of the matrimonial property regime). Are there any recent trends towards out-of-court proceedings in matters relating to matrimonial property? **40.** Briefly describe the procedural steps (if any) and specify if the outcome of the proceedings can be qualified as a decision. **41.** If your Member State provides for out-of-court proceedings, judicial proceedings should nevertheless be addressed. Highlight potential differences between judicial and non-judicial proceedings. In particular, refer to the tasks, functions, and powers of the competent judicial authorities, considering the aspects of a case which are examined, verified, and reviewed.

III. Succession law	This subsection deals with the role and function of non-judicial authorities in succession matters: **42.** Provide a **brief** overview of the succession law system of your country, only highlighting matters particularly relevant to the purpose of the Project, which may include sources of substantive and procedural law in succession matters; any notable general features; procedural principles; and the authorities involved. NB: **(a)** The questions under this subsection generally refer to proceedings before non-judicial authorities but should be dealt with even if they are currently administered by judicial authorities in your Member State. Should this be the case, please describe the judicial proceedings. **(b)** If your Member State provides for out-of-court proceedings, judicial proceedings should nevertheless be addressed. Highlight potential differences between judicial and non-judicial proceedings. In particular, refer to the tasks, functions, and powers of the competent judicial authorities, considering the aspects of a case which are examined, verified, and reviewed. Further, take differences regarding *lis pendens*, formal and substantive requirements, and the effects of a decision (*res judicata*) into account.

A. Devolution of the estate	**43.** Please describe the procedures to accept or waive a succession upon death. What authorities are involved? Also, consider how the liability of heirs and legatees for debts of the estate can be limited. **44.** How is the (international) jurisdiction of the authority established? What procedural law applies? Does the *lis pendens* principle apply? **45.** Describe the procedural steps. What are the competent authorities' functions, tasks, and powers? **46.** Do general rules on declarations of intent and/or legal acts apply? What effects do declarations in succession matters produce? Do they differ from those established under the law of obligations? Consider: binding effects (*inter partes/erga omnes* [also regarding other proceedings, eg a change of name following divorce]), receipt of the declaration, representation, vitiating factors (undue influence, induced error, misrepresentation, force, etc). Can declarations be challenged if they are vitiated? If so, what are the consequences for the declaration/decision? Are there special review procedures set in place for non-judicial decisions/declarations? **47.** What effects are connected to the declarations of the parties? What are the effects of the decisions of the non-judicial authorities involved? How can they be challenged? Can the order of succession be challenged in out-of-court-proceedings? In the case of testamentary succession or agreements as to succession: **48.** Which authorities are entrusted with the opening/reading of a will? What effects are connected to the opening/reading of a will? **49.** Are dispositions upon death void or voidable if they violate forced heirship rights of close family members of the deceased? Can dispositions be challenged in out-of-court-proceedings? If so, please describe the respective rules of procedure.

B. Certificates of succession	**50.** How is the position of heir, legatee, executor, or administrator established and proven in relation to third parties? Does your country provide for certificates or similar documents in this regard? If so, are certificates based on the decision of a court or any other competent authorities, or on the declarations of the parties? **51.** How is the competent authority established? Does the *lis pendens* principle apply? **52.** Describe the procedural steps when issuing certificates of succession. What tasks and powers do the issuing authority have? How are the relevant facts established? What are the consequences if they are disputed? How is evidence obtained and by whom? To what extent are the parties heard? **53.** Do general rules on declarations of intent and/or legal acts apply? What effects are connected to such declarations? Do they differ from those established under the law of obligations? Consider: binding effects (*inter partes/erga omnes* [also regarding other proceedings, eg a change of name following divorce]), receipt of the declaration, representation, vitiating factors (undue influence, induced error, misrepresentation, force, fraud, fear, incapacity, *contra legem*, *contra bonos mores*), conditions and time limits, etc. Can declarations be challenged if they are vitiated? If so, what are the consequences for the declaration/decision? Are there special review procedures in place for non-judicial decisions/declarations? **54.** What effects are connected to the certificate? Who is bound by its content? Does the certificate have *res judicata* effects? How can a certificate be challenged? What authorities are involved?

	55. In cross-border cases: Do the courts and authorities involved in the issuing of the certificate only act if their Member State has jurisdiction for the succession? Do the courts and authorities involved issue an attestation based on Art 46(3)(b) or Art 59(1)2 of the Succession Regulation? **56.** Which authorities issue the European Certificate of Succession? Provide an outline of the respective procedure.

C. Administration of estates	**57.** Which authorities are entrusted with the administration of estates? How is the competent authority determined? **58.** Please specify the formal and substantive requirements for the nomination and dismissal of executors and administrators. What are their functions, tasks (eg drawing up an inventory, distributing the estate, etc) and powers? How are relevant facts established? How is evidence obtained? **59.** How is the estate divided and distributed? To what extent can the parties influence the administration and distribution of the estate (through declarations, agreements)? Are authorisations by judicial bodies required? **60.** What aspects can be dealt with and decided by executors or administrators? What effects are connected to the decision? Can it be challenged? Please specify the relevant procedural steps. Does the decision become *res judicata*?

IV. The law of natural persons	**Name changes** **61.** How, and on which grounds, can the name of a person be changed? Which authorities are involved? What are the tasks and powers of the competent non-judicial authority? Can the establishment of a name or its change be reviewed or challenged? **62.** Describe the relevant procedural steps. Please comment on formal and substantive requirements, exclusions in scope, and other conditions which might be relevant to the purpose of the Project. Which parties have to be heard? **63.** Do general rules on declarations of intent and/or legal acts apply? What effects are connected to the declarations? Do they differ from those established under the law of obligations? Consider: binding effects (*inter partes/erga omnes* [also regarding other proceedings, eg a change of name following divorce]), receipt of the declaration, representation, vitiating factors (undue influence, induced error, misrepresentation, force, fraud, fear, incapacity, *contra legem*, *contra bonos mores*), conditions and time limits, etc. Can declarations be challenged if they are vitiated? If so, what are the consequences for the declaration/decision? Are there special review procedures in place for non-judicial decisions? **Gender recognition** **64.** Does your Member State provide for legal mechanisms to change a person's gender marker? Which authorities are involved? Are the proceedings judicial, or administrative in nature? How is the competent authority established? **65.** Describe the relevant procedural steps. Please comment on formal and substantive requirements, exclusions in scope, and other conditions which might be relevant to the purpose of the Project. Which parties have to be heard? What procedural safeguards are in place? **66.** Do general rules on declarations of intent and/or legal acts apply? What effects are connected to the declarations? Do they differ from those

	established under the law of obligations? Consider: binding effects (*inter partes/erga omnes* [also regarding other proceedings, eg a change of name following divorce]), receipt of the declaration, representation, vitiating factors (undue influence, induced error, misrepresentation, force, fraud, fear, incapacity, *contra legem*, *contra bonos mores*), conditions and time limits, etc. Can declarations be challenged if they are vitiated? If so, what are the consequences for the declaration/decision? Are there special review procedures in place for non-judicial decisions/declarations? **67.** Are the effects of declarations subject to review by judicial authorities? **Protection of adults** **68.** Which authorities are competent to take measures directed to the protection of the person and/or property of an adult, who, by reason of an impairment or insufficiency of their personal faculties, is not in a position to protect their interests? How is jurisdiction established? **69.** Describe the relevant procedural steps, formal and substantive requirements, and potential safeguards in place. What are the competent authorities' tasks and powers? How are relevant facts established? Which parties are heard? **70.** How are powers of representation granted by the adults themselves (to be exercised when they are no longer in a position to protect their interests) – under an agreement or by a unilateral act? Are these agreements/acts reviewed before they take effect? Are authorisations by judicial authorities necessary when exercising powers of attorney? Does your jurisdiction provide for *ex lege* powers of representation for close relatives in the case of incapacity? **71.** Do general rules on declarations of intent and/or legal acts apply? What effects are connected to the declarations? Do they differ from those established under the law of obligations? Consider: binding effects (*inter partes/erga omnes* [also regarding other proceedings, eg a change of name following divorce]), receipt of the declaration, representation, vitiating factors (undue influence, induced error, misrepresentation, force, fraud, fear, incapacity, *contra legem*, *contra bonos mores*), conditions and time limits, etc. Can declarations be challenged if they are vitiated? If so, what are the consequences for the declaration/decision? Are there special review procedures in place for non-judicial decisions/declarations? **72.** How, and on what grounds can protective measures be challenged, reviewed, or modified? What effects are connected to them?

V. Conclusions	Please provide a succinct summary of your findings. Identify overarching trends and/or potential contradictions.

II. Family law

9 The first part of the Project addressed family law – an area of law where, in the past, tasks of courts were shifted to other authorities or the parties themselves. The country reports show that the de-judicialisation trend only affects certain areas which were formerly in the firm hands of the (family) courts, whereas the judiciary is, in general, still an important actor in the field

of family law. (10) There are of course exceptions such as Denmark, where family law is traditionally implemented by administrative authorities, even by a specialised family law agency, thus reducing the role of courts in family matters primarily to cases that have the most severe impact on the parties involved, or to reviewing the administrative decisions of those agencies. (11) There are different reasons for shifting tasks from courts to other authorities or the parties. It appears from the reports that the heavy workload of courts is the main driving force of this development. (12) Furthermore, de-judicialisation can incentivise parties to use their party autonomy and to settle their disputes outside the conflict-prone atmosphere of a court. (13) Hence, it is not surprising that the de-judicialisation trend coincides with a growing relevance of private autonomy in substantive family law. De-judicialisation is, however, not a universal trend; in many systems, also in the European Union, family law is still mainly in the hands of the courts. (14)

A. *The traditional role of courts*

10 In the area of family law, justice is traditionally administered by courts. If parties do not fulfil their family law obligations, for example, maintenance duties, creditors can – as in private law in general – enforce those private rights in court proceedings.

11 However, courts in family matters, apart from the classic private law enforcement, also fulfil other tasks. Often, they are not only required to assess the facts of a case retrospectively and decide on private rights and duties but rather regulate family relationships for the future by, for example, determining the access rights of parents regarding their children, ordering protection measures, shifting parental responsibility (also only for certain issues) from one to the other party or dividing common property of spouses or partners.

12 A third area where courts are traditionally active in family matters concerns family status, especially parenthood and marriage as status relationships with potential *erga omnes* effects. The establishment of the status is, in most legal systems, traditionally based on the operation of law (for example, motherhood of the woman giving birth to a child or fatherhood or co-motherhood

---

(10) See eg *Patreider*, Austria, para 2; *O'Sullivan*, Ireland, para 5.

(11) *Pedersen/Thøgersen*, Denmark, paras 1ff, 8ff, 27ff.

(12) *Zervogianni*, Greece, para 3; *Stracqualursi/Chiricallo*, Italy, paras 39ff; *Bogdziewicz*, Lithuania, para 6; *Erjavec*, Slovenia, para 24.

(13) *Teixeira Pedro*, Portugal, para 12.

(14) *Patreider*, Austria, para 6; *Johanson*, Germany, para 9; *Jonker/Schrama*, The Netherlands, para 23; *Kamińska*, Poland, para 1.

of the person who is married to or concluded a registered partnership with the mother) or on declarations of the parties (marriage, registered partnership or recognition of fatherhood or co-motherhood). Courts are only rarely involved in the establishment of a family status; exceptions concern the establishment of parenthood – especially fatherhood – beyond the operation of law and recognition or the judicial review of the civil status authorities when registering the establishment of a status. However, the dissolution of a family status is mainly entrusted to courts, be it regarding the dissolution of a marriage (divorce), legal separation or marriage annulment or, regarding parenthood, the challenge of fatherhood, to mention only a couple of examples. Courts are often even the central actor in the dissolution of family status if substantive law grants the parties some degree of party autonomy, for example, allows for a consensual divorce which, however, still has to be pronounced by a judicial body. Furthermore, in one area of family status, the role of courts has even been strengthened: whereas some systems in the past allowed adoptions by private agreement, today adoption is mainly effected by a court decree in order to safeguard the best interests of the child (in the case of the adoption of minors) or the existence of a *de facto* parent-child relationship (in the case of the adoption of adults, if admissible at all); even if adoption is formally based on a status agreement between the adopter and the adoptee, this agreement requires judicial authorisation and its invalidity only affects the adoption if the court revokes the authorisation or annuls the adoption. (15) Of course, adoption can also be dealt with by other authorities, such as specialised agencies. (16)

As the tasks of courts in family matters – in particular, the regulation of family relationships for the future and the establishment and termination of family status – differ from those in civil and commercial matters, it is not surprising that many systems provide for specialised family courts dealing exclusively with family matters. (17) Also, courts entertain family proceedings not only on the basis of general civil procedure rules; rather, there are often special procedural rules for family matters, (18) for example, giving courts in family matters a much more active role, eg regarding the procedural protection of weaker parties, especially children, and the *ex officio* establishment of facts. (19) In most systems, family courts are equipped with professional lawyers who have obtained a university degree in law and have been admitted

13

(15) *Patreider*, Austria, paras 55, 58; *Zervogianni*, Greece, paras 52, 57, 60.
(16) See eg *Pedersen/Thøgersen*, Denmark, paras 88ff; *O'Sullivan*, Ireland, paras 30ff.
(17) Cf *Pedersen/Thøgersen*, Denmark, para 30.
(18) See eg *Johanson*, Germany, para 7.
(19) Cf *Pedersen/Thøgersen*, Denmark, paras 53ff; *Karm*, Estonia, para 5.

as judges. Often, some tasks in the court are also fulfilled by senior judicial officers. The family courts conclude their procedures with a court decision which is binding at least between the parties; under certain circumstances – particularly in family status matters – they even have *erga omnes* effects. However, not all systems in the European Union entrust family matters to specialised courts. (20)

B. *Enforcement of family law rights and duties*

14 As far as courts enforce private rights and duties, a de-judicialisation is only possible if the parties voluntarily fulfil their duties or agree on a certain enforcement. Such a de-judicialisation is already provided for by the traditional family court system. Most procedural rules allow the settlement of a claim or other agreements, often in a certain form, which can be (directly) enforced if a party does not honour the settlement or other agreement. Such agreements – which the parties negotiate in the shadow of their statutory rights and duties – are particularly common in divorce proceedings regarding the consequences of divorce. (21) In general, the same rules apply to those settlement agreements as they do to other agreements of the parties when they settle a dispute in civil and commercial matters. (22) If such an agreement is lacking, the enforcement of family law rights as private rights in general always requires the involvement of a State authority. Of course, the legislator can foster an agreement between the family members to settle their disputes, for example, by establishing a mediation procedure, as done, for example, in Estonia. (23)

15 The only further de-judicialisation option legislators have is to shift the enforcement of family law rights from courts to other authorities. Such a de-judicialisation can be justified by a reduction of transaction costs or the fact that the enforcement procedures can be better specialised in certain other authorities outside courts, which seems to be the case in Denmark, where the family law agency is the central body in the enforcement of family law (see para 9 above).

C. *Regulating family relationships for the future*

16 Although it is a second task of the courts in family law to regulate family relationships for the future, family relations are, also in the traditional

(20) See eg *Karm*, Estonia, para 4; *O'Sullivan*, Ireland, para 3.
(21) Cf *Patreider*, Austria, paras 25f.
(22) Cf *Patreider*, Austria, para 26.
(23) *Karm*, Estonia, paras 13f.

systems, often predominantly in the hands of the parties themselves. Matters are here generally de-judicialised due to parties being able to personalise and deviate from default regimes put in place by legislators. The consequences of marriage (also after the dissolution of marriage) are in the first place influenced by the operation of law to be enforced by the courts; however, the parties can modify the statutory regime by entering into marital agreements in many systems, also regarding the financial consequences of divorce. (24) The concrete rights and obligations arising from such a marital regime have then, if necessary, to be enforced by the courts (see paras 14f above).

17 Parental responsibility is traditionally attributed to the parents by the operation of law and court decision. However, in many systems, the parents can, by declarations or agreement, consent to a certain attribution of parental responsibility. However, the private autonomy of the parents is often limited; they can, for example, in some jurisdictions, not alter their agreement without a court decision. (25) The same is true for the termination of parental responsibility which is, in most systems, a privilege of the judiciary, in order to safeguard the best interests of the child, which could be endangered if the parties involved could agree on a certain re-attribution of this responsibility. However, in the area of parental responsibility, legislators have de-judicialised some tasks, for example, by entrusting the protection of children to specialised authorities such as youth welfare authorities. (26) Moreover, some systems in the meantime allow parents to modify the attribution and exercise of parental responsibility and access rights by agreement, (27) albeit, for example in Estonia or Sweden, only as a result of family mediation or with the approval of a State authority. (28)

D. *Establishing or dissolving family status*

18 The establishment of family status is, as already seen (para 12 above), only rarely the object of judicial proceedings. Rather marriage, registered partnership and parenthood are mainly constituted by private declarations or the operation of law. If parenthood is based on declarations, the general rules on juridical acts partly apply, (29) partly, they are ousted by special family law

(24) See, however, *O'Sullivan*, Ireland, paras 18, 44.
(25) *Patreider*, Austria, para 86: at least after a cooling-off period.
(26) *Patreider*, Austria, paras 94ff.
(27) *Berre*, France, para 34.; *Vlad*, Romania, para 92; cf also *Vaigė*, Sweden, paras 77ff.
(28) *Karm*, Estonia, paras 51ff, 62ff. The same applies to Sweden, see *Vaigė*, Sweden, para 78.
(29) See eg *Zervogianni*, Greece, para 41.

provisions. ([30]) Of course, the State documents the establishment of family statuses in public registers, mainly controlled by civil status authorities. Only if a family status is to be created against the intentions of one of the parties are court proceedings necessary. Whereas in most systems parenthood is established by the operation of law or declarations by the parties, it can also be established by a court in judicial (or administrative) proceedings, for example, if the biological father refuses to acknowledge his legal fatherhood (and is not already a legal father by operation of law because, for example, he is not married to the mother). Still, in most systems, such parenthood establishment proceedings have been retained. There is, however, a tendency to broaden the avenues leading to the creation of a family status outside of courts – a development which is not a result of a systematic de-judicialisation in family matters but rather a re-conception of the rules on the establishment of family status, notably when it comes to legal parenthood based on intentional parenthood. For example, in cases of medically assisted reproduction, some systems allow the establishment of parenthood by declarations of, or agreements between, the intended and biological parents. ([31])

19 Whereas the creation of a certain status often takes place outside the court, the dissolution of status usually requires judicial proceedings – a fact which stresses the stability of family status, also regarding its *erga omnes* effects. Divorce (and the same applies to the annulment of marriage) is in most Member States still within the domain of the judiciary and requires a court decision, although there is some discussion on de-judicialising divorce in some of the systems. ([32]) The majority of systems even retain the requirement of a judicial divorce if the dissolution of marriage is based on the mutual consent of the spouses. The only case in which a marriage is 'dissolved' extra-judicially – at least in fact – are invalid marriages, for example, if the formal requirements for concluding a marriage were not met. Sometimes the nullity of the marriage can be established in court proceedings.

20 However, there are clear tendencies to shift divorce from the judiciary to other authorities or the parties themselves if substantive family law bases divorce on the private autonomy of the spouses. For example, under Danish law, divorce is mainly based on an agreement between the spouses; the main task of the family law agency is to establish whether the divorce request (which can be submitted electronically) is based on mutual consent and

---

([30]) See eg *Johanson*, Germany, paras 41ff.

([31]) See eg *Patreider*, Austria, paras 39ff (non-medically assisted reproduction); *Jonker/Schrama*, The Netherlands, paras 7ff.

([32]) *Patreider*, Austria, para 10.

whether an agreement can be reached. (33) Facts beyond the consent of the spouses are only established by the agency if the parties do not agree on the divorce. Also in Estonia, a divorce based on consent can be implemented in proceedings before civil status officers or notaries, who mainly check whether the spouses agree on the termination of their marriage. (34) In Lithuania, a divorce based on mutual agreement of the spouses can be decreed by a notary. (35) Portuguese law allows spouses to agree on a consensual divorce before a civil status officer, who ratifies the agreement and pronounces the divorce. (36) The same applies for Romania, where a divorce based on the agreement of the spouses is pronounced by a civil status officer or a notary by issuing a divorce certificate. (37) In Spain, a consensual divorce can be decreed by a civil servant in the judicial administration or a notary. (38)

21 Nevertheless, in all those jurisdictions, divorce is still decreed by the State authority involved: the dissolution of the marital bond is only an indirect consequence of the spouses' declarations. This is stressed by the fact that the divorce decree has legal consequences going beyond mere private declarations. Insofar, divorce still differs from other areas of law which are governed by private autonomy. In the latter, legal consequences are triggered by the agreement itself even if a public authority is involved in the formalities of setting up the agreement.

22 The country reports, however, show that even this borderline is crossed in some systems, allowing a direct dissolution of marriage by agreement of the spouses. A pure divorce by agreement is admissible, for example, in certain circumstances in France. The divorce agreement has to fulfil a number of formalities, it has to be countersigned by lawyers and filed with a notary; and the agreement is subject to general contract law. (39) In Greece, spouses can divorce by mutual consent based on an agreement which is set up by a notary and signed by two lawyers. (40) According to Greek law, the general provisions on contracts apply to the divorce agreement, which directly dissolves the marital bond as well: in case the divorce agreement is void under the general rules, the marriage is not dissolved even if the divorce has been registered by civil status officers. Italy is a further prominent example

(33) *Pedersen/Thøgersen*, Denmark, paras 62ff.
(34) *Karm*, Estonia, paras 16ff.
(35) *Bogdziewicz*, Lithuania, paras 18, 21, 33ff.
(36) *Teixeira Pedro*, Portugal, paras 17, 22.
(37) *Vlad*, Romania, paras 9f, 26ff.
(38) *Esteve Alguacil*, Spain, paras 37ff.
(39) *Berre*, France, paras 7, 13.
(40) *Zervogianni*, Greece, paras 17ff.

of this trend: a divorce (and prior legal separation) can be obtained by spouses based on a negotiated agreement or an agreement entered into in front of a mayor. (41) Both avenues to a dissolution of marriage require the observation of formalities. Nevertheless, doctrinally, the agreement of the spouses ends the marital relationship, an agreement which is subject to the general rules on contracts. In Slovenia, the agreement of spouses on the divorce terminates the marriage once the notarial deed is signed by the spouses. (42)

23 Of course, the exact preconditions for such non-judicial divorces differ. Most systems which have de-judicialised divorce require a certain degree of agreement between the spouses as to the consequences of divorce and the parental responsibility for common children. The latter surprises as, in most legal systems, parental responsibility has been 'detached' from marriage, and hence, also divorce. It is furthermore noteworthy that jurisdictions which allow an out-of-court divorce require rather strict formalities and the participation of lawyers or notaries. Furthermore, interestingly, the systems mentioned restrict divorce without the involvement of a court to cases in which the spouses agree on the dissolution of their marriage. Divorce upon demand of one of the spouses still requires proceedings before a court or another public authority. (43) A unilateral private divorce – based on the declaration of one spouse only – is not admissible. Also, the annulment of defective marriages, however, still requires (in jurisdictions with non-judicial divorces) judicial proceedings, except in rare cases where the defect is regarded so grave that the marriage is null and void.

24 There is also an interesting borderline between the dissolution of a family status and other relationships. In legal systems where a registered partnership is marriage-like and regarded as a status, the law often requires a dissolution by court decision as in the case of divorce. In systems with a weaker form of registered partnership, for example, in France with the *pacte civil de solidarité*, a private declaration of one of the partners suffices to dissolve the relationship, (44) although an out-of-court divorce is only admissible if based on a mutual agreement drawn up by lawyers and filed with a notary. The same development can be observed in Greek law: here, the registered partnership can be dissolved without the involvement of a court unilaterally, whereas an out-of-court divorce requires the mutual consent of both

(41) *Stracqualursi/Chiricallo*, Italy, paras 97ff.
(42) *Erjavec*, Slovenia, para 27.
(43) *Pedersen/Thøgersen*, Denmark, paras 62ff; *Karm*, Estonia, paras 16ff.
(44) *Berre*, France, para 7.

spouses; (45) in fact a judicial 'divorce' of a registered partnership is not available in Greece. In the Netherlands, registered partnerships can be dissolved, under certain circumstances, by an agreement before the civil status registrar, even with a kind of *res judicata* effect. (46) This easier possibility to terminate the couple relationship regime has in the past even been used by spouses who converted their marriage into a registered partnership in order to get a quicker and easier 'divorce' – a development which even triggered a policy discussion on allowing out-of-court divorces. (47)

25 Also, the challenge (and dissolution) of parenthood, in particular, fatherhood, requires court proceedings in most systems because the facts of the case have to be established. This, for example, includes whether a legal father, based on marriage with the mother, is the biological father of the child. However, some systems allow – in limited circumstances – a challenge to legal fatherhood outside court, especially if the legal father and the mother consent that a third person – who acknowledges fatherhood – should be the legal father. Such a dissolution of the former legal father's fatherhood and establishment of the fatherhood of the acknowledging person are allowed in out-of-court proceedings in some Member States. (48) There are even policy discussions in Germany to extend the possibility to re-attribute parenthood by agreement between certain parties. (49) Finally, also the annulment of an adoption requires a court decision and judicial proceedings, in which certain limited grounds are assessed. (50)

III. Succession law

26 Non-judicial actors traditionally play important roles in succession matters. Unlike family law, their involvement does, however, not only reflect a recent trend but rather has developed historically in many Member States, such as Austria or Estonia. Generally, the out-of-court authorities involved in probate proceedings are either notaries, administrative and tax authorities, but – especially where private autonomy is key – also representatives of the deceased or the estate, administrators, and executors. Only in a limited

(45) *Zervogianni*, Greece, paras 11, 22.

(46) *Jonker/Schrama*, The Netherlands, paras 30ff.

(47) *Jonker/Schrama*, The Netherlands, para 10.

(48) See eg *Patreider*, Austria, para 37; *Johanson*, Germany, paras 49f; cf also *Stracqualursi/Chiricallo*, Italy, para 136 (if the mother is not named in the birth certificate).

(49) *Johanson*, Germany, paras 51f.

(50) *Patreider*, Austria, paras 71ff; *Karm*, Estonia, para 33.

number of cases, however, are these bodies entrusted with actual decision-making powers. Disputes remain, for the most part, a prerogative of the judiciary. (51) The same goes for the supervision and review of non-judicial activities. (52) Overall, judicial and non-judicial competences coexist and complement each other respectively.

27 The reasons for the use of out-of-court actors are not only to be found in (at times) century-old legal traditions. (53) While financial considerations appear to play a role, (54) it becomes clear from the reports that the reduction of the caseload of courts and the speeding-up of proceedings continue to be the main factors when deciding on delegating tasks to out-of-court authorities. (55) In some countries that offer both judicial and non-judicial (especially notarial) proceedings, such as Poland, the latter have – due to their efficiency – even become statistically more frequent with an increasing number of inheritance cases being handled by notaries. (56)

28 Beyond the involvement of non-judicial authorities, de-judicialisation in succession matters is further facilitated in areas subject to party autonomy. The extent to which parties can shape succession rights does, however, vary considerably throughout the Member States and often depends on the stage a succession proceeding is currently in. While private autonomy takes centre stage especially in the context of testamentary freedom and thus before proceedings are initiated, it is also prominent in the determination of heirs as beneficiaries are generally free in deciding to accept or waive an inheritance. In some legal systems, such as Germany, parties can even 'pre-emptively' dispose of succession rights by contractual means, eg by waiving mandatory shares before the accrual of the estate. Once the heirs and their abstract

---

(51) See eg *Karm*, Estonia, paras 96, 103, 118–120; *Berre*, France, para 44; *O'Sullivan*, Ireland, paras 46, 54 (however, informal solutions developed by practitioners), *Bogdziewicz*, Lithuania, paras 85f, 88, 94; *Kamińska*, Poland, para 104; *Erjavec*, Slovenia, para 190; *Esteve Alguacil*, Spain, para 182; *Vaigė*, Sweden, para 101.

(52) Cf *Patreider*, Austria, paras 135, 143, 217, 227; *Karm*, Estonia, paras 104, 107; *Berre*, France, paras 44, 59, 61; *Johanson*, Germany, paras 156, 166; *Zervogianni*, Greece, para 141; *Stracqualursi/Chiricallo*, Italy, paras 224, 257, 267; *Bogdziewicz*, Lithuania, paras 96, 105; *Teixeira Pedro*, Portugal, paras 110f, 115; *Vlad*, Romania, paras 155, 173; *Erjavec*, Slovenia, paras 155, 158; *Esteve Alguacil*, Spain, para 238; *Vaigė*, Sweden, para 126.

(53) Eg *Karm*, Estonia, para 92.

(54) With the shift to out-of-court actors being considered to be financially preferable either for the parties or the State. Arguments for 'financially preferable': *Patreider*, Austria, para 123ff. Notaries are in any case entitled to specific fees for their work, see ibid, paras 127. Also: *Karm*, Estonia, para 92.

(55) Eg *Patreider*, Austria, paras 123ff; *Karm*, Estonia, para 92; *Kamińska*, Poland, para 72.

(56) *Kamińska*, Poland, para 74.

shares are determined, party autonomy is again emphasised in the rules on the administration and division of estates. This phase of the proceedings often lies in the hands of the parties themselves or involves third parties such as administrators, distributors, or other representatives. (57) The powers exercised by the latter vary. Exceptionally, they can even make authoritative decisions that do not require an agreement between all parties. (58) In Sweden, for example, (special estate) administrators are qualified as non-judicial bodies adopting decisions (59) – also for the purposes of the Succession Regulation. (60) Consensual solutions in administrative and distributive matters are, however, still more prevalent than elsewhere in succession proceedings.

A. *Prerogatives of the judiciary*

29 Where Member States have started to delegate certain tasks or parts of substantive succession proceedings to out-of-court actors, they generally continue to reserve a number of activities for courts. Traditionally, contentious claims concerning intestate or testamentary successions such as those to determine the validity of a will, aimed at a reserved share, intended to recover assets of the estate from third parties (61) or for damages (against executors or other parties involved in the succession proceedings) remain court-administered.

30 The competence of courts for the settlement of disputes, one of the original functions assigned to them, is a red thread when it comes to succession matters. (62) This continues to be the case, even where Member States entrusted cases primarily to non-judicial authorities. (63) Disputes, consequently, generally determine a shift of competences from out-of-court actors

---

(57) *Patreider*, Austria, paras 201ff; *Karm*, Estonia, paras 122f; *Berre*, France, para 60; *Johanson*, Germany, paras 121, 128; *Zervogianni*, Greece, para 144; *Stracqualursi/Chiricallo*, Italy, para 265; *Jonker/Schrama*, The Netherlands, para 83; *Kamińska*, Poland, paras 85, 89; *Teixeira Pedro*, Portugal, para 81; *Vlad*, Romania, paras 140, 162, 172; *Erjavec*, Slovenia, para 142; *Vaigė*, Sweden, para 101.

(58) *Vaigė*, Sweden, para 106.

(59) *Vaigė*, Sweden, paras 102, 106, 131 (estate administrator, special estate administrator and estate distributor all adopt decisions in succession matters).

(60) *Vaigė*, Sweden, paras 129f, 149 (Table 2).

(61) *Berre*, France, para 44; *Zervogianni*, Greece, para 146; *Stracqualursi/Chiricallo*, Italy, paras 208, 248.

(62) See eg *Karm*, Estonia, paras 96, 103, 118–120; *Berre*, France, para 44; *O'Sullivan*, Ireland, paras 46, 54; *Bogdziewicz*, Lithuania, paras 85, 86, 88, 94; *Kamińska*, Poland, para 104; *Erjavec*, Slovenia, para 190; *Esteve Alguacil*, Spain, para 182; *Vaigė*, Sweden, para 101.

(63) Eg notaries: *Karm*, Estonia, paras 100, 102; *Berre*, France, para 47; *Kamińska*, Poland, paras 72ff; *Vlad*, Romania, paras 125, 151, 157; *Esteve Alguacil*, Spain, paras 182,

to judicial authorities, also in matters traditionally occupied by the former, such as receiving or recording acceptances or waivers, (64) drawing up inventories, (65) or issuing (European) certificates of succession. (66) Both the exercise of party autonomy and the involvement of non-judicial actors thus imply that matters between the parties do not become contentious. This is strikingly apparent where non-judicial procedures have been set in place as alternatives to judicial procedures: they can only be accessed when all parties are in agreement. (67)

31 For the most part, also the review of out-of-court activities remains vested in judicial authorities. (68) This, in particular, applies to the output of non-judicial actors carrying out tasks on behalf of courts (eg notaries) or entrusted with particular steps or parts of succession proceedings (eg executors, administrators (69)) and to certificates of succession. (70) For these purposes, in Austria and Slovenia, for example, all activities carried out by notaries have to be documented, allowing for an easier review of their actions in court. (71)

233ff. Civil registries: *Teixeira Pedro*, Portugal, para 103. At least provided certain requirements were met.

(64) *Patreider*, Austria, paras 175–177, 178–180.

(65) *Patreider*, Austria, para 185; *Berre*, France, para 44; *Teixeira Pedro*, Portugal, paras 104f, 110.

(66) Eg *Patreider*, Austria, paras 216f; *Johanson*, Germany, para 166; *Stracqualursi/Chiricallo*, Italy, para 257; *Erjavec*, Slovenia, paras 154ff; *Esteve Alguacil*, Spain, para 238; *Vaigė*, Sweden, para 126. In Greece, where the issuance of national certificates was recently partly de-judicialised and delegated to lawyers, a requirement introduced was the lack of dispute among parties, see *Zervogianni*, Greece, paras 5, 118, 122, 138ff.

(67) See below. As for the notarial succession proceedings in Estonia and Poland, see *Karm*, Estonia, para 103; *Kamińska*, Poland, para 73.

(68) See, for example, *Patreider*, Austria, para 227; *Berre*, France, paras 59, 61; *Johanson*, Germany, paras 117, 130; *Zervogianni*, Greece, para 124 (contentious proceedings); *Stracqualursi/Chiricallo*, Italy, paras 217, 227, 267; *Kamińska*, Poland, para 72; *Teixeira Pedro*, Portugal, para 111; *Vlad*, Romania, paras 137, 154, 173; *Esteve Alguacil*, Spain, para 228. The proceedings would thus often meet the respective requirement of Article 3(2)(a) Succession Regulation.

(69) *Kamińska*, Poland, para 81.

(70) Possible reasons for claims can, for example, be factors vitiating the consent when accepting or waiving a succession (*Patreider*, Austria, para 166; *Karm*, Estonia, para 95; *Berre*, France, para 48; *Johanson*, Germany, paras 115, 117; *Zervogianni*, Greece, para 124; *Stracqualursi/Chiricallo*, Italy, paras 217, 227; *Vlad*, Romania, para 137; *Esteve Alguacil*, Spain, para 206), but also the discovery of new wills (*Patreider*, Austria, para 227; *Berre*, France, paras 59, 61; *Vlad*, Romania, para 173; *Esteve Alguacil*, Spain, para 206), or the protection of creditors, eg when beneficiaries make declarations in succession matters that are detrimental to creditors (*Jonker/Schrama*, The Netherlands, para 77; *Vlad*, Romania, para 136).

(71) Eg *Patreider*, Austria, paras 175, 202; *Erjavec*, Slovenia, para 151.

The Succession Regulation follows this approach with regard to the European Certificate of Succession. Decisions taken by the issuing authority are to be challenged before a 'judicial authority', (72) not 'another authority' within the meaning of Article 64(b) of the Succession Regulation. The approach is further reflected in the definition of court in Article 3(2). According to the provision, for an authority to be qualified as a 'court', it must remain possible that its decisions can be made subject to an appeal or review by a judicial authority. **32**

Closely connected to review procedures are the traditional supervisory functions of courts. Judicial authorities are often involved in supervising the drafting of inventories (73) or tasks carried out by executors. (74) In Austria, the activities of notaries in succession matters are generally performed under the supervision of a court, with judges being allowed to issue binding directives, obtain reports and conduct investigations as well as to replace the non-judicial authorities involved in case of violations. (75) Supervision is, however, not always judicial. In Greece, for example, curators for a vacant estate are supervised by an administrative, not by a judicial authority. (76) Supervisory functions also become relevant in areas delegated to party autonomy, especially when specific procedural hurdles need to be overcome. This is often the case when minors or vulnerable adults are involved, (77) or authorisations are required. (78) Some jurisdictions, such as Italy, have nevertheless recently introduced notarial alternatives to judicial authorisations. (79) **33**

Competences of courts in contentious matters aside, many Member States also still continue to rely on the judiciary to establish succession rights in a legally binding way, even in non-contentious settings. (80) While parties can, as stated above, influence their position within proceedings to a certain extent (eg by accepting or waiving an inheritance or by pre-emptively **34**

---

(72) See Article 72(1)(3) Succession Regulation.

(73) Eg *Berre*, France, para 44.

(74) *Patreider*, Austria, para 227; *Berre*, France, paras 59, 61; *Vlad*, Romania, para 173.

(75) *Patreider*, Austria, paras 135, 142f, 237.

(76) *Zervogianni*, Greece, paras 154f, 118.

(77) Among others, when it comes to acceptances or waivers of inheritances. Cf *Karm*, Estonia, para 95; *Johanson*, Germany, para 115; *Jonker/Schrama*, The Netherlands, para 73; *Teixeira Pedro*, Portugal, para 96; *Vlad*, Romania, para 174; *Esteve Alguacil*, Spain, para 208; *Vaigė*, Sweden, para 109 (municipal chief-guardian [*överförmyndaren*] has to consent).

(78) Eg concerning the sale of certain assets of the estate, see *Stracqualursi/Chiricallo*, Italy, paras 211–214, 264.

(79) *Stracqualursi/Chiricallo*, Italy, para 220.

(80) Eg *Stracqualursi/Chiricallo*, Italy, paras 208, 233f; *Bogdziewicz*, Lithuania, para 85; *Erjavec*, Slovenia, paras 136, 134.

disposing of their shares), it is generally still a State authority that has to definitively establish the position as heir or beneficiary. While the State authority involved can be a non-judicial one, the respective tasks are still often entrusted to a court, as is, for example the case in Austria, Germany or Slovenia.

B. *Non-judicial authorities in succession proceedings*

1. *Overview and policy considerations*

35 As anticipated, non-judicial authorities are to some extent involved in all Member States when it comes to succession proceedings. While many authorities and especially those involved in determining disputes are judicial, (81) relevant steps (*infra* paras 39ff) or parts (*infra* paras 43ff) of proceedings are often carried out by out-of-court actors. The latter range from legal professionals (mainly notaries), (82) administrative authorities, (83) civil registries (84) to personal representatives or administrators (85).

36 Out-of-court actors are, for example, often involved in helping parties exercise their party autonomy (eg when drafting testamentary dispositions or disposing of succession rights or shares) or in supporting judicial authorities when it comes to carrying out steps leading up to the final determination of the heirs and assets of an estate (eg declarations of acceptance or waiver, drawing up inventories). Especially when it comes to tasks falling under the latter of the two categories, however, are they frequently pushed into a passive role, limited to receiving or recording party declarations. Their involvement is mainly justified by the relief they provide the courts, eg when it comes to time-consuming and costly tasks.

---

(81) *Patreider*, Austria, paras 120, 131, 149, 213; *Pedersen/Thøgersen*, Denmark, para 124; *Berre*, France, para 44; *Johanson*, Germany, paras 112, 149; *Bogdziewicz*, Lithuania, para 85; *Jonker/Schrama*, The Netherlands, para 70; *Kamińska*, Poland, paras 69–71; *Vlad*, Romania, para 174; *Erjavec*, Slovenia, para 134. Public prosecutors are involved in Greece, see *Zervogianni*, Greece, para 118. Before the Soviet occupation, proceedings were also judicial in Estonia, see *Karm*, Estonia, para 92.

(82) *Patreider*, Austria, paras 119ff; *Karm*, Estonia, paras 88f, 92; *Berre*, France, paras 44, 47; *O'Sullivan*, Ireland, para 46; *Bogdziewicz*, Lithuania, para 85; *Kamińska*, Poland, paras 69, 72–74; *Teixeira Pedro*, Portugal, paras 79, 102; *Vlad*, Romania, paras 125, 151; *Erjavec*, Slovenia, para 134; *Esteve Alguacil*, Spain, para 182. Certain 'judicial' competences for notaries used to exist in Germany (in Baden-Württemberg), see *Johanson*, Germany, para 112.

(83) *Pedersen/Thøgersen*, Denmark, para 124; *Teixeira Pedro*, Portugal, paras 102f; *Erjavec*, Slovenia, para 134; *Vaigė*, Sweden, para 103.

(84) *Teixeira Pedro*, Portugal, para 79.

(85) *O'Sullivan*, Ireland, para 51.

Furthermore, steps that do not require the determination of disputes or complex substantive assessments, such as receiving declarations of the parties, (86) recording agreements and facts, or drawing up inventories, (87) can generally be outsourced to non-judicial actors without undermining the traditional role of courts, even if non-judicial actors are given some investigative powers and discretion (88). While the respective tasks are nevertheless still often carried out by courts, (89) there is a clear trend to delegate them (at least alternatively) to notaries (90). These considerations do, however, not just hold true for the delegation of specific tasks but also in cases in which the overall proceedings are delegated due to them being non-contentious, with all parties in agreement – always provided that certain procedural and substantive safeguards are guaranteed. **37**

The involvement of non-judicial actors is – unlike in family law – not only a recent trend but often the result of decade-long legal developments. This is especially true in countries such as Austria, in which many aspects of the proceedings were already historically delegated to legal professionals (notaries). (91) Recently, some efforts to extend the current reach and competences of notaries in succession proceedings have resurfaced. (92) This particularly applies to non-contentious aspects of proceedings, while it generally does not seem to be the intention to transfer the resolution of disputes to out-of-court actors or legal professionals. **38**

2. *Tasks for non-judicial authorities*

Non-judicial authorities, and especially notaries, intervene at different stages of succession proceedings. They assist parties in drafting testamentary dispositions, in disposing of their shares, (93) in renouncing rights in an **39**

---

(86) Eg *Patreider*, Austria, paras 164, 165ff.

(87) Interestingly, in Estonia, the competent body (a bailiff) is appointed by a notary, see *Karm*, Estonia, paras 88f, 101, 128.

(88) *Patreider*, Austria, para 187 (accessing immovables); *Karm*, Estonia, paras 99ff; *Berre*, France, para 58.

(89) *Patreider*, Austria, para 178; *Kamińska*, Poland, paras 85, 87; *Erjavec*, Slovenia, paras 136f.

(90) *Patreider*, Austria, paras 152, 181ff; *Bogdziewicz*, Lithuania, paras 106, 111; *Kamińska*, Poland, para 85.

(91) This is, among others, also the case in the Netherlands.

(92) *Patreider*, Austria, para 148; *Bogdziewicz*, Lithuania, para 89; *Vlad*, Romania, para 125; *Erjavec*, Slovenia, para 190. Others are more reluctant when it comes to reforms, see *O'Sullivan*, Ireland, para 46.

(93) Eg agreements as to succession. The latter are currently not allowed in a number of jurisdictions or subject to strict requirements (*Berre*, France, para 50 [France, however,

inheritance, or facilitating the determination of the heirs (by receiving declarations, opening wills, (94) gathering information on the deceased) or of the assets of the estate (by drawing up inventories, securing the estate) (95).

40 Especially in the last two cases, the tasks are often carried out on behalf of, or under the supervision of, courts, even if at times with considerable discretion. (96) The overall proceedings in these cases often remain in the hands of the judiciary, which is reflected in the various supervisory functions exercised by them. (97) The delegation is consequently mainly understood as a tool to relieve judicial authorities. While the respective functions are in some Member States delegated *ex lege*, (98) others allow courts to decide to what extent non-judicial actors should be involved. (99) In some jurisdictions, out-of-court actors can request the assistance of other public authorities for these purposes, (at times) autonomously proceed to take evidence and to make inquiries, or are entitled to conduct informal hearings with interested parties. (100)

41 Once the heirs and their shares are determined, non-judicial bodies are further often involved in establishing succession rights towards third parties, by certifying their position as heirs, beneficiaries or other representatives (see below paras 53ff).

42 Due to increasing overlaps of steps carried out by non-judicial authorities and those reserved to courts, and to further safeguard all parties involved,

---

allows for the gift-sharing of assets between the presumptive heirs as well as for *mortis causa* gifts between spouses]; *Zervogianni*, Greece, paras 116, 121, 127 [registered partners can, however, when concluding a 'cohabitation agreement' waive their future reserved share]; *Stracqualursi/Chiricallo*, Italy, para 203; *Teixeira Pedro*, Portugal, paras 80, 83, 90 [parties can, however, exceptionally waive mandatory succession rights]; *Erjavec*, Slovenia, para 124 [certain types of waivers are, however, allowed, see para 132]; *Esteve Alguacil*, Spain, para 189 [there are, however, a few exceptions such as Catalonia]). Agreements are nevertheless allowed in countries such as Austria or Germany.

(94) Only some Member States, such as Spain, consider the activities carried out by notaries in the homologation process as falling under the definition of court of Article 3(2), see *Esteve Alguacil*, Spain, para 202.

(95) Outsourced tasks may further include: releasing assets from the estate to cover costs; summoning parties; receiving party submissions; serving relevant documents; receiving testamentary dispositions; carrying out publications and accessing public registers as well as immovables, premises and other belongings of the deceased to identify the assets of the estate. See *Patreider*, Austria, paras 128, 134, 137, 141, 145, 152ff, 181ff; *Teixeira Pedro*, Portugal, para 104; *Vlad*, Romania, para 153; *Erjavec*, Slovenia, paras 134, 150.

(96) *Patreider*, Austria, paras 132, 142.

(97) See above.

(98) *Patreider*, Austria, paras 128, 147.

(99) *Erjavec*, Slovenia, para 150.

(100) *Patreider*, Austria, paras 145f, 235.

some jurisdictions have started to subject especially notaries to a number of obligations safeguarding the rule of law when carrying out the tasks delegated to them. Many intend to guarantee the right to a fair trial, the right to be heard and the impartiality of the authorities involved. (101) Austria, for example, has introduced distribution rules for cases based on objective criteria (102) and extended several rules that were originally established for courts (eg rules on the recusal of judges, incompatibilities, and the parties' overall right to be heard). (103)

3. *Proceedings for non-judicial authorities*

Several jurisdictions, on the other hand, directly refer parties to out-of-court (oftentimes notarial) proceedings. (104) This is, however, generally only the case in non-contentious settings. (105) For the proceedings to take place, it is consequently often necessary that all parties are in agreement, again excluding a de-judicialisation in cases of dispute. (106) Notarial procedures, for example, exist in Estonia, France, Romania, and Spain. (107) Notaries are in these cases also entrusted with carrying out assessments, both in fact and in law. (108) **43**

A number of jurisdictions, however, have also introduced specific thresholds and requirements when parties want to access out-of-court proceedings. (109) In Portugal, parties can, for example, avail themselves of simplified out-of-court proceedings only when no immovables or movables subject to regis- **44**

(101) Eg *Patreider*, Austria, para 234.

(102) *Patreider*, Austria, paras 133, 151.

(103) See *Patreider*, Austria, paras 134f, 142ff, 146, 234, 237. Similar rules apply in Estonia, *Karm*, Estonia, para 88f, even though here it is not just tasks that are delegated but the entire proceedings are in the hands of notaries.

(104) Eg notaries: *Karm*, Estonia, paras 100, 102 (in their role, they are even considered to function as first instance courts, see paras 88f, 100, 102); *Berre*, France, para 47; *Kamińska*, Poland, paras 72ff; *Vlad*, Romania, paras 125, 151, 157; *Esteve Alguacil*, Spain, paras 182, 233ff. Civil registries: *Teixeira Pedro*, Portugal, para 103. At least provided certain requirements were met.

(105) See above.

(106) See *Karm*, Estonia, para 103; *Kamińska*, Poland, para 73; *Vlad*, Romania, para 125.

(107) See *Karm*, Estonia, paras 98, 100, 102; *Berre*, France, paras 47, 58; *Vlad*, Romania, paras 125, 151, 157; *Esteve Alguacil*, Spain, paras 182, 233ff.

(108) At times they are even competent to determine and evaluate the capacity of the potential successors to succeed (*Esteve Alguacil*, Spain, para 203) or to determine the shares of each heir (*Karm*, Estonia, para 99).

(109) *Kamińska*, Poland, paras 72f; *Teixeira Pedro*, Portugal, paras 103, 117.

tration are part of the estate. (110) Only then are succession proceedings delegated to specific sub-divisions of civil registries. (111)

45 Some legal systems, such as Poland, only introduced notarial proceedings as alternatives to court proceedings. (112) To limit conflicting decisions, it was at times further expressly established that the respective proceedings are incompatible with pending or completed judicial (113) or other notarial (114) proceedings, highlighting that the *lis pendens* principle can also be applied in out-of-court proceedings.

46 The reasons for the outsourcing are manifold. Out-of-court procedures are considered to be quicker, (115) can build on pre-existing legal traditions, (116) are often cheaper (117) and, from an institutional standpoint, reduce the workload of courts (118). Where parties are in agreement and non-judicial State bodies exercising public authority safeguard basic substantive and procedural rights, Member States seem to be more inclined to allow a shift in the administration of justice. Public interests are further ensured by authorising courts to supervise the activities of non-judicial authorities and allowing parties or the State to have their actions reviewed in court proceedings. (119)

C. *Party autonomy in succession proceedings*

1. *Devolution of the estate*

47 Party autonomy plays a role in different phases of succession proceedings. Beyond the drafting of testamentary dispositions or disposing of succession rights or assets, parties, for example, have the power to decide whether or not to take part in succession proceedings. Even if an estate devolves *ipso jure*, the designated successors are consequently not obliged to become heirs. Parties are rather – in all jurisdictions – entitled to accept or waive the inheritance at their discretion. The declarations themselves play a central role

---

(110) *Teixeira Pedro*, Portugal, paras 103, 117.
(111) Ibid. The one-stop shop-system is called 'Heritage Counter'.
(112) *Kamińska*, Poland, para 74.
(113) *Kamińska*, Poland, para 73.
(114) *Karm*, Estonia, para 98.
(115) *Kamińska*, Poland, para 72.
(116) *Karm*, Estonia, para 92.
(117) *Karm*, Estonia, para 92.
(118) *Patreider*, Austria, paras 123ff; *Karm*, Estonia, para 92.
(119) See above.

in the determination of the legitimate heirs. While at their core they constitute declarations of intent that would mainly require registration by any authority qualified to receive them (such as a notary (120) or other legal professionals (121)), they often can still (or have to) be made before judicial authorities, even if not necessarily before judges (122). This relates to the declarations' relevance for the establishment of succession rights. The multiplicity of options ensures legal certainty on the devolution of the estate and a quicker determination of heirs. (123)

Party autonomy and declarations further play a role when it comes to the **48**
liability for debts of the estate. While in some Member States, debts are not inherited but in any case borne by the estate, (124) parties can generally also autonomously (and unilaterally) limit their liability to the value of the estate if they accept with the benefit of inventory (*intra vires hereditatis*). (125) The declaration (combined with the drawing up of a list of the estate's assets (126)) determines a separation of the assets of the heir from those of the deceased. (127) Due to the implications, stricter formal requirements often apply that require the involvement of a notary (128) or court (129).

---

(120) *Patreider*, Austria, paras 129, 165; *Karm*, Estonia, paras 44, 95; *Berre*, France, para 45; *Stracqualursi/Chiricallo*, Italy, paras 210, 216, 227; *Bogdziewicz*, Lithuania, paras 92f, 96; *Kamińska*, Poland, para 68; *Vlad*, Romania, paras 129, 136, 163; *Esteve Alguacil*, Spain, para 207.

(121) *Vaigė*, Sweden, paras 110, 114.

(122) *Patreider*, Austria, paras 178ff; *Berre*, France, para 45; *Johanson*, Germany, paras 115f; *Zervogianni*, Greece, paras 118, 121; *Stracqualursi/Chiricallo*, Italy, paras 208, 216, 227; *Jonker/Schrama*, The Netherlands, paras 74f; *Kamińska*, Poland, para 68; *Erjavec*, Slovenia, para 137; *Esteve Alguacil*, Spain, para 208; *Vaigė*, Sweden, paras 115, 117, 110.

(123) The need to quickly establish potential heirs to an estate is also reflected by the fact that formal and procedural thresholds for waivers are generally higher than for acceptances (see eg *Teixeira Pedro*, Portugal, para 95; *Esteve Alguacil*, Spain, para 207), thus guaranteeing a smoother devolution of the estate and an easier (quicker) determination of its heirs.

(124) *Vlad*, Romania, paras 127, 143; *Kamińska*, Poland, para 68 (the *beneficium* is the default option should parties not have made any declaration); *Vaigė*, Sweden, para 111.

(125) *Patreider*, Austria, para 167; *Karm*, Estonia, paras 126f; *Zervogianni*, Greece, para 123; *Bogdziewicz*, Lithuania, para 95; *Jonker/Schrama*, The Netherlands, para 73; *Kamińska*, Poland, para 68; *Teixeira Pedro*, Portugal, paras 93f; *Esteve Alguacil*, Spain, para 211.

(126) Cf *Patreider*, Austria, para 167; *Karm*, Estonia, paras 126, 128; *Zervogianni*, Greece, para 123.

(127) Eg *Zervogianni*, Greece, para 123; *Stracqualursi/Chiricallo*, Italy, para 216.

(128) *Patreider*, Austria, para 167; *Berre*, France, para 45; *Stracqualursi/Chiricallo*, Italy, paras 210, 216; *Bogdziewicz*, Lithuania, para 95; *Esteve Alguacil*, Spain, para 211.

(129) *Zervogianni*, Greece, para 123; *Stracqualursi/Chiricallo*, Italy, paras 208, 216.

2. *Administration and distribution of the estate*

49 Besides these declarations, the main area for party autonomy, however, remains the administration and division of the estate. Once the heirs and other beneficiaries are determined, competences can shift to the parties more easily – provided they are in agreement. Some jurisdictions provide, in particular, for extra-judicial agreements regarding the shares heirs have in an estate. (130) Such out-of-court solutions aim to avoid delays and costs connected to potential disputes in matters of testamentary successions. In Ireland, parties can, by entering into Deeds of Family Arrangement, also known as Deeds of Variation, proceed to 'rewrite' testamentary dispositions – provided that there is agreement among all parties. (131) The involvement of judicial authorities is often subsidiary in administrative and distributive matters. It however always becomes necessary when controversies arise, (132) or judicial authorisations are required, for example, in case particular interests are at play, often of minors or vulnerable adults. (133)

50 While the appointment of executors by testators with regard to the administration often remains the preferred solution in Member States as it constitutes an expression of testamentary freedom, (134) jurisdictions generally also provide for default rules delegating administrative tasks to the heirs should no representative have been chosen (135). Judicial appointments are often subsidiary and only become necessary in cases of dispute or when there is no suitable candidate among the heirs. (136) The relevance of party autonomy and the non-contentious nature of a case gives room for some de-judiciali-

---

(130) *O'Sullivan*, Ireland, para 54; *Stracqualursi/Chiricallo*, Italy, para 241.

(131) *O'Sullivan*, Ireland, para 54.

(132) As for the division, generally, if no agreement could be reached: *Patreider*, Austria, para 204; *Karm*, Estonia, paras 120, 124; *Berre*, France, para 44; *Johanson*, Germany, paras 125, 131; *Zervogianni*, Greece, para 145; *Stracqualursi/Chiricallo*, Italy, paras 208, 266; *Vlad*, Romania, para 140; *Erjavec*, Slovenia, para 142.

(133) See, for example, *Zervogianni*, Greece, paras 149; 213–216, 222, 263, 266, 269; *Esteve Alguacil*, Spain, para 218.

(134) See *Patreider*, Austria, para 222; *Karm*, Estonia, paras 111, 113; *Berre*, France, para 59; *Johanson*, Germany, paras 171, 173; *Zervogianni*, Greece, para 147; *O'Sullivan*, Ireland, para 51; *Stracqualursi/Chiricallo*, Italy, para 262; *Bogdziewicz*, Lithuania, para 108; *Jonker/Schrama*, The Netherlands, para 83; *Kamińska*, Poland, para 81; *Teixeira Pedro*, Portugal, para 126; *Vlad*, Romania, para 166; *Erjavec*, Slovenia, para 164; *Esteve Alguacil*, Spain, para 219; *Vaigė*, Sweden, para 115 (see also paras 102, 106, 131).

(135) *Patreider*, Austria, para 222; *Johanson*, Germany, para 167; *Zervogianni*, Greece, para 143; *Stracqualursi/Chiricallo*, Italy, para 259; *Kamińska*, Poland, para 80; *Teixeira Pedro*, Portugal, para 125; *Vlad*, Romania, para 161; *Erjavec*, Slovenia, paras 139, 163; *Esteve Alguacil*, Spain, para 216; *Vaigė*, Sweden, paras 104, 127.

(136) See eg *O'Sullivan*, Ireland, paras 6, 46; *Vaigė*, Sweden, paras 114, 129f.

sation also in the present context. In some Member States, such as Estonia or Romania, the competence to appoint administrators can in certain circumstances lie with notaries. (137) Similar notarial appointment procedures can also be found with regard to distributors. Under Spanish law, the distribution has at times to be delegated to an external professional. While the appointment generally had to be made in court, the procedure was eventually de-judicialised and now lies with notaries or civil servants in the judicial administration that lead a particular judicial office. (138)

A similar inclination to favour solutions based on party autonomy exists in distributive matters. Divisions consequently primarily occur by way of agreement and are contractual (139) in nature – even if they might have to be approved in court to safeguard certain public interests (140). Only if there is no agreement between the parties have courts to become involved. (141) Countries such as Germany and Italy introduced further ways of de-judicialisation, providing the possibility to delegate the division to notaries or lawyers. (142) **51**

Overall, when the administration or division is not in the hands of the beneficiaries, the tasks with which executors and other representatives are entrusted are for the most part not authoritative. (143) The solutions proposed by them can thus not be imposed on the parties involved. There are **52**

(137) *Karm*, Estonia, para 113. See also *Vlad*, Romania, para 165.

(138) *Esteve Alguacil*, Spain, para 226 (the appointment used to be judicial up until 2015).

(139) *Patreider*, Austria, paras 201ff; *Karm*, Estonia, paras 122, 123; *Berre*, France, para 60; *Johanson*, Germany, paras 121, 128; *Zervogianni*, Greece, para 145; *Stracqualursi/Chiricallo*, Italy, para 265; *Jonker/Schrama*, The Netherlands, para 83; *Kamińska*, Poland, paras 85, 89; *Vlad*, Romania, paras 140, 162, 172; *Erjavec*, Slovenia, para 141f; *Esteve Alguacil*, Spain, para 225.

(140) Eg *Patreider*, Austria, para 203; *Karm*, Estonia, para 123; *Berre*, France, para 60.

(141) *Patreider*, Austria, para 250; *Karm*, Estonia, paras 120, 124; *Berre*, France, para 44; *Johanson*, Germany, paras 125, 131; *Zervogianni*, Greece, para 145; *Stracqualursi/Chiricallo*, Italy, paras 208, 266; *Vlad*, Romania, para 140; *Erjavec*, Slovenia, paras 142, 140.

(142) *Johanson*, Germany, paras 129f; *Stracqualursi/Chiricallo*, Italy, para 267.

(143) Beyond their specifically assigned functions, executors are further often statutorily entrusted with (some of) the following tasks: representing the estate; acting as estate administrator (at times even for matters of extraordinary administration) and distributor; settling debts; receiving and requesting payments on behalf of the estate; initiating estate insolvency proceedings; taking possession of the estate; sealing the estate; requesting or preparing an inventory; establishing title to, and gathering in of, assets; at times even searching for heirs and providing them with a copy of the will. See *Patreider*, Austria, para 227; *Karm*, Estonia, paras 116, 125; *Berre*, France, para 61; *Johanson*, Germany, paras 126, 173–175; *Zervogianni*, Greece, para 148; *O'Sullivan*, Ireland, para 51; *Stracqualursi/Chiricallo*, Italy, para 262; *Bogdziewicz*, Lithuania, para 111; *Jonker/Schrama*, The Netherlands, para 83; *Kamińska*, Poland, paras 81, 84; *Vlad*, Romania, para 167; *Erjavec*, Slovenia, para 163; *Vaigė*, Sweden, paras 115, 131.

some exceptions, however. In Sweden, for example, distributors can exercise compulsory and authoritative powers. (144) They do not necessarily have to follow the approaches proposed by the parties and can even resolve disputes, even if distributors generally try to reach an amicable solution and have to expect that their proposal might be challenged in court. (145) The Danish system presents some similarities. Under the relevant statutory default rules, the administration and division are handled by an authorised manager, generally a lawyer. (146) The latter are appointed by the Minister of Justice and are, when exercising the tasks entrusted to them, entitled to overrule the decisions of heirs and creditors. (147) Disputes arising from their rulings, however, still have to be heard in court.

D. *Establishing succession rights towards third parties*

53 While so far, the focus has been on the (internal) relations between the heirs or other beneficiaries and the establishment of succession rights between them (including the administration and distribution of the estate), different considerations apply when succession rights have to be established towards third parties.

54 All Member States provide heirs (as well as legatees, executors), in some way or another, with the possibility to prove their right of succession to private parties, public authorities or courts. (148) The respective title or document generally goes by the name of 'certificate of succession'. Some jurisdictions do not provide for a national certificate as such (ie in the form of a separate public document) but refer parties to the judicial decision or other court-issued documents. (149) Others again rely on public documents issued by

---

(144) *Vaigė*, Sweden, para 131. Which is also why heirs or other beneficiaries are generally excluded from these functions as they are considered to require impartiality. The same applies in Spain. Cf *Esteve Alguacil*, Spain, para 225.

(145) *Vaigė*, Sweden, para 131 (called *tvångskifte*).

(146) *Pedersen/Thøgersen*, Denmark, paras 11, 139–140. See also paras 126, 127, 130.

(147) *Pedersen/Thøgersen*, Denmark, paras 139–140. Disputes arising from their rulings still have to be heard in court.

(148) Eg *Patreider*, Austria, para 195; *Pedersen/Thøgersen*, Denmark, para 129; *Karm*, Estonia, paras 97, 105, 117; *Berre*, France, paras 44, 47, 53; *Johanson*, Germany, paras 151, 164; *Bogdziewicz*, Lithuania, para 108; *Kamińska*, Poland, para 83; *Teixeira Pedro*, Portugal, paras 116, 119; *Vlad*, Romania, paras 149, 156.

(149) Eg *Patreider*, Austria, para 194; *Pedersen/Thøgersen*, Denmark, para 129; *Berre*, France, para 56; *Stracqualursi/Chiricallo*, Italy, paras 249f; *Johanson*, Germany, para 152; *Kamińska*, Poland, paras 69–71; *Teixeira Pedro*, Portugal, paras 113, 122. In a number of countries, succession proceedings end with a judicial decision definitively establishing the status of heirs or legally transferring the estate to the legitimate successors (eg *Patreider*, Austria, paras 120, 190f, 194; *Kamińska*, Poland, paras 70f; *Erjavec*, Slovenia, para 143). The effects of the final decisions, however,

administrative authorities, (150) excerpts from population registers (151) or from national registers concerning wills (152) or – as is frequently the case – on notary-issued documents. (153) Regardless of several non-judicial options set in place, it appears that many countries still refer parties to courts. (154) This is also showcased by the situation in Greece: while it recently entrusted lawyers with ordering the issuance – provided that there is no dispute among the parties – the document itself continues to be court-issued. (155) The competence to issue national certificates is thus not necessarily an out-of-court one. Where Member States provide for both types of procedures, however, out-of-court certifications are often issued quicker than the alternative judicial ones. (156)

The certificates can either be based on a judicial decision, (157) on the declarations of heirs (158) or administrators of estates, (159) or, more generally, on the findings of (notarial or judicial) succession proceedings (160). When courts are involved, they often rely on documents prepared or declarations received by notaries. (161) The certainty and reliability as to the national certificates' legal and factual basis can thus vary, even if generally all authorities carry out some assessments as to the rights of the applicants, both

---

vary. In some jurisdictions, they are merely declaratory (*Erjavec*, Slovenia, para 144f) or have no *res iudicata* effects (*Karm*, Estonia, para 109). In others, the decision is constitutive in nature (*Patreider*, Austria, para 194), binding on the parties (*Erjavec*, Slovenia, para 145), becomes final and enforceable (*Patreider*, Austria, para 199).

(150) *Teixeira Pedro*, Portugal, paras 117; *Vaigė*, Sweden, paras 121, 113.

(151) *Vaigė*, Sweden, para 121.

(152) *Esteve Alguacil*, Spain, paras 231f.

(153) *Karm*, Estonia, paras 102, 105; *Berre*, France, paras 47, 53 (a notary establishes the devolution of the estate in a deed of notoriety); *Bogdziewicz*, Lithuania, paras 85, 87, 96; *Jonker/Schrama*, The Netherlands, paras 72, 78; *Kamińska*, Poland, paras 69, 72–74 (alternatively to a judicial decision); *Teixeira Pedro*, Portugal, paras 114, 115; *Vlad*, Romania, paras 126, 151.

(154) *Patreider*, Austria, paras 195, 221; *Pedersen/Thøgersen*, Denmark, paras 132, 138, 139; *Berre*, France, paras 44, 53 (in Alsace and Moselle); *Johanson*, Germany, paras 151, 152, 153; *Zervogianni*, Greece, paras 136, 137, 138f; *Stracqualursi/Chiricallo*, Italy, para 249; *Kamińska*, Poland, paras 69, 70, 72–74; *Teixeira Pedro*, Portugal, paras 113, 122.

(155) *Zervogianni*, Greece, paras 5, 118, 122, 138ff (while lawyers order the issuance, the certificate itself is still issued by a court).

(156) *Kamińska*, Poland, para 72.

(157) Eg *Vlad*, Romania, para 126.

(158) *Berre*, France, para 53; *Teixeira Pedro*, Portugal, para 114.

(159) *Teixeira Pedro*, Portugal, paras 114, 118.

(160) *Patreider*, Austria, para 194; *Karm*, Estonia, para 102.

(161) *Johanson*, Germany, para 155.

in law and in fact. (162) While evidence can also be gathered *ex officio*, (163) it often has to or can be provided by the parties themselves as well (164). If facts or legal aspects of a case are, however, disputed or do not clearly result from the documentation at hand, parties are generally referred to judicial authorities. Notaries or other non-judicial authorities are not entitled to issue a certificate in these situations. (165)

56 In many cases, the effects of the certificates are merely evidentiary, even in cases in which the certificates are court-issued. (166) Material findings of facts are consequently often only considered true until the contrary is proven. (167) This, however, still facilitates a *bona fide* acquisition from the certificate's holder and allows for their use for registration purposes. (168) *Res judicata* effects nevertheless generally do not follow from a certificate; (169) nor does it necessarily constitute an enforceable title. (170) The effects of national certificates are thus normally not comparable to judicial decisions. (171)

57 The involvement of non-judicial actors in the context of providing proof of (pre-)established succession rights appears unproblematic considering their long experience and specific competences when it comes to receiving and assessing party declarations or establishing undisputed facts of a case. Where the certificates are mainly based on uncontested declarations of the parties, there is generally no need for courts to become involved. Other authorities are better suited to receive, assess, and record them. Legal certainty and the accuracy of public registers can thus still be upheld.

58 Similar considerations apply in cross-border scenarios. The range of authorities that have to be seized generally remains the same: courts (172) and

---

(162) Eg *Johanson*, Germany, paras 152, 166; *Stracqualursi/Chiricallo*, Italy, para 250; *Jonker/Schrama*, The Netherlands, para 78; *Vlad*, Romania, para 151.

(163) *Johanson*, Germany, para 154; *Zervogianni*, Greece, para 139.

(164) *Zervogianni*, Greece, para 139; *Bogdziewicz*, Lithuania, para 106.

(165) Eg, *Bogdziewicz*, Lithuania, para 94; *Kamińska*, Poland, para 72.

(166) *Karm*, Estonia, para 106; *Johanson*, Germany, para 159 (rebuttable); *Zervogianni*, Greece, para 137 (rebuttable); *Bogdziewicz*, Lithuania, para 104; *Jonker/Schrama*, The Netherlands, para 78; *Vlad*, Romania, para 155.

(167) *Karm*, Estonia, para 107 (rebuttable); *Johanson*, Germany, para 159 (rebuttable); *Bogdziewicz*, Lithuania, para 87; *Vlad*, Romania, para 155.

(168) *Johanson*, Germany, para 160.

(169) Eg *Johanson*, Germany, paras 154, 161, 162; *Vlad*, Romania, para 155.

(170) Eg *Bogdziewicz*, Lithuania, para 104; *Jonker/Schrama*, The Netherlands, para 78.

(171) See eg *Berre*, France, para 55; *Bogdziewicz*, Lithuania, para 105. Also Case C–187/23 *Albausy* [2024] ECLI:EU:C:2024:309, Opinion of AG Campos Sánchez-Bordona, para 43.

(172) *Johanson*, Germany, paras 151, 166; *Zervogianni*, Greece, para 142; *Kamińska*, Poland, para 79; *Erjavec*, Slovenia, paras 152f.

notaries (173) in many, public administrative authorities (174) in some. Only some Member States such as Austria have shifted the competences to non-judicial actors ie notaries, when it comes to the European Certificates of Succession. (175)

59 The proceedings for the issuance of European Certificates of Succession are oftentimes modelled on (or the same as) those provided for the issuance of national certificates. (176) Some jurisdictions even require that interested parties apply for a national 'certificate' before a European Certificate can be issued: While Ireland does not apply the Succession Regulation (and does not recognise European Certificates of Succession) and thus always requires a Grant of Probate to be issued by an Irish court, (177) Romania, for example, only issues European Certificates after a national certificate has been drawn up. (178)

60 Jurisdiction is a relevant factor – both in domestic and cross-border cases. (179) While the authorities involved (even if non-judicial) can often check whether they possess competence under the Succession Regulation and issue Certificates only if they have jurisdiction, (180) other Member States, such as Estonia, do not consider their designated out-of-court actors (notaries) to be bound by the jurisdictional rules of the Succession Regulation. (181)

IV. The law of natural persons

61 The third comparative part of the Project was dedicated to the law of natural persons and assessed procedures in matters concerning name changes, gender recognition, and the protection of adults. The role of courts relating to the law of natural persons traditionally remained somewhat residual with

---

(173) *Patreider*, Austria, paras 141, 212; *Karm*, Estonia, para 107; *Berre*, France, para 57; *Stracqualursi/Chiricallo*, Italy, para 255; *Bogdziewicz*, Lithuania, para 107; *Jonker/Schrama*, The Netherlands, para 81; *Kamińska*, Poland, para 79; *Vlad*, Romania, paras 126, 151, 159; *Esteve Alguacil*, Spain, paras 236f.

(174) *Teixeira Pedro*, Portugal, para 123; *Vaigė*, Sweden, para 126.

(175) *Patreider*, Austria, paras 141, 212f.

(176) *Bogdziewicz*, Lithuania, para 107; *Kamińska*, Poland, para 79.

(177) *O'Sullivan*, Ireland, para 56.

(178) Eg *Vlad*, Romania, para 159.

(179) See *Kamińska*, Poland, para 79 and Principle 4, para 57.

(180) *Zervogianni*, Greece, para 142; *Stracqualursi/Chiricallo*, Italy, para 255; *Kamińska*, Poland, para 79; *Vlad*, Romania, paras 151, 159.

(181) *Karm*, Estonia, paras 109, 111 (they are, however, bound by national rules similar to those of the Succession Regulation). In the Netherlands, notaries are not bound by the rules on jurisdiction when issuing national certificates, see *Jonker/Schrama*, The Netherlands, para 81.

regard to name changes, while judicial authorities were more closely involved when it came to changes in a person's gender marker or to protective measures concerning adults. While this still holds true to some extent today, many Member States have started to delegate these tasks to non-judicial authorities, often public administrative bodies, such as civil registries. (182) The latter, as specialised authorities in receiving and recording declarations on a person's status, are often recognised as more suitable contact points for parties. (183) This further correlates to an overall tendency to strengthen party autonomy in personal status matters, especially those related to name and gender, excluding the need to involve authorities on a substantive level. Similar tendencies can be detected in matters of adult protection, in particular, with the introduction of private mandates for cases of incapacity and the rise of more specific measures tailored to the needs of the adult concerned. (184) Seldom are vulnerable adults consequently still fully deprived of their decision-making capacity. (185)

62 The out-sourcing of competences to out-of-court actors is further justified considering that the respective status matters are often non-contentious and the number of interests at play and parties involved are generally manageable without the need for a court to become involved. Acts in these matters only seldom have *res judicata* effects and are mostly declaratory in nature.

63 Controversies and cases involving particular interests such as those of children, however, generally remain within the reach of the judiciary. (186) The latter often exercise supervisory functions and are entrusted with

---

(182) Civil registry: *Patreider*, Austria, paras 242, 252, 255; *Pedersen/Thøgersen*, Denmark, para 146; *Berre*, France, para 62; *Johanson*, Germany, paras 184f, 187, 196; *Zervogianni*, Greece, para 167; *Stracqualursi/Chiricallo*, Italy, para 279; *Bogdziewicz*, Lithuania, paras 120, 123, 132; *Jonker/Schrama*, The Netherlands, para 91; *Teixeira Pedro*, Portugal, paras 128, 134; *Vlad*, Romania, para 176; *Esteve Alguacil*, Spain, paras 246, 256f.

Administrative bodies: *Patreider*, Austria, paras 242f; *Pedersen/Thøgersen*, Denmark, paras 149–150; *Karm*, Estonia, paras 138f, 134; *Johanson*, Germany, para 191; *Zervogianni*, Greece, para 172; *O'Sullivan*, Ireland, para 58; *Stracqualursi/Chiricallo*, Italy, para 276; *Bogdziewicz*, Lithuania, paras 120, 123, 128; *Jonker/Schrama*, The Netherlands, paras 85–87; *Vlad*, Romania, para 182; *Erjavec*, Slovenia, paras 171, 174–176; *Vaigė*, Sweden, para 134.

(183) Or other specialised authorities, particularly medical boards in matters of gender recognition, see *Vaigė*, Sweden, paras 137, 139.

(184) *Patreider*, Austria, paras 263f, 281; *Pedersen/Thøgersen*, Denmark, paras 152, 158; *Karm*, Estonia, para 155; *Zervogianni*, Greece, para 181; *Johanson*, Germany, paras 205, 207, 210; *Teixeira Pedro*, Portugal, paras 145f, 148f, 151; *Vlad*, Romania, para 192; *Erjavec*, Slovenia, para 181; *Esteve Alguacil*, Spain, paras 246, 276.

(185) *Pedersen/Thøgersen*, Denmark, para 153 (decision has to be judicial then); *Stracqualursi/Chiricallo*, Italy, para 300; *Jonker/Schrama*, The Netherlands, para 97; *Kamińska*, Poland, paras 98f.

(186) See eg *Esteve Alguacil*, Spain, para 239.

reviewing non-judicial acts, especially in matters concerning the protection of adults. Despite maintaining these – in their origins – judicial tasks, the importance of mere declarations or (quasi-)contractual acts is steadily increasing, leaving more and more room for party autonomy and thus de-judicialisation.

A. *De-judicialisation as a consequence of increasing party autonomy*

Regardless of the competent – nowadays often non-judicial – authority, it has become increasingly common to emphasise the applicant's right of self-determination in status matters. Regarding gender recognition, for example, in a small number of jurisdictions, declarations of intent already constitute the central element in the proceedings. (187) In Ireland, applicants can proceed to the change of their name or gender by merely filling in and signing a form, with very few other formalities applying. (188) **64**

Changes based merely on party declarations are, however, not the norm. Many countries have established sets of requirements that need to be met in addition to the declaration of intent and assessed in some capacity by the competent authority before a change can be authorised or registered. (189) Many, however, only require a limited amount of evidence before approving the request, (190) do not require that other parties are heard in the proceedings (given that the change reflects a private decision), (191) or have simply introduced reflection periods. (192) Certain patterns can, however, be identified when it comes to the requirements. Name changes, for example, are often connected to changes in a person's civil or family status (eg entering or **65**

---

(187) *Pedersen/Thøgersen*, Denmark, para 150; *Johanson*, Germany, para 201; *Zervogianni*, Greece, para 176; *O'Sullivan*, Ireland, para 58; *Esteve Alguacil*, Spain, paras 243, 255.

(188) Name change: signing a so-called Deed Poll, see *O'Sullivan*, Ireland, para 57. Gender change: witnessed by either a peace commissioner, notary public, commissioner for oaths or solicitor; form deposited with an administrative authority, see *O'Sullivan*, Ireland, para 58.

(189) *Patreider*, Austria, para 256; *Pedersen/Thøgersen*, Denmark, para 150; *Karm*, Estonia, paras 137, 144; *Berre*, France, paras 62, 66f; *Johanson*, Germany, paras 190f; *Zervogianni*, Greece, paras 161, 164, 172, 176–178; *O'Sullivan*, Ireland, para 58; *Stracqualursi/Chiricallo*, Italy, paras 275, 295f; *Bogdziewicz*, Lithuania, paras 120, 131f; *Jonker/Schrama*, The Netherlands, paras 86, 91–93; *Kamińska*, Poland, paras 90, 95f; *Teixeira Pedro*, Portugal, para 135; *Vlad*, Romania, paras 181, 189; *Erjavec*, Slovenia, paras 175f; *Esteve Alguacil*, Spain, paras 244, 246; *Vaigė*, Sweden, paras 137–139 (the need for an authorisation by the National Board of Health and Welfare will no longer be required under the new 2025 regime).

(190) *Teixeira Pedro*, Portugal, para 137; *Esteve Alguacil*, Spain, para 246.

(191) *Esteve Alguacil*, Spain, para 246.

(192) *Pedersen/Thøgersen*, Denmark, para 150; *Johanson*, Germany, para 201; *Esteve Alguacil*, Spain, para 246.

exiting a formalised relationship, establishing or dissolving parenthood) (193) or to changes of a person's gender marker (194). Generally, authorities are, however, often relegated to the passive role of receiving party declarations or verifying the existence of statutorily identified grounds based upon which applications can be granted.

66 Procedurally, the strengthening of party autonomy is also emphasised by the fact that multiple changes of one's name or gender have become possible in several jurisdictions, (195) even if they might be subject to judicial authorisations. (196) Other jurisdictions have liberalised the field by limiting the grounds for refusal (197) or more generally by adopting liberal approaches in relation to the reasons for the change (198).

67 In matters of adult protection, many Member States have in recent years introduced different non-judicial options which allow adults to autonomously provide for times in which they would no longer be capable of protecting their own interests, by appointing one or more (199) representatives. (200) Not all provide statutory rules (201) but rather rely on the use of contractual powers of representation – another indication for the increasing

---

(193) See *Patreider*, Austria, para 243; *Karm*, Estonia, para 137; *Berre*, France, para 62; *Johanson*, Germany, paras 184–186; *Zervogianni*, Greece, paras 160, 164–170; *Stracqualursi/Chiricallo*, Italy, paras 277–291; *Bogdziewicz*, Lithuania, paras 117f; *Teixeira Pedro*, Portugal, paras 129f; *Vlad*, Romania, paras 175–180; *Erjavec*, Slovenia, paras 167–169; *Vaigė*, Sweden, para 134.

(194) *Patreider*, Austria, para 254; *Johanson*, Germany, para 187; *Zervogianni*, Greece, paras 160, 164f; *Stracqualursi/Chiricallo*, Italy, paras 282, 297; *Bogdziewicz*, Lithuania, paras 121, 124, 128, 132; *Jonker/Schrama*, The Netherlands, para 92; *Kamińska*, Poland, para 97; *Teixeira Pedro*, Portugal, paras 131, 134; *Vlad*, Romania, paras 181, 190; *Erjavec*, Slovenia, para 167; *Esteve Alguacil*, Spain, paras 258, 248.

(195) *Jonker/Schrama*, The Netherlands, para 93; *Teixeira Pedro*, Portugal, para 142; *Vlad*, Romania, para 191; *Erjavec*, Slovenia, para 172; *Esteve Alguacil*, Spain, para 249.

(196) *Teixeira Pedro*, Portugal, para 142.

(197) *Patreider*, Austria, para 256; *Pedersen/Thøgersen*, Denmark, para 150; *Stracqualursi/Chiricallo*, Italy, para 294; *Bogdziewicz*, Lithuania, para 132; *Jonker/Schrama*, The Netherlands, para 91; *Teixeira Pedro*, Portugal, para 137; *Erjavec*, Slovenia, para 172; *Esteve Alguacil*, Spain, paras 242f; *Vlad*, Romania, para 189. The need for medical procedures or hormonal therapies thus remains the exception eg in Estonia (*Karm*, Estonia, para 145).

(198) Eg by including 'any other compelling reason', see *Vlad*, Romania, para 181.

(199) *Pedersen/Thøgersen*, Denmark, para 159.

(200) Eg *Patreider*, Austria, paras 269ff; *Pedersen/Thøgersen*, Denmark, para 151; *Karm*, Estonia, para 152; *Berre*, France, para 70; *Johanson*, Germany, paras 207–209; *Zervogianni*, Greece, para 187; *O'Sullivan*, Ireland, para 59; *Jonker/Schrama*, The Netherlands, para 104; *Teixeira Pedro*, Portugal, para 150; *Esteve Alguacil*, Spain, para 261; *Vaigė*, Sweden, para 142.

(201) *Zervogianni*, Greece, para 188; *Stracqualursi/Chiricallo*, Italy, para 311; *Jonker/Schrama*, The Netherlands, para 104.

importance of party autonomy. (202) These continuing powers of attorney or other voluntary measures are, in an attempt to strengthen the self-determination of the parties involved, often the preferred solution when it comes to the protection of an adult. (203) Judicial measures might still be adopted but generally only when they are considered to better reflect the adult's interests. (204) Most Member States require parties to respect some formalities (205) and to meet certain substantive requirements when drawing up mandates, especially as to age and decision-making capacity of the individual involved. (206) The contents of the respective private acts are generally (or can at least be) tailored to each individual case. (207) Liberal approaches were at times also taken with regard to the revocation of the respective measures, eg when it can occur at the discretion of the adult. (208)

68 The respective acts, however, generally do not establish a status in the legal sense of the word, be it for the adult or the appointed representative. Private mandates or powers of attorney rather constitute (quasi-)contractual acts, closely related to the law of obligations, and thus limit the need for judicial authorities to be involved. Most jurisdictions at the same time safeguard parties from undue influence and abuse by allowing relatives or persons close to the adult to access judicial review procedures. It thus seems that the controls have moved from *ex ante* reviews to *ex post* ones. This shift of when to review is a further expression of the right to self-determination and a sign of de-judicialisation given that courts now only have to become involved when disputes arise.

B. *The role of the judiciary*

69 The competent non-judicial authorities can generally rely on extensive experience when it comes to receiving and recording declarations of private parties that are intended to have effects on an applicant's personal status.

---

(202) *Stracqualursi/Chiricallo*, Italy, para 311.

(203) Eg *Patreider*, Austria, paras 263, 269; *Esteve Alguacil*, Spain, para 262.

(204) Eg *Berre*, France, para 70.

(205) The act either needs to be drawn up personally, in writing, before a notary, lawyer or other specialised organisation: *Patreider*, Austria, paras 269f; *Karm*, Estonia, para 152; *Johanson*, Germany, para 208; *O'Sullivan*, Ireland, para 60; *Jonker/Schrama*, The Netherlands, para 104; *Esteve Alguacil*, Spain, paras 261, 265.

(206) *Pedersen/Thøgersen*, Denmark, para 160; *O'Sullivan*, Ireland, para 60; *Esteve Alguacil*, Spain, para 263.

(207) *Patreider*, Austria, para 269; *Jonker/Schrama*, The Netherlands, para 104; *Esteve Alguacil*, Spain, para 264.

(208) *Patreider*, Austria, para 272; *Vaigė*, Sweden, paras 142f. Sometimes, declarations and statements have to submitted as well, see *O'Sullivan*, Ireland, para 60.

Party autonomy, as seen, also plays a relevant role. The involvement of courts is, in matters personal status, generally limited but can at times be justified by the principle of procedural economy. This is, for example, the case when it comes to adoptions or when the name changes are already related to judicial procedures in matters of divorce or connected to the establishment of parent-child-relationships. (209)

70 The need for courts to become involved can also reflect the intent to introduce higher formal thresholds for interested parties, potentially limiting the number of applications, or, in some cases, are due to the lack of statutory provisions in place. (210) This frequently occurs in matters connected to gender recognition. Compared to name changes, some Member States (France, Greece, Italy, Lithuania, Poland, and Romania) still rely on judicial procedures or involve courts in some capacity. (211) Proceedings before a judicial authority are used by some countries as the standard procedure, (212) while others only refer parties to them when particular interests are at play, for example, those of minor children (213) or when changes are not requested for the first time (214).

---

(209) *Karm*, Estonia, para 138; *Johanson*, Germany, para 186; *Zervogianni*, Greece, paras 159, 162, 166; *Stracqualursi/Chiricallo*, Italy, paras 281, 284f, 291; *Jonker/Schrama*, The Netherlands, para 85; *Teixeira Pedro*, Portugal, para 129; *Vlad*, Romania, paras 175, 180; *Vaigė*, Sweden, para 134.

(210) In matters of gender recognition, many jurisdictions rely on few or no statutory rules or refer parties to case-law: *Patreider*, Austria, paras 252, 257f; *Bogdziewicz*, Lithuania, para 131; *Kamińska*, Poland, para 93; *Vlad*, Romania, para 189; *Erjavec*, Slovenia, paras 174f; *Esteve Alguacil*, Spain, para 241. Policy discussions are ongoing in a number of Member States: *Karm*, Estonia, para 142; *O'Sullivan*, Ireland, para 58; *Jonker/Schrama*, The Netherlands, para 91; *Teixeira Pedro*, Portugal, para 132; *Esteve Alguacil*, Spain, para 240; *Vaigė*, Sweden, para 136. Other jurisdictions provide for express rules: *Karm*, Estonia, para 142; *Johanson*, Germany, paras 192f; *O'Sullivan*, Ireland, para 58; *Jonker/Schrama*, The Netherlands, para 91; *Teixeira Pedro*, Portugal, para 132; *Esteve Alguacil*, Spain, para 240; *Vaigė*, Sweden, para 136.

(211) *Berre*, France, para 65; *Zervogianni*, Greece, paras 177, 180 (policy discussion to change it into an administrative one due to duration); *Stracqualursi/Chiricallo*, Italy, paras 269, 292; *Bogdziewicz*, Lithuania, para 132; *Jonker/Schrama*, The Netherlands, paras 92 (was formerly a judicial procedure; still is for minors under 16), 95 (gender-neutral registration (X) is a judicial proceeding); *Kamińska*, Poland, para 94; *Vlad*, Romania, para 188.

(212) *Berre*, France, para 66; *Zervogianni*, Greece, paras 177, 180; *Stracqualursi/Chiricallo*, Italy, paras 293f; *Bogdziewicz*, Lithuania, para 132.

(213) *Jonker/Schrama*, The Netherlands, para 92; *Esteve Alguacil*, Spain, paras 247–249.

(214) Multiple changes are possible in a few jurisdictions: *Jonker/Schrama*, The Netherlands, para 93; *Teixeira Pedro*, Portugal, para 142; *Vlad*, Romania, para 191. A judicial authorisation is required in Portugal: *Teixeira Pedro*, Portugal, para 142.

In matters of adult protection, courts generally maintain their competences when adults are fully deprived of their legal capacity. (215) Traditionally, judicial authorities further remain competent (in all matters concerning the status of natural persons) for – at times periodic – review procedures (eg under the general rules of the law of obligations (216)) and frequently exercise supervisory functions. (217) Several Member States, however, have also started to entrust administrative (at times even political) authorities with the respective tasks. (218) **71**

C. *Protecting interests and minimum standards*

Member States have introduced various safeguards and minimum standards in matters related to the law of natural persons. This particularly applies where children are involved, and intends to balance the increasing relevance of party autonomy with the compliance with public interests. Whereas disagreements on the best solution for a child between those exercising parental responsibility often require an authoritative (not necessarily judicial) decision, (219) some Member States have opted for the appointment of representatives or the involvement of authorities facilitating an agreement. (220) This ensures that the best interests of the child are safeguarded and that minimum procedural standards are complied with. **72**

Regardless of a contentious or non-contentious setting, the hearing of minors remains a central aspect in many cases. When they are involved in proceedings concerning names, their consent is generally required, especially once **73**

---

(215) *Pedersen/Thøgersen*, Denmark, para 153. Denmark otherwise delegates the entire appointment procedure to the family law agency.

(216) See eg *Patreider*, Austria, paras 244, 253.

(217) *Patreider*, Austria, paras 243, 253, 265; *Pedersen/Thøgersen*, Denmark, para 147; *Karm*, Estonia, paras 139f, 150; *Berre*, France, paras 62, 68, 70; *Johanson*, Germany, paras 209f, 215, 217; *Zervogianni*, Greece, paras 162, 185; *O'Sullivan*, Ireland, para 60; *Stracqualursi/Chiricallo*, Italy, para 308; *Bogdziewicz*, Lithuania, para 129; *Jonker/Schrama*, The Netherlands, paras 86, 97, 102; *Kamińska*, Poland, para 99; *Teixeira Pedro*, Portugal, para 153; *Vlad*, Romania, para 184; *Esteve Alguacil*, Spain, paras 271–273, 279f; *Erjavec*, Slovenia, para 171, *Vaigė*, Sweden, paras 137, 144.

(218) *Pedersen/Thøgersen*, Denmark, paras 147, 157, 162f; *Karm*, Estonia, para 139; *O'Sullivan*, Ireland, para 60; *Jonker/Schrama*, The Netherlands, para 104; *Kamińska*, Poland, para 92; *Teixeira Pedro*, Portugal, para 141; *Vlad*, Romania, para 183; *Erjavec*, Slovenia, paras 170f, 176, 186; *Vaigė*, Sweden, para 144.

(219) *Bogdziewicz*, Lithuania, para 119; *Vlad*, Romania, para 178; *Erjavec*, Slovenia, para 170; *Esteve Alguacil*, Spain, para 254.

(220) *Erjavec*, Slovenia, para 170; *Esteve Alguacil*, Spain, para 245.

they reach a certain age. (221) They are then often heard as parties with a particular interest. (222) Similar considerations apply in proceedings concerning a change of gender. (223) In many Member States, the respective proceedings can already be accessed by minors should they have reached a certain age or possess the required decision-making capacity. (224) Representation is not always needed. (225) Several jurisdictions have, however, introduced the need for the child to be represented by their parents or another person exercising parental responsibility. (226) Others again have established that, for the change to be approved, parents have to consent to the change. (227) Some Member States have also introduced other specific procedural hurdles should minors be involved, for example, the involvement of specific committees. (228)

V. Conclusions

74 The analysis has shown that the de-judicialisation of family law constitutes a recent trend, while the extra-judicial administration of justice in succession matters has grown historically. However, there do not seem to be coherent approaches to the respective developments, making it difficult – on the level of substantive and procedural law – to draw overarching conclusions for all the areas examined in this report. Nevertheless, some policy recommendations for the European Union and the Member States, in particular in cross-border cases, can be derived from the comparative observations. (229)

A. *Family law*

75 De-judicialisation in family matters is closely linked to the rise of party autonomy in substantive family law. If legal consequences in family law are

---

(221) *Johanson*, Germany, para 185; *Jonker/Schrama*, The Netherlands, para 85; *Vlad*, Romania, para 182 (if over 14); *Erjavec*, Slovenia, paras 168 (if at least nine years old).

(222) *Patreider*, Austria, para 247 (if over ten years of age); *Stracqualursi/Chiricallo*, Italy, para 281 (acknowledgement of a child, court hears them if over 12 or otherwise capable).

(223) *Zervogianni*, Greece, para 178; *Teixeira Pedro*, Portugal, para 135.

(224) *Johanson*, Germany, para 196 in connection with para 201; *Vaigė*, Sweden, para 139.

(225) Eg *Jonker/Schrama*, The Netherlands, para 92 (ages 16–18); *Esteve Alguacil*, Spain, para 245 (ages 16–18).

(226) *Johanson*, Germany, para 201; *Teixeira Pedro*, Portugal, para 135 (16–18); *Esteve Alguacil*, Spain, para 245 (ages 14–16); *Vaigė*, Sweden, paras 138f (applications can be filed from age 12; changes can, however, only be approved once they have become an adult; beginning in 2025, the age limit for changes was reduced to 16).

(227) *Johanson*, Germany, para 196 in connection with para 201; *Zervogianni*, Greece, para 176 (parents need to consent if applicant is 17); *Vaigė*, Sweden, para 139.

(228) *Zervogianni*, Greece, para 178 (in cases of changes in their gender marker).

(229) See Part III oft he present volume.

triggered by agreements and private declarations, there is little need for courts, which are specialised in establishing facts in contentious cases, to become involved. Rather, the State can appoint other authorities, such as notaries or civil status officers who are traditionally specialised in receiving and documenting private declarations, to ensure that the exercise of party autonomy is based on the true intentions of the parties. Hence, it is not surprising that some systems have, for example, de-judicialised divorce: whereas in the past, divorce presupposed the establishment of facts, such as a violation of marital duties or an irretrievable breakdown of the spouses' relationship, if the spouses agree to dissolve their marital bond, no judicial proceedings are required. Of course, it has to be checked whether the legal consequences are anticipated by both parties – a task which can be fulfilled by imposing informational duties on the authorities involved, be it notaries or civil status officers. From a policy perspective, it would even be more coherent to further de-judicialise divorce, for example, if, under substantive family law, divorce upon unilateral demand of one of the spouses is possible. The fact that one of the spouses wishes to divorce can also be established outside of a court by other non-judicial authorities.

76 If the intention of the parties governs the family relationship, the participation of the State is, from a functional perspective, reduced to documenting the parties' intention, also for the sake of legal clarity, the more so if – as regarding family status – the relationship has *erga omnes* effects: from a substantive perspective, it makes little difference whether, for example, an agreed divorce is pronounced by a court or other authority or whether the agreement of the spouses terminates the marital status. Of course, the variety of doctrinal concepts for de-judicialised divorces have different legal consequences: a *res judicata* effect of divorce is only possible if the divorce is pronounced by a court or other authority, however, not if the dissolution is a direct consequence of a private agreement subject to the general rules on contracts.

77 There consequently seems to be a distinction between status matters and matters concerning the consequences of status. While the former are only in certain particular situations de-judicialised, the latter are more often subject to party autonomy and thus to the overall contractualisation of family law.

78 From an European private international law perspective, recognition rules can only apply to divorces where such effects are established by an authority, whereas purely private divorces have to be dealt with on the level of the applicable law determined by the pertinent conflict rules. Otherwise, doctrinal frictions are inevitable, as a closer look at the already mentioned *TB*

decision of the Court of Justice shows ([230]): How can any *res judicata* effects of an Italian out-of-court divorce be (automatically) extended to the other Member States if the divorce agreement can be invalid under Italian (contract) law and the marriage still exists?

79 Hence, a consistent approach of European private international law would provide comprehensive mechanisms for de-judicialised divorces, addressing jurisdiction, applicable law and recognition. ([231]) In some areas of law, European private international law is well equipped to address the de-judicialisation trend in the Member States. For example, in the area of parental responsibility, the Brussels IIb Regulation and the Hague Child Protection Convention contain a comprehensive regime which, for example, provides for adequate rules, irrespective of whether parental responsibility is attributed by the operation of law (conflict rule in Article 16(1) of the Hague Convention) or by declaration (conflict rule Article 16(2) of the Hague Convention) or by court decision (jurisdiction rules in Articles 7ff, recognition rules in Articles 30ff of the Brussels IIb Regulation).

B. *Succession law*

80 Many aspects of succession law remain in the hands of the judiciary. Out-of-court actors do nevertheless play vital roles and provide courts with relevant facts and information about a case, carrying out specific tasks on their behalf or assigned to them by law, in part even exercising authoritative functions in doing so and having to respect safeguards and precautions originally established for judicial authorities. In particular, they play a central role when it comes to helping parties exercise their private autonomy (be it when it comes to testamentary freedom or disposing of succession rights) and establishing pertinent facts of a case. At times, they even assess them as to their substance. A number of Member States have furthermore delegated the entirety of non-contentious proceedings to out-of-court actors, often notaries. Almost never do these non-judicial authorities, however, exercise 'judicial functions' within the meaning given to the phrase by the Court of Justice ([232]), at least, for the purposes of the Succession Regulation: disputes and controversies continue to have to be resolved in court. Only few

---

([230]) Case C–646/20 *Senatsverwaltung für Inneres und Sport v TB* [2022] ECLI :EU:C:2022:879.

([231]) See below Principle 7, paras 112ff.

([232]) Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444; Case C–80/19 *E.E.* [2020] ECLI:EU:C:2020:230.

exceptions remain in which non-judicial actors can take (minor) decisions without requiring the parties' or a court's approval. (233)

81 Some of the essential elements of succession proceedings, such as the definitive determination of heirs, often remain a prerogative of the judiciary too. Member States thus still tend to exclude non-judicial authorities from shaping legal relationships in succession matters and from taking decisions with *res judicata* effects, at least in contentious settings. There is, however, a trend to entrust non-judicial authorities with succession proceedings should the parties be in agreement, or when it comes to cases with little complexity. In non-contentious scenarios, the authority involved is mainly involved in receiving and assessing party declarations, carrying out some assessment of fact or checking the existence of statutory requirements. These tasks traditionally fall within the competences of legal professionals such as notaries. The involvement of highly specialised non-judicial bodies consequently does not harm legal certainty or weaker parties, especially considering that notaries, for example, have – at least under the Latin-type notariat – to undergo legal training similar to that of judges. (234) Private parties are in any case able to resort to supervising courts that hold their protective hand over activities carried out by non-judicial authorities.

82 There is also room for party autonomy in succession proceedings. Private parties can shape succession rights, in particular during preliminary stages, eg when exercising testamentary freedom or disposing of shares (often with the assistance of legal professionals), and in the first steps of the proceedings, when making declarations of acceptance or waiver. Determining the heirs and assets of an estate with binding effects then generally occurs with some State involvement. This tendency generally shifts again once proceedings transition into the administrative or distributive phase. As soon as the key parameters of a case are established and provided that there is no dispute among parties, there is no need for courts to get involved in a capacity other than a supervisory one (if at all). Contractual solutions or the involvement of representatives, preferably appointed by the *de cuius* or chosen from their close relatives, are thus the norm in relation to the administration and division of an estate.

---

(233) Eg some functions carried out by Spanish notaries are considered to fall within the definition of court in Article 3(2) Succession Regulation. The same applies to the Swedish special estate administrator.

(234) See also a recent study written by the Council of the Notariats of the European Union (CNUE): Council of the Notariats of the European Union, 'Specific Study of the CEPEJ on the Legal Professions: Notaries – 2020 data' 18f <https://www.notariesofeurope.eu/wp-content/uploads/2024/01/Specific-Study-on-Notaries-2020-data-CNUE-EN-final.pdf> accessed 1 June 2025.

83 With regard to the cross-border dimension of succession matters, the qualification of notaries and other extra-judicial authorities, such as estate administrators, (235) as courts for the purposes of the Succession Regulation continues to raise some questions. While partly considered to exercise judicial functions, legal professionals are generally not characterised as courts for all purposes and tasks entrusted to them. (236) This is in particular due to the narrow approaches taken by the Court of Justice in the *WB* and *E.E.* decisions (237) that required the resolution of a dispute and thus authoritative powers that do not (entirely) depend on the will of the parties involved. (238) This is, however, almost never the case with out-of-court authorities. In Austria, for example, where notaries have very wide-ranging competences in succession matters, only few activities are truly authoritative and 'fit' the understanding that the Court gives to 'judicial function' under the Succession Regulation. (239)

84 Nevertheless, a number of Member States consider some of their non-judicial authorities as 'courts' for the purposes of the Succession Regulation. In Spain, this is, for example, the case for notaries, in particular, for the role they play in the homologation of testamentary dispositions and when it

---

(235) Given that the decisions of special estate administrators are in Sweden comparable to those of courts, they are considered to be courts for the purposes of the Succession Regulation, see *Vaigė*, Sweden, para 114.

(236) Notaries are, for example, not considered to be courts for the purposes of the Succession Regulation in Estonia (*Karm*, Estonia, para 111 [reasons: their decisions do not have a similar force and effect as a decision of a judicial authority on the same matter; no *res judicata* effects, even if it is acknowledged that it is not a strong argument]), even if they are considered as such under Article 2(1) of Regulation (EU) 2020/1783 of the European Parliament and of the Council on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence), and there only with regard to succession proceedings. Interestingly, notaries are not considered to be courts in Lithuania either. For insights into the Member State from which Case C–80/19 *E.E.* [2020] ECLI:EU:C:2020:230 stemmed, see *Bogdziewicz*, Lithuania, paras 85f, 88. Similar in the Netherlands, *Jonker/Schrama*, The Netherlands, para 81. Austrian notaries (court commissioners), on the other hand, might only qualify under Article 3(2) Succession Regulation for very few purposes, see *Patreider*, Austria, paras 228ff (mostly limited to authoritative tasks eg releasing certain assets from the estate). The same goes for some activities of Spanish notaries, see *Esteve Alguacil*, Spain, paras 202 (homologation process of wills), 233f (notarial declaration of intestate heirs). France does not seem to qualify notaries as courts under Article 3(2) Succession Regulation when it comes to issuing a European Certificate of Succession, see *Berre*, France, para 54.

(237) Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444; Case C–80/19 *E.E.* [2020] ECLI:EU:C:2020:230.

(238) Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444, para 56.

(239) These almost only include releasing certain assets from the estate in order to pay funeral costs, see *Patreider*, Austria, paras 239f.

comes to notarial declarations of intestate heirs, a particular way to determine the heirs to an estate. (240) Sweden has adopted a wide understanding of 'court', with special estate administrators, social welfare committees, property distributors, and chief-guardians being considered to be courts for the purposes of European private international law. (241)

85 At the same time, the restrictive approaches taken by the Court of Justice with regard to the definition of 'court' lead to other, potentially undesirable, outcomes. Courts (in institutional terms), for example, that – when it comes to some tasks – do not exercise judicial functions (242) (eg when recording party declarations or issuing certificates) might not be bound by the respective rules of jurisdiction of the Succession Regulation. Further implications can arise with regard to the European Certificates of Succession. The Court of Justice recently held that a German court issuing a European Certificate of Succession is not exercising a 'judicial function' and would thus not be entitled to request a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. (243) While what a 'court or tribunal' is for the purposes of Article 267 of the Treaty on the Functioning of the European Union is not the same as what a 'court' has to be for Article 3(2) of the Succession Regulation, the existing case-law of the Court of Justice may also lead to judicial authorities being excluded from asking the Court of Justice for a preliminary ruling should the issuance of a European Certificate of Succession not constitute the exercise of a 'judicial function'.

C. *The law of natural persons*

86 The law of natural persons is currently not governed by specific regulations or directives at the European Union level but (in parts) rather by case-law of the Court of Justice. (244) This might, however, change in the future. First legislative proposals are already on the political agenda. (245) Others might be

---

(240) *Esteve Alguacil*, Spain, paras 202, 233f.

(241) *Vaigė*, Sweden, paras 148f (both stated in legal writings and the preparatory works for law reforms).

(242) Case C–187/23 *Albausy* [2024] ECLI:EU:C:2024:309, Opinion of AG Campos Sánchez-Bordona, para 57.

(243) Case C–187/23 *Albausy* [2024] ECLI:EU:C:2025:34, para 66.

(244) Names: Case C–148/02 *Carlos Garcia Avello v État belge* [2003] ECLI-:EU:C:2003:539; Case C–353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECLI-:EU:C:2008:559; Case C–208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECLI:EU:C:2010:806. Gender: Case C–4/23 *Mirin* [2024] ECLI:ECU:2024:845.

(245) A Proposal on the international protection of vulnerable adults has entered the legislative procedure as well: Commission, 'Proposal for a Regulation on jurisdiction, appli-

triggered by the case-law of the Court of Justice in order to further strengthen legal certainty.

87 Many aspects related to the law of natural persons were already traditionally administered out of court. In particular, changes of name and gender, as civil status events, are often in some capacity or another connected to civil registries. The latter are not only entrusted with registering the respective events but oftentimes carry out essential procedural steps in assessing applications. Their competences are justified by their expertise in receiving and recording uncontested declarations in status matters. Substantive assessments or the establishment of facts are furthermore often no longer a relevant part of the respective proceedings. Other Member States, however, have maintained judicial competences in status matters. This is frequently the case when it comes to changes in a person's gender marker. While the change generally depends on the applicant's gender identity, some legal systems still believe that this must be determined objectively in a judicial procedure, often based on expert opinions. The respective applications still have to seemingly meet higher thresholds than applications to change one's name. There is, however, a trend towards individuals being able to sufficiently document their gender identity through a private declaration. When it comes to gender recognition in cross-border scenarios, the Court of Justice nevertheless has held that a change of gender carried out in one Member State would have to be recognised in all others, even if the first procedure was a non-judicial one, at least for the purposes of Article 21 of the Treaty on the Functioning of the European Union. ([246]) Parties could thus generally not be obliged to bring new judicial proceedings where a status was already lawfully acquired in another Member State.

88 The reliance on non-judicial authorities might further be based on the following: given the highly personal nature of the requests that often do not concern multi-person legal relationships requiring a balancing act of the interests of the parties involved, there is generally less potential for disputes and more room for party autonomy and self-determination.

89 Similar considerations apply to matters of adult protection. Most Member States have in the last years strengthened the right of self-determination of vulnerable adults, allowing them to autonomously provide for situations of future incapacity. The role of judicially-appointed representatives has become subsidiary in many jurisdictions. Courts are, however, still involved when it comes to supervisory functions or review procedures and thus also

---

cable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults' COM (2023) 280 final.

([246]) Case C–4/23 *Mirin* [2024] ECLI:ECU:2024:845 paras 57, 70.

in contentious matters. Where certain tasks have been delegated to non-judicial authorities, (247) they usually have no decision-making power but rather carry out certain assessments on behalf of courts that do not imply the determination of disputes.

(247) See eg the involvement of medical boards in Estonia and Sweden: *Karm*, Estonia, para 144; *Vaigė*, Sweden, para 137. Or the use of specialised organisations in adult protection matters in Austria: *Patreider*, Austria, para 266.

PART II
NATIONAL REPORTS

AUSTRIA

by *Paul Patreider*

I. Introduction and overall considerations

Austria is a federal State that follows the civil tradition. Substantive aspects of both family and succession law are therefore, for the most part, codified in a uniform Civil Code, the *Allgemeines Bürgerliches Gesetzbuch* (ABGB), enacted in 1811. (1) Procedural matters, on the other hand, are generally subject to the *Außerstreitgesetz* (AußStrG 2005), the Act Governing Non-contentious Proceedings. Certain matters nevertheless have to be tried in contentious proceedings under the Code of Civil Procedure (ZPO). (2) **1**

While the administration of justice is still largely carried out by judicial authorities, certain tasks, especially in the field of succession law, have been delegated to non-judicial actors. Many aspects of Austrian family law remain, however, a prerogative of the judiciary. **2**

II. Family law

Austrian family law has been subject to several reforms since the codified rules of the ABGB entered into force over two centuries ago: (3) many **3**

---

(1) JGS 1811/946.

(2) Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung - ZPO), RGBl Nr 113/1895.

(3) Eg Kaiserliche Verordnung vom 12. Oktober 1914 über eine Teilnovelle zum allgemeinen bürgerlichen Gesetzbuche, RGBl 1914/276 (I. TN); Kaiserliche Verordnung vom 19. März 1916 über die dritte Teilnovelle zum allgemeinen bürgerlichen Gesetzbuch, RGBl 1916/69 (III. TN); EheG 1938; JWG 1954; AdoptionsG 1960; Bundesgesetz vom 8. März 1967, mit dem vormundschaftsrechtliche Bestimmungen des allgemeinen bürgerlichen Gesetzbuchs geändert werden, BGBl 1967/122; Bundesgesetz vom 30. Oktober 1970 über die Neuordnung der Rechtsstellung des unehelichen Kindes, BGBl 1970/342; Bundesgesetz vom 1. Juli 1975 über die Neuordnung der persönlichen Rechtswirkungen der Ehe, BGBl 1975/134; Bundesgesetz vom 30. Juni 1977 über die Neuordnung des Kindschaftsrechts, BGBl 1977/403; EheRÄG 1978; Bundesgesetz: Änderung des Ehegesetzes, BGBl 1978/303; Bundesgesetz: Änderung des Personen-, Ehe- und Kindschaftsrechts, BGBl 1983/566; PStG 1983; Bundesgesetz: Ehenamensrechtsänderungsgesetz, BGBl 1986/97; NÄG 1988; JWG 1989; KindRÄG 1989; ErbRÄG 1989; FMedG 1992; NamRÄG 1995; EheRÄG 1999; KindRÄG 2001; FamErbRÄG 2004; FamRÄG 2008; EPG 2009; Bundesgesetz, mit dem zur Einführung des Kinderbeistands das Außerstreitgesetz, die Zivilprozessordnung, das Gerichtsgebührengesetz und das Justizbetreuungsagentur-Gesetz geändert werden (Kinderbeistand-Gesetz), BGBl I 2009/137; KindNamRÄG 2013; B-KJHG 2013; PStG 2013; AdRÄG 2013; FMedRÄG 2015; ErbRÄG 2015; 2. ErwSchG 2017; AbAG 2023.

changes were initiated by the Constitutional Court. Recent examples include marriage equality or co-parenthood.

4 From a statutory standpoint, the greatest part of substantive family law is currently codified in the ABGB, while procedural rules are mainly found in the AußStrG 2005. Several specialised areas of family law are contained in separate acts that will be highlighted throughout the report.

5 Overall, the general rules on declarations of intent established under contract law (4) (eg vitiating factors, undue influence, induced error, misrepresentation, force, fraud, fear, incapacity) also apply to declarations of intent in family matters, (5) which include declarations in matters of name, parental responsibility, and the acknowledgement of paternity, (6) but also to those connected to changes in a person's gender-marker. Some rules were adapted to the family law environment.

6 As for the actors involved in shaping family law relationships, a central role is still played by the judiciary. This includes courts and senior judicial officers (*Rechtspfleger*). (7) A number of relevant tasks have, however, been delegated to non-judicial bodies, such as notaries, public authorities (municipalities, child and youth welfare services), or civil status officials or were even left to be governed by party autonomy. In non-contentious matters, courts generally issue decisions (*Beschlüsse*) that, once final, are enforceable, become binding and establish/shape the respective parties' legal relationships. (8)

---

(4) §§ 869ff ABGB.

(5) § 876 ABGB; RIS-Justiz RS0025291. According to Andreas Vonkilch, Mathias Walch, '§ 876', in Attila Fenyves, Ferdinand Kerschner, Andreas Vonkilch (eds), *Großkommentar zum ABGB – Klang Kommentar. §§ 859–887*, paras 47ff (3rd edn, Verlag Österreich 2022) this even applies to declarations that do not need to be received by the other party for them to take effect.

(6) Defined as family law's declarations of intent ('*Willenserklärungen des Familienrechts*'), see Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 30 August 2022, rdb.at) § 67 PStG 2013, para 1a.

(7) Senior judicial officers, who, while not being judges, are part of the judiciary and have decision-making powers in the matters referred to in a separate act, the RPflG. Cases in which foreign law has to be applied remain a prerogative of judges, see § 16(2)(6) RPflG. While European Union law is not regarded as foreign law (eg Andrea Grün, '§ 143' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 8 (following OGH 5 Ob 186/17i), the application of the substantive law rules European Private International Law acts refer to, is foreign law. See Robert Fucik, 'EU-Erbrechtsverordnung – EuErbVO' (2016) 11 EF-Z 164, 166.

(8) §§ 36–44 AußStrG 2005.

A. *Divorce and legal separation*

1. *General remarks*

Austria follows the principle of marriage equality. Same or different-gender couples can under Austrian law thus either contract a marriage or enter into a registered partnership (*eingetragene Partnerschaften*). The respective rules are – with some minor exceptions – the same. (9) The rules for the dissolution of these relationship models do, nonetheless, differ slightly. Also *de facto* relationships are legally recognised, however, without there being a detailed statutory regime in place. They fall outside the scope of this report and will thus not be considered in the following sections. **7**

Overall, rules concerning divorce (*Scheidung*) can be found in the Marriage Act (EheG). (10) The Act was introduced in Austria in 1938 during the Anschluss to the *Deutsches Reich* and maintained under the allied occupation. (11) It has been amended (and 'modernised') several times and is still in force today. (12) The dissolution of registered partnerships, on the other hand, is governed by the Act on Registered Partnerships (EPG). (13) There is no regime for legal separation under Austrian law. **8**

Both proceedings in matters of divorce (or the annulment of a marriage [*Aufhebung, Nichtigerklärung*]) and proceedings concerning the dissolution of a registered partnership are judicial in nature and thus require a court **9**

---

(9) Some proposed to abolish the provisions on marriage altogether to just leave those on registered (or 'civil') partnerships as a uniform model for all relationships, see Edwin Gitschthaler, 'Ehe für alle? Ein Alternativvorschlag!' (2018) 13 EF-Z 49, 49.

(10) Gesetz vom 6. Juli 1938 zur Vereinheitlichung des Rechts der Eheschließung und der Ehescheidung im Lande Österreich und im übrigen Reichsgebiet, dRGBl I S 807/1938.

(11) § 2 of the Verfassungsgesetz vom 1. Mai 1945 über die Wiederherstellung des Rechtslebens in Österreich (Rechts-Überleitungsgesetz – R-ÜG), StGBl 1945/6. Some 'ideological' provisions were removed with the Gesetz vom 26. Juni 1945 über Maßnahmen auf dem Gebiete des Eherechtes, des Personenstandsrechtes und des Erbgesundheitsrechtes, StGBl 1945/31. For more information, cf Othmar Wentzel, 'Das Ehegesetz. Vorbemerkungen', in Heinrich Klang, Franz Gschnitzer (eds), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol I/1 (2nd edn, Verlag der Österreichischen Staatsdruckerei 1964) 299ff.

(12) Concerning divorce, eg Bundesgesetz vom 15. Juni 1978 über Änderungen des Ehegattenerbrechts, des Ehegüterrechts und des Ehescheidungsrechts, BGBl 1978/280 (EheRÄG 1978); Bundesgesetz, mit dem das allgemeine bürgerliche Gesetzbuch, das Ehegesetz, das Außerstreitgesetz, die Zivilprozeßordnung, die Exekutionsordnung und die Strafprozeßordnung geändert werden (Eherechts-Änderungsgesetz 1999 – EheRÄG 1999), BGBl I 1999/125.

(13) Bundesgesetz über die eingetragene Partnerschaft (Eingetragene Partnerschaft-Gesetz – EPG), BGBl I 2009/135.

decision. (14) Competence generally lies with the court in whose district the spouses or registered partners had established their common habitual residence. (15) Spouses and registered partners have to personally request a divorce or dissolution and be capable of making informed decisions. (16)

10 Discussions concerning a potential shift of the respective competences to out-of-court actors have been scarce; (17) some scholars have considered the introduction of a notarial divorce. (18) Recently, also the Austrian Chamber of Notaries has argued for a transfer of the respective competence to notaries. (19) Currently, according to data made available by *Statistik Austria*, there were almost 14,000 divorces in 2022, and almost 140 registered partnerships were dissolved in the same year. (20)

2. *Judicial proceedings*

a) *Contentious*

11 i) *Divorce*. — Austria still distinguishes between 'fault-based' divorces and divorces on 'other grounds'. Many academics have demanded reform in this

---

(14) §§ 27, 34, 46 EheG as well as §§ 13(1), 19(1) EPG.

(15) See § 76 JN. The details and exceptions of the provision go beyond the scope of this paper and will thus not be addressed.

(16) § 47(1) EheG; § 13(2) EPG.

(17) Susanne Ferrari, 'Stand des Scheidungsrechts in Österreich' in Anatol Dutta, Dieter Schwab, Dieter Henrich, Peter Gottwald, Martin Löhnig (eds), *Scheidung ohne Gericht? Neue Entwicklungen im europäischen Scheidungsrecht* (Verlag Ernst und Werner Gieseking 2017) 76 which retraces the lack of initiatives to the fast consensual divorce proceedings.

(18) Edwin Gitschthaler, 'Das österreichische Familienrecht und sein Blick nach Europa' (2024) 71 FamRZ 325, 330-331 mentions a discussion on a potential shift of competence for divorce to notaries. This likely refers to Karl Stöger, 'Das Gerichtskommissariat im mitteleuropäischen Vergleich' (2022) 154 NZ 209, 209 and Brigitta Lurger, Karl Stöger, Romina Herz, 'JuWiLi Study 2022. Legal Part' in Brigitta Lurger, Karl Stöger (eds), *Justice Without Litigation. Non-contentious proceedings by notaries in the European Union* (Manz 2022) 67–69, 107 which identified a potential for Austria regarding a notarial divorce.

(19) Österreichische Notariatskammer, 'Justiz im Belastungstest: Notariat legt konkrete Vorschläge vor' <https://ihr-notariat.at/informationen/aktuelle-infos-veranstaltungen/justiz-im-belastungstest-notariat-legt-konkrete-vorschlaege-vor/> accessed 31 May 2025; Österreichische Notariatskammer, 'Effiziente Justiz durch Übertragung von Kompetenzen' <https://ihr-notariat.at/informationen/aktuelle-infos-veranstaltungen/effiziente-justiz-durch-uebertragung-von-kompetenzen/> accessed 31 May 2025

(20) See Statistik Austria, 'Divorce and dissolution of registered partnerships' <https://www.statistik.at/en/statistics/population-and-society/population/marriage-and-registered-partnership/divorce-and-dissolution-of-registered-partnerships> accessed 1 June 2025.

regard. (21) Proceedings remain contentious either way and subject to the Code of Civil Procedure (ZPO). (22)

12 Under the first category ('fault-based'), spouses can unilaterally initiate judicial proceedings should they consider that their partner caused the marital breakdown due to serious misconduct (*schwere Eheverfehlung*) or dishonourable or immoral behaviour and provided that the spouse cannot be expected to restore their previous marital life. (23) A divorce cannot be sought if it is evident that the 'aggrieved' spouse forgave the misconduct or did not perceive it as disruptive of their relationship. (24) Courts can (be requested to) highlight that the breakdown was attributable to one of both parties. (25) The question of who was 'at fault' is particularly relevant for maintenance claims. (26) A similar fault-based form of dissolution can be found in the case of registered partnerships. (27)

13 What the EheG considers as 'other grounds' – the second category – is varied, on the other hand. A spouse may, for example, seek divorce if the marriage has broken down due to behaviour that – while not constituting 'marital misconduct' (for it being attributable to a mental illness or comparable impairment) – led to an irretrievable breakdown of the marriage (*ehezerrüttendes Verhalten ohne Verschulden*). (28) The same applies in registered partnerships. (29) 'Other cases' refers then also to (somewhat outdated) situations in which spouses suffer from infectious (or 'revolting') diseases that are not expected to be cured, or whose risk of contagion will not be eliminated in the foreseeable future (*ansteckende oder ekelerregende Krankheit*). (30) Similar provisions have been introduced for registered partners. (31) In both of the aforementioned cases (irretrievable breakdown,

---

(21) A need for reform was recently stressed again by Gitschthaler, 'Blick nach Europa' (n 18) 330. See also Ferrari, 'Stand des Scheidungsrechts in Österreich' (n 17) 76.

(22) Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung – ZPO), RGBl 1895/113.

(23) § 49 EheG expressly mentions adultery, the infliction of physical violence, or emotional suffering.

(24) § 56 EheG. The same applies to registered partnerships, see § 16(1) EPG.

(25) § 60 EheG. The same applies to registered partnerships, see § 17(1) EPG.

(26) §§ 66–68a EheG. The spouse who is solely or predominantly 'at fault' must provide the other spouse with appropriate maintenance in accordance with their living conditions should their own income not be sufficient. Is the divorce attributable to both parties alike, maintenance payments are determined equitably.

(27) § 15(1) EPG.

(28) § 50 EheG.

(29) § 15(2)(1) EPG.

(30) § 52 EheG.

(31) § 15(2)(1) EPG.

diseases), applications can exceptionally ([32]) be dismissed if they would lead to particular hardship for one of the spouses. ([33])

14 Another ground for divorce which is not based on fault, but which is particularly relevant in practice, is the dissolution of the common household (*Auflösung der häuslichen Gemeinschaft*). Divorce can be requested should both spouses (or registered partners ([34])) not have lived in the same household for the previous three years. ([35]) The petition might, however, not always be granted. This is especially the case if the court does not consider the marital breakdown to be irremediable, or if the applicant is considered to have caused the breakdown – a breakdown that would furthermore cause particular hardship for the defendant. ([36]) The application has in any case to be granted if the spouses have not lived together for six years. ([37])

15 ii) *Void marriages, registered partnerships.* — Marriages or registered partnerships can further 'end' due to them being void or voidable. The respective proceedings are also contentious in nature and follow the procedural rules established for divorce. Thus, while some marriages end upon divorce, others are void from the beginning (*Nichtigkeit der Ehe, eingetragenen Partnerschaft*). This is, for example, the case if formal requirements were not met by the parties, ([38]) if they lacked the capacity to marry/enter into a registered partnership, ([39]) if the marriage/partnership was purely (without intending to establish a common life) concluded to acquire a name or nationality, ([40]) in case one spouse/partner was already living in a marriage or

---

([32]) See OGH 7 Ob 567/79 and Marco Nademleinsky, '§ 55 EheG' in Georg Kodek, Michael Schwimann (eds), *ABGB Praxiskommentar*, vol II (5th edn, Lexis Nexis 2020) paras 19–22.

([33]) § 54 EheG, § 15(4) EPG. This depends on the circumstances of a case, eg the duration of the marriage, the age of the spouses and the cause of the illness.

([34]) § 15(3) EPG.

([35]) § 55 EheG.

([36]) § 55 EheG. 'Causing' means that the breakdown is solely or predominantly the 'fault' of the applicant. All circumstances of a case have to be considered, in particular the duration of the marital relationship, the age and health of the spouses, the welfare of the children and the duration of the dissolution of the common household.

([37]) § 55(3) EheG.

([38]) § 21(1) EheG, § 19(2)(1) EPG. Either partner can bring such a claim in court (§ 28(1) EheG). The marriage/partnership is, however, deemed to be valid (*ex tunc*) if the spouses/partners had lived together for five years after the marriage/partnership or, if one of them died beforehand, until their death, but for at least three years (§ 21(2) ZPO).

([39]) § 22(1) EheG; § 19(2)(2) EPG. However again, the marriage/partnership is considered valid (*ex tunc*) if the spouse/partner shows that they wish to continue the marriage/partnership after acquiring the required capacity (§ 22(2) ZPO).

([40]) § 23(1) EheG; § 19(2)(4) EPG. Only a public prosecutor can bring such a claim in court (§ 28(1) EheG). The marriage/partnership is, however, deemed to be valid (*ex tunc*) if

registered partnership (41) or if the spouses were related (42). The existence of one of the aforementioned grounds has to be established in court by means of a judicial decision. (43) Only then, do the effects of the relationship cease *ex tunc*. Claims can generally be brought be either spouse/partner (personally (44)) or a public prosecutor. (45) If the marriage had been previously dissolved, the claim can only be brought by the prosecutor. (46)

iii) *Voidable marriages.* — Other marriages can be voided upon request (*Aufhebung der Ehe*). While this also requires a judicial decision, its effects are only *ex nunc*. (47) The reasons that can be invoked are manifold, including the lack of consent of the legal representative of the not yet of age spouse, (48) errors concerning the marriage or the other spouse, (49) or even certain relevant facts about the other spouse (50) as well as deceit, (51) or threats (52). Many grounds thus resemble the vitiating factors found under the general **16**

---

the spouses/partners had lived together for five years after the marriage/partnership or, if one of them died beforehand, until their death, but for at least three years (§ 21(2) ZPO).

(41) § 24 EheG; § 19(2)(3) EPG.

(42) § 25 EheG; § 19(2)(4) EPG.

(43) § 27 EheG.

(44) § 29(1) EheG; § 13(2) EPG. They have to be capable of making informed decisions.

(45) § 28(2) EheG; § 19(3) and (4) EPG. See, however, n 37 and 39. The claim can furthermore no longer be brought if both spouses are deceased.

(46) § 28(2) EheG.

(47) § 34 EheG. The decision has to be final, however.

(48) § 35 EheG. The provision does not apply if the then-minor accepted the marriage once of-age.

(49) § 36(1) EheG. Meaning that one party did not know that they were entering into a marriage or that one party mistook someone else for their spouse. The marriage is not voidable if the party making the mistake somehow expressed that they wanted to continue living in that marriage (§ 36(2) EheG).

(50) § 37(1) EheG. Relevant means that that party would not have married if they had known about the respective fact/circumstance (a criminal past, certain diseases). The marriage is again not voidable if the party making the mistake somehow expressed that they wanted to continue living in that marriage or when it would be unjustified to void the relationship (§ 37(2) EheG). Cf Marco Nademleinsky, 'Scheidung und Aufhebung der Ehe' in Astrid Deixler-Hübner (ed), *Handbuch Familienrecht* (2nd edn, Linde 2020) 875.

(51) § 38(1) EheG. The deceit must concern relevant facts (having known them, the marriage would not have been contracted, eg, that a spouse is pregnant from someone else, see Nademleinsky, 'Scheidung und Aufhebung der Ehe' (n 50) 876, not, however, the financial circumstances of the other spouse (§ 38(3) EheG). The marriage cannot be voided if the deceit was orchestrated by a third party without the knowledge of the other spouse, or if the spouse had made it known after discovering the deception that they wished to continue the marriage (§ 38(2) EheG).

(52) § 39(1) EheG. The marriage cannot be voided if the spouse had made it known after the threat ended that they wished to continue the marriage (§ 39(2) EheG).

law of obligations. (53) Claims have to be brought by the spouses (again: personally), (54) generally within one year. (55) The legal consequences for the parties are modelled on those of a divorce. (56) With regard to registered partnerships, most of the aforementioned grounds have been incorporated under the category 'dissolution'.

17 iv) *The dissolution of registered partnerships.* — The grounds for the dissolution of registered partnerships were modelled on those provided for in the case of divorce and the grounds determining void or voidable marriages. The respective provisions only speak of 'dissolution', no subcategories were introduced with the EPG.

18 Partners can consequently request that their relationship be dissolved should they have lacked the capacity to enter into the partnership; if they did not know that they were entering into this kind of formalised relationship; committed an 'error' concerning their partner or facts concerning them; if a partner was misled and induced to establish the registered partnership, with relevant circumstances having been misrepresented; were threatened in order to establish the registered partnership. (57)

19 The rules are again similar to the vitiating factors relevant under the general rules of the law of obligations. They often involve errors, deceit, a lack of decision-making capacity or the use of force. However, should a partner have made it clear that they intended to continue the relationship after the respective vitiating factors ceased to exist, the grounds can no longer be invoked when seeking the dissolution of the registered partnership. (58) The same reasoning applies to cases in which the dissolution does not seem justifiable considering the way the partnership was lived. (59)

20 v) *Procedural rules.* — All of the aforementioned grounds have to be tried in contentious (and adversarial) proceedings (*streitige Verfahren*) that are governed by the ZPO, the Code on Civil Procedure. (60) The ZPO contains specific rules on matrimonial and partnership matters, which further apply to

---

(53) See Ferrari, 'Stand des Scheidungsrechts in Österreich' (n 17) 74; Ferdinand Kerschner, Katharina Sagerer-Forić, Thomas Schoditsch, *Familienrecht (Bürgerliches Recht Band V)* (7th edn, Verlag Österreich 2020) para 2/13.

(54) § 39a(1) EheG; § 13(2) EPG.

(55) § 40(1) EheG. Starting eg from the moment a) the legal representative becomes aware of the marriage, b) the spouse becomes of age, c) the spouse becomes aware of the error or deceit.

(56) § 42(1) EheG.

(57) § 14(1)(1)–(6) EPG.

(58) § 14(2)(1) EPG.

(59) § 14(2)(3) EPG.

(60) In particular, § 460 ZPO. Some aspects are still governed by the 1. DVEheG of 1938 (provisions implementing the EheG), in particular, §§ 17, 18 and 82–86.

the annulment (*Aufhebung*) of voidable marriages or the contentious dissolution of registered partnerships. (61) Maintenance and other purely property-related issues are, however, not tried under these specific contentious rules but are subject to the general procedural provisions of the ZPO. (62)

21 There are no explicit rules on how to consolidate proceedings in matters of divorce with those required to determine the consequences thereof. (63) While both divorce and (marital/partnership) maintenance matters are contentious in nature, questions relating to the division of relationship property, the parental relationship, the right to contact and child maintenance fall under the *Außerstreitgesetz*, the Act on Non-contentious Proceedings. (64) These different types of proceedings (contentious/non-contentious) can thus generally not be combined. (65)

22 Parties to the proceedings can invoke more than one ground for divorce in their claim. (66) Cases are tried by the competent district court ie a court of first instance. (67) At least in the first instance proceedings, legal counsel is not required. (68) Parties do, however, have to participate in person and cases are tried *in camera*. (69) The relevant facts are not established *ex officio*; the decision is rather based on the parties' submissions (70) unless the proceedings concern the annulment of void marriages. (71)

23 Courts have to attempt to reconcile the parties, both at the beginning of the proceedings and throughout the course thereof. (72) Parties are further prohibited from recognising the plaintiff's claims, there are no default judgments, settlements or judgments based on the plaintiff's waiver of their

---

(61) § 43(1)(25) EPG. All further references in this paragraph to spouse/divorce also refer to registered partners/the dissolution of a registered partnership.

(62) *Ex multis*, Gerhard Hopf, Georg Kathrein, *Eherecht* (3rd edn, Manz 2014) § 460 ZPO, para 2.

(63) Daphne-Ariane Simotta, '§ 76a JN' in Hans W Fasching, Andreas Konecny (eds), *Zivilprozessgesetze. Kommentar* vol I (3rd edn, Manz 2013) paras 14ff.

(64) On this, see Ferrari, 'Stand des Scheidungsrechts in Österreich' (n 17) 72.

(65) § 227 ZPO.

(66) Ferrari, 'Stand des Scheidungsrechts in Österreich' (n 17) 60, 70.

(67) § 49(2)(2a) JN. Competence generally lies with the court in whose district the parties have (or had) their common habitual residence, see § 76(1) JN.

(68) The provisions of § 460 ZPO, however, do not apply in purely patrimonial cases (eg, maintenance), see Robert Fucik, '§ 460' in Walter H Rechberger, Thomas Klicka (eds), *ZPO. Zivilprozessordnung* (5th edn, Verlag Österreich 2019) para 2.

(69) § 460(1) and (3) ZPO.

(70) *E contrario* § 460(4) ZPO; Fucik, '§ 460' (n 68) para 5; Susanne Beck, '§ 460 ZPO' in Edwin Gitschthaler, Johann Höllwerth (eds), *Ehe- und Partnerschaftsrecht. Kommentar* (2nd edn, Verlag Österreich 2022) para 18.

(71) § 460(4) ZPO.

(72) § 460(7) ZPO.

claim in contentious divorce proceedings. (73) The final judgment can (potentially) determine the legal consequences of the divorce in matters relating to name, maintenance, relationship property and parental responsibility, and declare to which of the parties the marital breakdown is attributable. (74) In practice, before the decision becomes final, both partners, however, often decide to transition from contentious to non-contentious proceedings, filing for a divorce by mutual consent. (75)

b) *Non-contentious*

24 Of considerable practical relevance are divorces or dissolutions of registered partnerships by mutual consent (*einvernehmliche Scheidung, einvernehmliche Trennung einer eingetragenen Partnerschaft*). (76) If both partners, who had not lived together for at least six months, admit to the irreparable breakdown of their relationship and there is agreement between them on the divorce/dissolution, they can jointly initiate the respective proceedings. (77) In practice, courts often content themselves with the consent of both parties, without further questioning the relationship breakdown. (78) Courts could, however, review whether the request was submitted freely and based on the serious intent of the parties. (79)

25 The declarations do not have to meet specific formal requirements but are personal in nature and presuppose the parties' decision-making capacity. (80) A consensual divorce further requires that both partners have concluded a written (contractual) agreement in court, containing arrangements on the care of their children or exercise of their parental responsibility, on the exercise of the right to personal contact and the maintenance obligations with regard to their joint children as well as their maintenance (*rebus sic*

---

(73) § 460(9) ZPO. The principle of party disposition consequently does not fully apply, see Beck, '§ 460 ZPO' (n 70) para 42.

(74) § 61 EheG. This is even the case in divorce for 'other grounds'.

(75) Specifically addressed by § 460(10) ZPO.

(76) Ferrari, 'Stand des Scheidungsrechts in Österreich' (n 17) 60. The consensual divorce is part of the divorces for 'other reasons'.

(77) § 55a EheG.

(78) See Ferrari, 'Stand des Scheidungsrechts in Österreich' (n 17) 76.

(79) Stefanie Nitsch, 'Scheidung durch Privaturkunde. Eine rechtsvergleichende Betrachtung des französischen und österreichischen Rechts' in Edwin Gitschthaler, Joachim Pierer, Brigitta Zöchling-Jud (eds), *Festschrift Fischer-Czermak* (Manz 2024) 545.

(80) Ferrari, 'Stand des Scheidungsrechts in Österreich' (n 17) 63; Astrid Deixler-Hübner, '§ 93' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 3c. The consent cannot be replaced by a legal representative, see Nademleinsky, 'Scheidung und Aufhebung der Ehe' (n 50) 869.

stantibus) and relationship property obligations (81) in relation to each other (*Scheidungsfolgenvereinbarung*). (82) The agreement is subject to the general rules of contract law. (83) Its contents are more limited when it comes to the dissolution of a registered partnership. Both partners have in general only to agree on maintenance and the division of their relationship property. (84) While matters concerning the partners' joint children are not expressly mentioned in the provision, similar arrangements might have nevertheless to be included for the proceedings to be able to continue. (85)

26 Agreements do not have to be submitted if the respective matters were already settled in court in a legally binding manner. (86) The agreement in any case constitutes an enforceable title and is contractually binding even if not concluded in court. (87) It is conditioned on the divorce and loses its effects should the marriage/partnership not be dissolved. (88) A judicial approval or authorisation is not required; courts do, however, (potentially) assess the agreement as to its compatibility with the best interests of children. (89) The agreement, even if concluded in court, remains – as was said – contractual in nature and is subject to the general rules of the law of obligations. (90) It can consequently be challenged on the basis of vitiating factors: a diminished decision-making capacity when entering the agreement; (91) the agreement is considered to be *contra legem* or *contra bonos mores*, fictitious, (92) or usurious. (93) Challenges based on errors committed by one party are only

---

(81) Relationship property could also be divided in separate non-contentious proceedings at a later point, see, eg, OGH 2 Ob 73/99w.

(82) § 55a(2) EheG. If the parties do not already submit an agreement, courts are required to invite them to submit one (§ 95(2) AußStrG 2005).

(83) Nitsch, 'Scheidung durch Privaturkunde' (n 79) 543f. This includes several vitiating factors (undue influence, induced error, force, fear, *contra bonos mores*).

(84) § 15(5) EPG.

(85) See Johannes Stabentheiner, Lena Kolbitsch, '§ 15 EPG' in Peter Rummel, Meinhard Lukas, Andreas Geroldinger (eds), *Kommentar zum ABGB. §§ 137–230 ABGB* (4th edn, Manz 2022) para 8.

(86) § 55a(3) EheG.

(87) Nademleinsky, 'Scheidung und Aufhebung der Ehe' (n 50) 870; Astrid Deixler-Hübner, '§ 95' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 4.

(88) OGH 9 Ob 76/04y; RIS-Justiz RS0106968.

(89) Deixler-Hübner, '§ 95' (n 87) para 4a.

(90) OGH 1 Ob 1574/92; Monika Hinteregger, Susanne Ferrari, *Familienrecht* (7th edn, Verlag Österreich 2015) 105.

(91) OGH 5 Ob 604/84.

(92) OGH 83 Ob 7/95.

(93) OGH 1 Ob 532/85.

possible to a limited extent. (94) The agreement can, however, be reviewed for *errores in motivis*, errors concerning the basis of the settlement, (95) and induced errors. Vitiating factors concerning the agreement do not affect the divorce itself; (96) and have to be tried in contentious proceedings. (97)

27 Divorces by mutual consent are governed by the AußStrG 2005 (98) as are consensual dissolutions of registered partnerships. (99) Parties are in general entitled to file a joint application with the competent (100) district court (*Bezirksgericht*) but cannot opt for joint legal counsel. (101) Only the spouses and registered partners are considered as parties to the proceedings. (102) The proceedings are carried out orally and should a party not appear at a hearing, their application is *ex lege* considered to be withdrawn. (103) Withdrawals are otherwise possible until the divorce decision becomes final. (104) A central aspect of the proceedings is arranging the legal consequences of a divorce/dissolution. In cases in which there is an agreement between the parties, they are generally required to submit (or draft) a formal document containing the specific rules that are to govern their post-divorce/dissolution relationship. Should one of the parties not be represented by a lawyer and were they not advised regarding the consequences of the divorce, courts are required to inform the respective party about the possibility to seek legal advice and the potential negative consequences of the divorce. (105) In any case, before an agreement is concluded or submitted, parties have to declare that they have been informed of any divorce-related needs of their minor children by competent professionals. (106)

---

(94) Within the meaning of § 1380 ABGB. As for the limitation, see § 1385 ABGB.

(95) OGH 1 Ob 1574/92.

(96) RIS-Justiz RS0057101.

(97) Nitsch, 'Scheidung durch Privaturkunde' (n 79) 544f. Deixler-Hübner, '§ 95' (n 87) para 4.

(98) See §§ 93-96 AußStrG 2005. The same rules apply in proceedings concerning the division of marital property and marital savings, on which *infra* paras 103ff.

(99) The rules of the AußStrG 2005 (especially §§ 93–98, 99 AußStrG 2005) were expressly extended to registered partnerships by § 43(1)(2) EPG.

(100) §§ 104a, 114a JN.

(101) § 93(1) AußStrG 2005. According to the explanatory report, the reason was to protect the interests of all parties, see ErlRV 224 BlgNR XXII GP 70.

(102) § 93(2) AußStrG 2005.

(103) § 94(1) and (2) AußStrG 2005.

(104) § 94(3) AußStrG 2005.

(105) § 95(1) AußStrG 2005. Information leaflets suffice, cf Deixler-Hübner, '§ 95' (n 87) para 1a.

(106) § 95(1a) AußStrG 2005. Eg, lawyers, notaries, counselling organisations for families (*Familienberatungsstellen*), see ErlIA 673/A XXIV GP 31.

At the end of the proceedings, the marriage (or registered partnership) is dissolved by means of a judicial decision (*Beschluss auf Scheidung*). (107) The decision has to be motivated and takes effect once it becomes final. (108) It can, however, not refer to the fault of one party in the breakdown of the partners' relationship. (109) **28**

3. *Qualifications under private international law*

In 2022, approx 30% of all marriages concluded in Austria had a cross-border element. (110) Jurisdiction in international cases lies with the district courts. (111) Divorces in Austria require a court decision (the same being true for dissolutions of registered partnerships). (112) For this reason, parties cannot proceed to a private divorce even if the applicable foreign law would allow so. (113) Out-of-court divorces that were granted abroad, however, can be recognised. Outside the scope of application of the Brussels IIa or IIb Regulation, (114) the specific rules on the recognition of foreign divorce decisions of the Austrian Act on Non-contentious Proceedings apply. (115) Its concept of 'decision' is functional in nature, wide, and includes all procedures in which courts or other public authorities were involved even if only to a minimum extent, eg carrying out mediation, registering or authenticating party declarations. (116) **29**

If a procedure cannot be recognised because courts or other authorities were in no way involved in it, the effectiveness of a private divorce has to be **30**

---

(107) § 96 AußStrG 2005.

(108) § 96(2) and (3) AußStrG 2005.

(109) Deixler-Hübner, '§ 95' (n 87) para 4a. Fault can, however, be attributed to a party to the agreement.

(110) See Statistik Austria, 'Marriage and registration of registered partnerships' <https://www.statistik.at/en/statistics/population-and-society/population/marriage-and-registered-partnership/marriage-and-registration-of-registered-partnerships> accessed 1 June 2025. With regard to registered partnerships, the number declined to 25%.

(111) §§ 104a, 114a(4) JN. Jurisdiction is established if one party has Austrian citizenship or their habitual residence in Austria.

(112) § 46 EheG, § 13(1) EPG. Qualified as a mandatory rule by Marco Nademleinsky, '§ 20 IPRG' in Simon Laimer (ed), *IPR Praxiskommentar* (Lexis Nexis 2024) para 2.

(113) Nademleinsky, § 20 IPRG (n 112) para 2; Ferrari, 'Stand des Scheidungsrechts in Österreich' (n 17) 74.

(114) The rules of the Brussels IIa and IIb Regulation generally take precedence over the internal rules, see § 100 AußStrG 2005. Outside the scope of application of the Regulation, § 20 IPRG does, however, still apply, see Nademleinsky, § 20 IPRG (n 112) para 2.

(115) § 97 AußStrG 2005. Cf Marco Nademleinsky, Matthias Neumayr, *Internationales Familienrecht* (3rd edn, Manz 2022) para 5.122.

(116) See already ErlRV 296 BlgNR XXI GP 107. Also, Marco Nademleinsky, 'Vor § 97–100 AußStrG' in Edwin Gitschthaler, Johann Höllwerth (eds), *Ehe- und Partnerschaftsre-*

assessed under the applicable conflict rules. (117) Given that the Rome III Regulation is not applicable in these cases, reference is to be made to Austria's internal choice of law rules. (118) If the latter refer to foreign law, the divorce can in principle take effect but might be incompatible with Austria's public policy. This is often the case with regard to the unilateral repudiation of a spouse under Islamic law (*ṭalāq*). (119) The characterisation of the Jewish *get* (a document leading to the divorce of a Jewish couple) as a decision under the internal conflict rules remains ambiguous. (120)

B. *Parenthood*

1. *Recent developments*

31 New rules on the establishment of parenthood entered into force in Austria on 1 January 2024. The reform (121) had become necessary due to a judgment of the Constitutional Court that had declared parts of the previous regime unconstitutional. (122) After the reform, the gender of the mother's partner is no longer a factor when it comes to establishing parenthood. Nor is it any

---

cht. Kommentar (2nd edn, Verlag Österreich 2022) para 18; Nademleinsky, Neumayr (n 115) para 5.124.

(117) Thomas Garber, 'Art 1 Brüssel IIa-VO', in Edwin Gitschthaler (ed), *Internationales Familienrecht* (Verlag Österreich 2019) para 15; Ferrari, 'Stand des Scheidungsrechts in Österreich' (n 17) 75; Nademleinsky, Neumayr (n 115) para 5.155. The effectiveness of these purely private divorces was to be checked as a preliminary question, see ErlRV 296 BlgNR XXI GP 107.

(118) Ie § 20 IPRG. See Nademleinsky, § 20 IPRG (n 112) para 2; Nademleinsky, Neumayr (n 115) para 5.105. Concerning the Rome III Regulation, see Case C–281/15 *Soha Sahyouni v Raja Mamisch* [2016] ECLI:EU:C:2016:343 and Case C–372/16 *Soha Sahyouni v Raja Mamisch* [2017] ECLI:EU:C:2017:988.

(119) See the established case-law of the Austrian Supreme Court: RIS-Justiz RS0121192. It is not incompatible if the wife consented to the divorce, see OGH 6 Ob 115/19h and 6 Ob 69/11g. The temporary *nikah mut'ah* or *sigheh* marriages are considered by some to be in violation of Austria's public policy, see Lydia Fuchs, '§§ 97–100', in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 4. Nademleinsky, 'Vor § 97–100 AußStrG' (n 116) para 18 argues for an application of §§ 97–100 AußStrG 2005 by way of analogy in the latter cases.

(120) Nademleinsky, 'Vor § 97–100 AußStrG' (n 116) para 18. Not qualified as a decision by Fuchs, '§§ 97–100' (n 119) para 4.

(121) See Bundesgesetz, mit dem das Allgemeine bürgerliche Gesetzbuch geändert wird (Abstammungsrechts-Anpassungsgesetz 2023 - AbAG 2023), BGBl I 2023/180. On the proposal, Robert Fucik, 'Initiativantrag betreffend ein Bundesgesetz, mit dem das Allgemeine Bürgerliche Gesetzbuch geändert wird (Abstammungsrechts-Anpassungsgesetz 2023 – AbAG 2023), eingebracht' (2023) 78 ÖJZ 947, 947.

(122) VfGH G 230/2021.

longer relevant how the child was conceived. (123) The only remaining difference is terminological in nature (fatherhood/paternity [*Vaterschaft*] or parenthood [*Elternschaft*]), (124) even if all rules referring to the 'father' of a child apply to their 'parent' as well. (125)

Overall, parent-child relationships can either be established *ex lege*, by way of an acknowledgement or in court proceedings. (126) In some limited cases, senior judicial officers (*Rechtspfleger*) might exercise certain judicial functions; not, however in cross-border scenarios. (127) **32**

The establishment and any subsequent changes of the relationship have *erga omnes* effects. (128)

Proceedings in matters of parenthood are generally only initiated upon request. (129) The child, the person whose parenthood is to be established, terminated or re-established and the other parent of the child have to take part in such proceedings, (130) which are, in principle, held orally. (131) Persons possessing legal capacity can act on their own. (132) **33**

Austrian law in parenthood matters has certain statutory limits. There can, for example, never be more than two parents (133) and surrogacy is not allowed under the existing rules. (134) **34**

2. *Statutory regime*

As a default system, Austrian law relies on a number of presumptions in matters of parenthood. Persons living in a marriage or registered partnership **35**

---

(123) Constanze Fischer-Czermak, 'Neuerungen im Abstammungsrecht. Abstammungsrechtliche Folgen der nicht-medizinisch unterstützten Fortpflanzung' (2024) 19 EF-Z 51, 53. In particular, whether any artificial means (IVF, artificial insemination, etc) were used.

(124) § 144(1) is dedicated to fatherhood, § 144(2) ABGB, on the other hand, to the establishment of parenthood with regard to all persons not legally considered to possess a male gender-marker ('*die Frau oder andere Person*').

(125) § 144(3) ABGB. This particularly includes provisions on the rights and duties between parents and between parents and children.

(126) § 144(1)(1)–(3) and § 144(2)(1)–(3) ABGB.

(127) § 16(2)(6) RPflG. Their competences in internal cases are listed in § 19(1) RPflG.

(128) § 140 ABGB. Joachim Pierer, 'Abstammung' in Astrid Deixler-Hübner (ed), *Handbuch Familienrecht* (2nd edn, Linde 2020) 238.

(129) § 82(1) AußStrG 2005.

(130) § 82(2) AußStrG 2005. The other parent is only involved if alive and capable of making informed decisions.

(131) § 83(1) AußStrG 2005.

(132) § 141 ABGB. The respective capacity is presumed after the age of fourteen.

(133) § 144(4) ABGB.

(134) If carried out abroad, the legal relationship can, however, be recognised. See *infra* paras 52ff.

with the mother of a child at the moment of birth (135) are, for example, *ex lege* considered to be the child's father (in opposite-gender couples (136)) or 'other parent' (*anderer Elternteil*) (in same-gender relationships or if the partner has an unspecified gender-marker (137)). (138) The mother is the woman (*rectius*: person) that gave birth to the child. (139)

3. *Non-judicial establishment*

a) *Acknowledgements*

36 Should the statutory default regime not be applicable, partners of the mother have to resort to the acknowledgement of their paternity or parenthood. For the legal relationship to be established, partners have to issue a personal (140) declaration recognising their parenthood status. (141) The declaration has to be included in an Austrian public or publicly certified document which takes retroactive effect once received by a registrar. (142) It can, however, not only be presented to a registrar, but also to a child and youth welfare service (*Kinder- und Jugendhilfeträger*), (143) in court, (144) before all Austrian representations abroad, (145) or to a notary (146). The declaration must in any case accurately designate the acknowledging party, the mother and the child. (147) Acknowledgements can also be made before the child is born.

37 Both the child and the mother can challenge the acknowledgement within a period of two years. (148) However, had parenthood previously been estab-

---

(135) The same applies if less than 300 days have lapsed between the death of the partner and the birth of the child.

(136) See § 144(1)(1) ABGB.

(137) See § 144(2)(1) ABGB. See the explanatory report to the proposal 3754/A XXVII GP 4; Fischer-Czermak, 'Neuerungen im Abstammungsrecht' (n 123) 52–53.

(138) Interestingly, if more persons qualify as the child's father or other parent under the *ex lege* rules, parenthood (or fatherhood) is conferred on the person who last entered a marriage or registered partnership with the mother.

(139) § 143 ABGB.

(140) No representation is allowed, see Pierer, 'Abstammung' (n 128) 266–267. For the same reason, no conditions or time limits are possible (ibid, 268).

(141) § 145(1) ABGB.

(142) Ibid. It might be questionable whether the need for an Austrian document is compatible with EU law.

(143) § 44 B-KJHTG.

(144) § 81 AußStrG 2005.

(145) §§ 35(2), 67(3) PStG 2013.

(146) §§ 2, 52ff NO 1871.

(147) § 145(2) ABGB.

(148) § 146 ABGB. The two-year-period starts once the mother or child become aware of the fact that the declarations became effective. The period does not begin as long as the

lished with regard to another person, an acknowledgement can only take effect once the former relationship is dissolved. (149) This generally has to be done in court. The declaration can, however, take effect without the need for a judicial intervention if the child in question consents to the ('breakthrough') acknowledgement in a public or publicly certified document (*durchbrechendes Anerkenntnis*). (150) Due to the *erga omnes* effects of the change, further requirements were introduced with regard to children not yet of age. Should the child in question be a minor, the acknowledgement can only take effect if the child's mother (personally (151)) indicates the acknowledging party as the father/parent of the child as well. (152) The child has to consent in any case. The declarations again take effect once received by a registrar. (153) The official is required to inform the previously registered parent of the change, in order to provide them with the opportunity to potentially challenge the declarations in court. (154) A review process must be initiated within two years. (155)

Acknowledgements can be set aside in court. When deciding on the effec- **38**
tiveness of the respective declarations, judges can either proceed *ex officio*, (156) due to a challenge to the acknowledgement, (157) or upon request of

---

child is a minor or incapable of taking legally valid decisions or if the latter was due to an unforeseen or unavoidable event, prevented from bringing the issue to the attention of a court. When the acknowledgement is challenged by the mother, she has to be alive and be capable of making informed decisions.

(149) § 146 ABGB. The two-year-period starts once the mother or child become aware of the fact that the declarations became effective. The period does not begin as long as the child is a minor or incapable of taking legally valid decisions or as long as the person entitled to object to the acknowledgement was, due to an unforeseen or unavoidable event, prevented from bringing the issue to the attention of a court.

(150) § 147(2) ABGB.

(151) See Astrid Deixler-Hübner, '§ 147', in Andreas Kletečka, Martin Schauer, *ABGB-ON*[1.08] (15 September 2023, rdb.at) para 3.

(152) § 147(2) ABGB. § 147(4) ABGB states that the child and youth welfare service (*Kinder- und Jugendhilfeträger*) act as the minor child's legal representative when it comes to consenting to the acknowledgment.

(153) § 147(2) ABGB.

(154) § 147(3) ABGB and § 68(5) PStG 2013. The information also regards the possibility to bring a claim.

(155) § 146 ABGB applies here as well, cf § 147(3) ABGB.

(156) § 154(1)(1) ABGB: for the violation of formal requirements; the lack of decision-making capacity; if the child's legal representative did not consent.

(157) § 154(1)(2) ABGB (which also establishes some exceptions). By the mother, child, or current parent (§ 146(1) and § 147(3) ABGB).

the acknowledging party (158). Especially the latter present some similarities to declarations of consent under the law of obligations.

b) *Agreements and other declarations*

39 The 2024 reform introduced some new forms of de-judicialisation in parenthood matters. (159) Given that a Constitutional Court decision had held that medically assisted reproduction should no longer constitute a necessary prerequisite if the non-gestational partner of a same-sex couple intended to establish a parent-child relationship, new rules had to be introduced. (160) Cases in which pregnancy is induced with sperm from a third party but without the use of medical procedures (161) can now lead to the establishment of parenthood for the mother's partner (irrespective of their gender (162)) as well. (163) Should the latter have consented to the procedure, they can no longer challenge their parenthood status. Nor can parenthood be established with regard to the donor. (164) This, however, does not apply to *de facto* partners. (165) They have to resort to an acknowledgement. (166)

---

(158) § 154(1)(3) ABGB. They have to prove that they were induced to make the acknowledgement through the use of deceit, force or due to an error concerning the fact that the child was theirs or that their semen was used to carry out medically assisted reproduction or that non-medically assisted reproduction was carried out with their consent using gametes of a third party. In cases of non-medically assisted reproduction in *de facto* couples, the acknowledgement cannot be challenged due to an error regarding the non-existing genetic link, see Fischer-Czermak, 'Neuerungen im Abstammungsrecht' (n 123) 56–57.

(159) Edwin Gitschthaler, 'Editorial: Sex zu dritt und ganz herkömmlicher Geschlechtsverkehr: Und wer sind jetzt die Elternteile?' (2024) 19 EF-Z 49, 49 speaks of 'privatised'.

(160) VfGH G 230/2021.

(161) The new rules particularly cover home inseminations (*Heiminsemination*, *Bechermethode/-spende* (already mentioned by VfGH G 230/2021) and intercourse with a donor (cf explanatory report to the proposal 3754/A XXVII GP 5 and JAB 2345 BlgNR XXVII GP 4. Also, Ulrich Pesendorfer, 'Das Abstammungsrechts-Anpassungsgesetz 2023 (AbAG 2023)' (2023) 18 iFamZ 304, 305; Fischer-Czermak, 'Neuerungen im Abstammungsrecht' (n 123) 54; Helmut Ofner, 'Nicht-medizinisch unterstützte Fortpflanzung - die österreichische Lösung' (2024) 65 ZfRV 1, 1.

(162) Cf explanatory report to the proposal 3754/A XXVII GP 5.

(163) See the new rules in §§ 148(3a) and (5), 152a, 154a ABGB. § 154a ABGB defines these methods as 'non-medically assisted reproduction' (*nicht-medizinisch unterstützte Fortpflanzung*). Cf Pesendorfer, 'Abstammungsrechts-Anpassungsgesetz' (n 161) 304f; Gitschthaler, 'Blick nach Europa' (n 18) 326.

(164) § 148(5) ABGB; § 152a ABGB.

(165) See Fischer-Czermak, 'Neuerungen im Abstammungsrecht' (n 123) 56. While the justice committee report (JAB 2345 BlgNR XXVII GP 3) still included them, the current provisions only speak of spouses and registered partners.

(166) Fischer-Czermak, 'Neuerungen im Abstammungsrecht' (n 123) 56–57.

40 The partners' consent to the non-medically assisted reproduction technique does not have to meet special formal requirements, even if the parties are advised to record the declaration in writing in the explanatory report to the reform. (167) A notarial act is, though sensible, not necessary. (168) The declaration can further be limited to a specific method, donor or timeframe, and can even be blanket or unconditional. (169) It does, however, have to be given before the method is used, ie before the insemination is carried out. (170) The same applies to the revocation of consent. (171) Declarations of consent can be challenged under rules not dissimilar to those found under contract law. (172)

41 If both partners draw up an agreement expressing their consent to the non-medically assisted reproduction method, they can further include the name and date of birth of the donor or have them co-sign the document. (173)

42 With regard to the consent given by the donor, similar rules apply. It is, however, necessary that the 'third person' transfers their semen – regardless of the method used – knowing that it will be used for the purpose of non-medically assisted reproduction. (174) What the donor will actually have to be aware of remains to be seen. (175) The current phrasing of the relevant provision (§ 154a ABGB) does, however, seem to indicate that the third party might have to be aware of the fact that their gametes are intended to be used to induce a pregnancy and that they function as a 'donor'. (176)

---

(167) See explanatory report to the proposal 3754/A XXVII GP 4 and 5. Also, JAB 2345 BlgNR XXVII GP 3. Criticised by Fischer-Czermak, 'Neuerungen im Abstammungsrecht' (n 123) 55; Ofner, 'Nicht-medizinisch unterstützte Fortpflanzung' (n 161) 1.

(168) See explanatory report to the proposal 3754/A XXVII GP 5; JAB 2345 BlgNR XXVII GP 3. A notarial act is, however, necessary in cases of medically assisted reproduction, see § 8(1) FMedG.

(169) See explanatory report to the proposal 3754/A XXVII GP 4; JAB 2345 BlgNR XXVII GP 3.

(170) Ibid.

(171) Ibid.

(172) § 154(1)(3)(a) ABGB.

(173) See explanatory report to the proposal 3754/A XXVII GP 4–5 and JAB 2345 BlgNR XXVII GP 3. See also § 154a(2) ABGB.

(174) See explanatory report to the proposal 3754/A XXVII GP 5 (and also: JAB 2345 BlgNR XXVII GP 4). Cf Gitschthaler, 'Blick nach Europa' (n 18) 326.

(175) Issue highlighted by Gitschthaler, 'Editorial' (n 159) 49.

(176) Cf Pesendorfer, 'Abstammungsrechts-Anpassungsgesetz' (n 161) 305. Knowledge of the legal consequences of the donation (eg, that they cannot be registered as the child's father, etc) are not required.

Whether the consent to unprotected sex might suffice to meet these requirements will have to be decided by courts. (177)

43 Reference to the required decision-making capacity of the donor was made in the explanatory report, which stated that the rules on non-medically assisted reproduction were to apply even if the donor was a minor or incapable of making an informed decision, in order to avoid legal parenthood being established in their regard. (178)

44 The mediation or commercialisation of donor services is prohibited both in cases of medically and non-medically assisted reproduction. (179) Contracts which provide remuneration for the donation are considered *contra bonos mores* and thus void. (180)

4. *Judicial establishment*

45 Alternatively, parenthood can be established in court proceedings. In these cases, judges have to determine the man/person from whom the child is considered to descend. The respective proceedings can be initiated by either the parent seeking recognition of their legal relationship to the child or by the child itself. (181) Such proceedings can only take place if parenthood has not already been established in another way, at least if the application is not filed by the child. (182)

46 Should the claim be brought by the child, certain presumptions apply. Courts can determine parenthood with regard to the person who had had sexual intercourse with the mother within a period from 300 to 180 days prior to the child's birth, or whose semen was used within that same period to perform a medically assisted reproduction technique. (183) Given that parenthood is in these cases only presumed (*juris tantum*), the defendant can

---

(177) Gitschthaler, 'Blick nach Europa' (n 18) 326 and Fischer-Czermak, 'Neuerungen im Abstammungsrecht' (n 123) 54 come to the (seemingly correct) conclusion that the unknowing third party would have to become the child's legal father.

(178) See explanatory report to the proposal 3754/A XXVII GP 5. Same conclusion in JAB 2345 BlgNR XXVII GP 4.

(179) Cf § 154a(3) ABGB.

(180) See § 879(2) ABGB; explanatory report to the proposal 3754/A XXVII GP 5 and JAB 2345 BlgNR XXVII GP 4.

(181) § 148(1) ABGB.

(182) See § 150 ABGB; Hinteregger, Ferrari (n 90) 177, 178. Fathers/persons believing themselves to be a child's true father/parent can thus only resort to the disruptive acknowledgement under § 147 ABGB. Criticised by Martin Stefula, '§ 163a' in Attila Fenyves, Ferdinand Kerschner, Andreas Vonkilch (eds), *Großkommentar zum ABGB – Klang Kommentar. §§ 137-267* (3rd edn, Verlag Österreich 2008) para 7; Gitschthaler, 'Blick nach Europa' (n 18) 327.

(183) § 148(1) ABGB.

still prove that there is no genetic link to the child. (184) The lack of such a link is accepted in cases of (non-)medically assisted reproduction. (185) Should the father/parent be deceased, the child generally has to bring a claim within two years if they want to rely on the aforementioned presumptions. (186) Other means always remain available and without statutory limitations. (187) Donors consenting to the use of their gametes can, however, generally not be established as parents. (188)

47 Children can bring a claim for the establishment of parenthood even if a parent-child relationship had previously been established with regard to another person. (189) Judicial proceedings are not only intended for the establishment but also for the removal and change of existing relationships and thus for determining that a child did not descend from a certain person. (190) This is, in principle, relevant for setting aside presumptions in parenthood matters (especially with regard to the *ex lege* establishment of parenthood in marriages or registered partnerships). (191) No statute of limitations applies. The respective claims can be brought by both the parent and the child but have to be filed within two years from the time the parties gained knowledge of the circumstances of their case. (192)

48 The child's legal representative is required to ensure that paternity/parenthood is established, unless the establishment would be detrimental to the child's welfare, or the mother exercised her right not to disclose the father's/parent's name. (193)

---

(184) § 148(2) ABGB. Eg, via DNA testing or testimonies.

(185) § 148(3) and (3a) ABGB. Thus, if gametes of a donor were used, parenthood is still established with regard to the man who had consented to the technique. It can still be proved that the child was not conceived through that technique.

(186) § 148(2) ABGB. The child can prove that they were unable to bring the claim for reasons that are attributable to the man/person with regard to whom parenthood is to be established, cf Caroline Mokrejs-Weinhappel, '§ 148' in Peter Rummel, Meinhard Lukas, Andreas Geroldinger (eds), *Kommentar zum ABGB. §§ 137–230 ABGB* (4th edn, Manz 2022) paras 14–16.

(187) See Astrid Deixler-Hübner, '§ 148', in Andreas Kletečka, Martin Schauer, *ABGB-ON*$^{1.08}$ (15 September 2023, rdb.at) para 5.

(188) § 148(4) and (5) ABGB.

(189) § 150 ABGB.

(190) § 151(1) ABGB. This does not apply to cases of (non-)medically assisted reproduction, see §§ 152, 152a ABGB.

(191) Other forms (acknowledgements, judicial determination of parenthood) cannot be set aside under § 151(1) ABGB. Cf Pierer, 'Abstammung' (n 128) 261. The change is, however, possible under §§ 150, 147(2) ABGB.

(192) § 153 ABGB.

(193) § 149(1) ABGB. The child and youth welfare services have to inform the mother of the consequences of the non-establishment (§ 149(1) ABGB). Under § 208(2) ABGB, the

5. *Qualifications under private international law*

49 Conflict rules concerning parenthood are to be found in §§ 21–25 of the Act on Private International Law (IPRG). (194) The rules (still) distinguish between children born in and out of wedlock. Jurisdiction is established if the child or parent are Austrian citizens or have established their habitual residence in Austria. (195)

a) *Acknowledgements*

50 Available out-of-court options are generally (but not necessarily) within the scope of application of the provisions on children born out of wedlock. Under these rules, acknowledgements are subject to the personal status (196) of a child at the time of birth. (197) This includes any requirements for the acknowledgement and the challenge of a pre-established parent-child relationship. (198) Its form is assessed under the *lex causae*. (199) The legal effects concerning these children are governed by the law of their personal status as well. (200) Foreign public documents concerning parenthood matters are accepted under the Public Documents Regulation. (201) Acknowledgements that were issued abroad with the involvement of an authority that recorded the declaration are furthermore qualified as 'decisions' for the purposes of § 91a AußStrG 2005 which relates to the recognition of foreign adoptions and (by way of analogy to) other 'decisions' in matters of parenthood. (202) For a decision to be recognised, it does not necessarily have to be constitutive; the authority did not have to have reviewed the request as to its subject matter

---

child and youth welfare services can – if the legal representative consents – act as a representative of the child.

(194) Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht (IPR-Gesetz), BGBl 1978/304.

(195) § 108(3) JN.

(196) § 9 IPRG. Personal status generally refers to the law of nationality.

(197) § 25(1) IPRG. For this qualification of acknowledgements, see Matthäus Uitz, Agnes Balthasar-Wach, Verena Wodniansky-Wildenfeld, '§ 21 IPRG', in Simon Laimer (ed), *IPR Praxiskommentar* (Lexis Nexis 2024) para 10.

(198) § 25(1) IPRG. Uitz, Balthasar-Wach, Wodniansky-Wildenfeld, '§ 21 IPRG' (n 197) para 10.

(199) § 8 IPRG.

(200) § 25(2) IPRG.

(201) Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012. It established a presumption of authenticity for Member State documents in the field of civil status (as well as documents in election matters and criminal records).

(202) OGH 2 Ob 238/13h.

either. (203) In Austria, there is consequently a broad understanding of 'decision' in matters of parent-child relationships.

Out-of-court scenarios further relate to changes to previously established parent-child relationships. Had parenthood already been established with regard to another person, in Austria, a new acknowledgement can only take effect once the former relationship is dissolved. (204) This generally requires the involvement of a court but not, however, if the child in question consents to the acknowledgement in a public or publicly certified document received by a registrar. (205) Further requirements have been established with regard to minor children. The so-established parent-child relationship has *erga omnes* effects and can in principle only be challenged in court. While such breakthrough acknowledgements issued in Austria are generally governed by the child's law of personal status and thus *lex patriae* (unless the previously established relationship was established in wedlock (206)), different rules apply to the circulation of the respective documents. Currently, European private law does not provide for Union-wide rules on the recognition of decisions and authentic instruments in matters of parenthood. It remains, however, to be seen whether the respective declarations, all contained in public documents, might qualify as 'authentic instruments with binding legal effects' under the current Proposal for a Regulation on the Recognition of Parenthood (207) (should it ever enter into force). (208) Currently, the circulation of these documents (ie, of their *instrumentum*, not *negotium*) is facilitated under the Public Documents Regulation. (209)

51

(203) Ibid.

(204) § 146 ABGB. The two-year period starts to run once the mother or child become aware of the fact that the declarations became effective. The period does not begin as long as the child is a minor or incapable of taking legally valid decisions or as long as the person entitled to object to the acknowledgement was, due to an unforeseen or unavoidable event, prevented from bringing the issue to the attention of a court.

(205) § 147(2) ABGB.

(206) See Uitz, Balthasar-Wach, Wodniansky-Wildenfeld, '§ 21 IPRG' (n 197) paras 10, 23; Matthäus Uitz, Agnes Balthasar-Wach, Verena Wodniansky-Wildenfeld, '§ 25 IPRG', in Simon Laimer (ed), *IPR Praxiskommentar* (Lexis Nexis 2024) para 8. In this case, § 21 IPRG applies, which refers to personal status as well but to the personal status of the parents at the moment of birth. If they have different statuses, the personal status of the child governs the case.

(207) Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final.

(208) See Article 36 of the Proposal.

(209) Regulation (EU) 2016/1191.

b) *Other non-judicial decisions*

52 Conflict-of-laws issues also arise with regard to (non-)medically assisted reproduction. While so far, there have been (almost) no legal writings with regard to the newly introduced non-medically assisted reproduction technique, the latter might have to be qualified depending on the type of relationship in which it is applied (children born out of wedlock for *de facto* partners, children born in wedlock for spouses and registered partners). The respective Austrian rules might, however, be considered to be mandatory. Similar considerations were raised with regard to cases of medically assisted reproduction.

53 While Austria does not allow surrogacy within its own borders, it recognises parent-child-relationships established abroad through the use of a surrogate mother. If the intended parents were established as the child's legal parents by a final judicial (or other authoritative) decision, § 91a AußStrG 2005 (on the recognition of foreign adoptions) applies by way of analogy – provided that there are no grounds for refusal. (210) In that regard, apostillised birth certificates were accepted by first instance courts as well. (211) Following these developments, civil status authorities were advised by the Ministry of the Interior to proceed to registration in case legalised foreign birth certificates were presented. (212) The wide understanding of 'decision' was thus extended to include birth certificates. (213)

54 If parenthood cannot be recognised procedurally under the rules of the AußStrG 2005, the IPRG's conflict rules apply. A parent-child relationship can thus still be recognised *incidenter tantum*. For this purpose, most

---

(210) Cf Brigitta Lurger, Martina Melcher, *Handbuch Internationales Privatrecht. Mit Hinweisen auf das Internationale Zivilverfahrensrecht* (2nd edn, Verlag Österreich 2021) para 2/148; Nademleinsky, Neumayr (n 115) para 6/42; Caroline Mokrejs-Weinhappel, '§ 143' in Peter Rummel, Meinhard Lukas, Andreas Geroldinger (eds), *Kommentar zum ABGB. §§ 137–230 ABGB* (4th edn, Manz 2022) para 13; Thomas Schoditsch, 'Leihmutterschaft in Österreich? Über die Möglichkeit dessen, was nicht sein darf' (2024) 19 EF-Z 4, 7; Bea Verschraegen, '§ 21 IPRG', in Peter Rummel, Meinhard Lukas, Andreas Geroldinger (eds), *Kommentar zum ABGB. IPR*, vol I (4th edn, Manz 2023) paras 21f. Also, VfGH B 13/11.

(211) See BG Tirol (NN) 2 Fam 54/19z = EF-Z 2020, 44 (no higher instance court decisions have so far been issued).

(212) Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 1 July 2021, rdb.at) § 143 ABGB para 2.

(213) See Nademleinsky, Neumayr (n 115) para 6/34 and seemingly also Verschraegen, '§ 21 IPRG' (n 210) para 24. Not qualified as such and thus not recognisable under § 91a AußStrG 2005 according to Schoditsch, 'Leihmutterschaft' (n 210) 8 (who, however, pleads for another application by analogy); Lurger, Melcher, *Handbuch Internationales Privatrecht* (n 210) para 2/149 n 236.

scholars argue for the application of the rules concerning parenthood, (214) others refer to the law to which the case has the closest connection to. (215) The recognition in any case does not violate Austria's public policy. (216)

C. *Adoption*

1. *Introductory remarks*

55 Parent-child relationships can further be established by way of adoption (*Annahme an Kindesstatt*). This requires the conclusion of a written (217) adoption contract (*Adoptionsvertrag, Annahmevertrag*) between the adopter(s) (*Annehmende*) and the adoptee (*Wahlkind*) that is subject to judicial authorisation. (218) Rules on the substantive legal requirements, effects, and potential grounds for dissolution can be found in the ABGB; (219) procedural aspects are governed by the AußStrG 2005 and partly by the ABGB. (220)

56 Adoption can generally be accessed by singles, married couples, registered or *de facto* partners, (221) and can concern both minors and adults. The gender of the parties involved, on the other hand, is irrelevant. The adoptive parent(s) take the place of the child's biological parents.

57 Procedures in both domestic and intercountry adoption cases require the involvement of both judicial and non-judicial actors. The contents of the

---

(214) §§ 21, 25 IPRG, see Brigitta Lurger, 'Das Internationale Privatrecht der medizinisch unterstützten Fortpflanzung' in Magdalena Flatscher-Thöni, Caroline Voithofer (eds), *FMedG und IVF-Fonds-Gesetz* (Verlag Österreich 2019) 528, 543 para 27; Lurger, Melcher, *Handbuch Internationales Privatrecht* (n 210) para 2/149; Nademleinsky, Neumayr (n 115) para 6/43; Verschraegen, '§ 21 IPRG' (n 210) para 25.

(215) § 1 IPRG, see Florian Aspöck, 'Anerkennung der Leihmutterschaft in Österreich!?' (2013) 9 Zak 371, 371–372.

(216) VfGH B 13/11; VfGH B 99/12. See also Bea Verschraegen, 'Leihmutterschaft. Zum Recht auf Elternschaft' (2019) 14 iFamZ 266, 266–271 and Pierer, 'Abstammung' (n 128) 255.

(217) The contract has to be concluded in writing (§ 886 ABGB), the contract does neither have to be concluded before a notary nor do the signatures have to be authenticated; an electronic document can in this matter meet the formal requirements as well, see § 4(2)(1) SVG. See Peter Barth, Matthias Neumayr, '§ 179a' in Attila Fenyves, Ferdinand Kerschner, Andreas Vonkilch (eds), *Großkommentar zum ABGB – Klang Kommentar. §§ 137–267* (3rd edn, Verlag Österreich 2008) paras 10–11.

(218) § 192(1) ABGB. See RIS-Justiz RS0048726.

(219) In particular, §§ 191–203 ABGB. Relevant as well: § 26 IPRG; § 10 EheG; § 43(1)(27) EPG.

(220) Cf §§ 86–91d AußStrG 2005; see also: §§ 113a–113b JN; § 19(2)(1) RpflG.

(221) This includes stepchild adoptions. For the requirements, see § 191 ABGB. Regarding unmarried couples, the extension was clarified by VfGH G 247/2021.

adoption contract are predetermined by statutory law, with party autonomy playing an almost non-existing role. (222) While the authorisation of the adoption ultimately remains a prerogative of the judiciary, (223) any preliminary tasks in domestic cases – including the assessment of the prospective adoptive parents, their legal counsel, preparation, and supervision (224) – are mainly arranged by public intermediaries (*Kinder- und Jugendhilfeträger*) entrusted with safeguarding the welfare of the children in question (*Adoptionsvermittlung*). (225) They are the initial contact point for prospective parents: a formal adoption contract can only be drawn up after initial consultations with the respective authorities. A core task of the child welfare services remains the issuance of declarations of eligibility and suitability for the purposes of the adoption. (226) Similar activities are carried out in cross-border cases.

2. *Non-judicial phase*

58 Under the ABGB, adoptions are based on a contract (*Statusvertrag*) between the adopting parents and the adoptee. (227) For the adoption to take effect, the contract has, however, to be authorised and reviewed by a judicial authority. (228)

59 Parties to the contract are the adopter(s) and the child/adult with whom a new parent-child relationship is to be established. The former, ie, the adoptive parents, are in principle required to adopt together, have to have legal capacity, take part in the proceedings person (representation is not

---

(222) See Johann Höllwerth, '§ 192 ABGB' in Georg Kodek, Michael Schwimann (eds), *ABGB Praxiskommentar*, vol I (5th edn, Lexis Nexis 2018) para 14.

(223) Senior judicial officers (*Rechtspfleger*) are not competent in this matter: § 19(2)(1) RpflG.

(224) Except for the assessment, the other tasks can further be delegated to private entities, see Claudia Rudolf, 'Adoption' in Astrid Deixler-Hübner (ed), *Handbuch Familienrecht* (2nd edn, Linde 2020) 348.

(225) These authorities correspond to the territorial units of the federal state, ie the federal states (*Bundesländer*). Competences there lie either with the district authorities (*Bezirkshauptmannschaften*), the municipal executive (*Magistrat*) or, in Vienna, the Youth and Family Office (*Amt für Jugend und Familie*). Initially, the legal basis was §§ 31–34 B-KJHG 2013. Now, for the respective rules of the federal states: §§ 35–36 TKJHG; § 29 V-KJH-G; §§ 35–37 S.KJHG; §§ 36–38 StKJHG; §§ 67–74 NÖ KJHG; §§ 36–39 Oö KJHG 2014; §§ 36–38 Bgld KJHG; §§ 50–53 K-KJHG; §§ 49–52 WKJHG 2013. For more details on the child and youth welfare services, see *infra* paras 94ff.

(226) Cf Rudolf, 'Adoption' (n 224) 348.

(227) § 192(1) ABGB.

(228) Ibid.

possible ([229])) and meet certain age requirements. ([230]) Adoptees are generally presumed to possess the capacity to enter into the agreement themselves if they are over 14 years of age. ([231]) Children of that age can in any case (actively) participate in non-contentious proceedings, without the need for legal representation. ([232]) The required consent can otherwise (and when the adoption concerns younger children) be expressed by the child's legal representative; the latter can act without judicial authorisation. ([233]) The best interests of the child have, however, to remain the guiding principle for the legal representative. Should the latter unjustifiably refuse to give their consent, both the adoptee and the adopter(s) can refer the matter to court and ask that the consent be judicially replaced. ([234])

60 The contract itself must be concluded in writing; the involvement of a notary or other authenticating body is not required. ([235]) Agreements can even be included in separate documents. ([236]) Parties are not free to customise the specific contents of the arrangement and are prohibited from introducing time limits or conditions. ([237]) The only ([238]) condition permissible in adoption contracts is the condition precedent of judicial authorisation. Name changes connected to the adoption lie in the competence of civil status authorities. ([239])

61 Given that the respective agreements between adopter(s) and adoptee(s) are an expression of party autonomy, courts are not entitled to modify them and

---

([229]) See Astrid Deixler-Hübner, '§ 912' in Andreas Kletečka, Martin Schauer, *ABGB-ON*[1.07] (15 September 2023, rdb.at) para 8; Martina Weixelbraun-Mohr, '§ 192 ABGB' in Peter Bydlinski, Stefan Perner, Martin Spitzer (eds), *ABGB. Kommentar (KBB)* (7th edn, Verlag Österreich 2023) para 2; Höllwerth, '§ 192 ABGB' (n 222) para 4.

([230]) § 191(1) ABGB. See also n 251.

([231]) § 192(2) ABGB. Adoptees younger than fourteen can still prove that they possess the required decision-making power.

([232]) See § 104 AußStrG 2005.

([233]) See § 192(3) and (4) ABGB. Cf Höllwerth, '§ 192 ABGB' (n 222) para 6.

([234]) See § 192(3) ABGB.

([235]) See Rudolf, 'Adoption' (n 224) 351. If not concluded in writing, the contract is null and void, LGZ Wien 16.11.2004, 42 R 537/04p.

([236]) See Caroline Mokrejs-Weinhappel, '§ 192' in Peter Rummel, Meinhard Lukas, Andreas Geroldinger (eds), *Kommentar zum ABGB. §§ 137–230 ABGB* (4th edn, Manz 2022) para 5.

([237]) See Mokrejs-Weinhappel, '§ 192' (n 236) para 5; Höllwerth, '§ 192 ABGB' (n 222) para 15.

([238]) Another exception would be the case of incognito adoptions (*Inkognitoadoption*). In the latter, the condition is set that some or all persons that have to consent to the adoption or that are entitled to being heard during the proceedings waive their right to receive certain information about the adoptive parents (name, residence). See § 88 AußStrG 2005.

([239]) Höllwerth, '§ 192 ABGB' (n 222) para 15.

can thus only authorise or reject the contract as a whole. (240) Once concluded, the agreement cannot be unilaterally revoked by the parties either. (241) Nor can they modify the legal consequences connected to the adoption under the ABGB. Written amendments to the contract remain possible, even during the judicial phase, eg if the parties forgot to include the date on which the agreement was reached. (242) The date is relevant to establish the point in time from which the adoption can take effect after its authorisation.

62 Information on the adopters can, under certain circumstances, be excluded from the contract. The exception relates to a so-called incognito adoption (*Inkognitoadoption*). (243) Under the respective rules, parties can, by mutual agreement, make the judicial authorisation subject to the condition that all (or some) of the individuals required to be heard during the proceedings and asked to give their consent to the adoption waive their right to be informed of the name and place of residence of the adopter(s). (244) This does, however, upon request, not apply to their general personal and economic circumstances. (245) An incognito adoption is not possible when the adoptee is an adult. (246)

3. *Judicial phase*

a) *Authorisation*

63 The adoption contract is subject to a condition precedent until its authorisation by a judicial body. Once legally binding, the contract takes retroactive effect. (247) Competence for both the authorisation, its revocation and the overall dissolution of the adoptive relationship, generally, lies with the

---

(240) RIS-Justiz RS0048900; Mokrejs-Weinhappel, '§ 192' (n 236) paras 3–4.

(241) Cf OGH 7 Ob 510/94; Barth, Neumayr, '§ 179a' (n 217) para 3.

(242) Barth, Neumayr, '§ 179a' (n 217) para 5. See Mokrejs-Weinhappel, '§ 192' (n 236) para 8. Changes regarding the name of the adoptee that were contained in the contract cannot be authorised in court, given that the respective matters fall under the competence of civil status authorities.

(243) See § 88(1) AußStrG 2005.

(244) Except for the child and youth welfare service (*Kinder- und Jugendhilfeträger*).

(245) § 88(2) AußStrG 2005.

(246) Ingmar Vinzenz, '§ 88' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 1.

(247) § 192(1) AußStrG 2005. The effects are not retroactive if the court has to replace the consent of the child's legal representative, while contemporaneously authorising the adoption, see Barth, Neumayr, '§ 179a' (n 217) para 26.

guardianship court (*Pflegschaftsgericht*). (248) Furthermore, all parties are, in principle, required to have legal counsel. (249)

64 The competent court can only authorise or reject the contract as a whole. (250) As for the requirements that need to be met, the ABGB distinguishes between the adoption of minors (*Minderjährigenadoption*) and the adoption of adults (*Erwachsenenadoption*). (251) Other requirements have to be met in any case. (252)

65 When adopting a minor, courts have to assess two things: firstly, whether the adoption is in the best interests of the child, and secondly, whether a parent-child like relationship is already in existence between the parties or is (expected) to be established through the adoption. (253) Courts have a certain amount of discretion when it comes to the assessment. (254) The same applies to the opinion on the eligibility and suitability of the adoptive parents necessarily expressed by the child and youth welfare services. (255) The opinion is not an expression of authoritative (sovereign) powers of the service and consequently not binding on the court – at least in domestic cases. (256) In intercountry adoptions covered by the 1993 Hague Convention, the service issues a decision within the meaning of Article 5(a) of the Convention, and thus exercises sovereign functions. (257)

66 When assessing the adoption of an adult, on the other hand, parties have to prove a pre-existing relationship that goes beyond the average connection

---

(248) § 113a JN. If no minor children are involved or if the guardianship court has no jurisdiction, the respective matters have to be heard by the district court at the place of habitual residence of the adoptee. If jurisdiction cannot be established that way either, parties have to seize the district court at the habitual residence of the adopter(s).

(249) § 6(2) AußStrG 2005.

(250) See Barth, Neumayr, '§ 179a' (n 217) para 2; Rudolf, 'Adoption' (n 224) 353.

(251) § 194(1) ABGB. The relevant point in time to determine whether the adoptee is a minor or of age is the moment in which the authorisation decision is taken, cf Rudolf, 'Adoption' (n 224) 354.

(252) The adopters have to be 25 years old, and older than the adoptee, see § 193 ABGB. Neither age differences (VfGH G 18/2014) nor a maximum age are listed as adoption requirements.

(253) § 194(1) ABGB. For a detailed analysis, see Peter Barth, Matthias Neumayr, '§ 180a' in Attila Fenyves, Ferdinand Kerschner, Andreas Vonkilch (eds), *Großkommentar zum ABGB – Klang Kommentar. §§ 137–267* (3rd edn, Verlag Österreich 2008) paras 5–7.

(254) See Johann Höllwerth, 'Adoption und Ehepakte nach dem FamRÄG 2009. Materielle und formelle Änderungen' (2010) 5 EF-Z 7, 7.

(255) OGH 4 Ob 45/14t.

(256) Ibid.

(257) Ibid; and RIS-Justiz RS0129657.

between parents and their adult children. (258) Such a connection is in particular considered to exist if the adoptee and the adopter(s) have lived in the same household for five years (as an approximate guideline) or have supported each other in a similarly close relationship. (259) Again, courts have discretion when assessing the respective applications. (260)

67 Overall (and thus in both the adoption of minors and adults), if overriding concerns of the adopter's children oppose the adoption, the authorisation has to be refused. (261) This includes cases in which their maintenance or education would be endangered; other economic considerations (262) are generally not relevant, except if the adopter's (only or main) intention for going through with the proceeding was to harm their child(ren).

68 While some persons affected by, or with an interest in, the establishment of a new parent-child relationship merely have to be heard before the court authorisation can be given (*Anhörungsrecht*), (263) others have to expressly consent to the adoption (*Zustimmungsrecht*). (264) This is, for example, the case for the parents of the adoptee (if not yet of age), the spouse or registered partner of the adopter and adoptee, the legal representative of the minor adoptee as well as on adoptees that are of age but not fully capable of making the respective decision. (265) Their consent constitutes a necessary requirement for the authorisation and has to be expressed in person (266) before the competent judicial authority. (267) The consent can be revoked until the first instance decision, either in writing or directly in court. (268)

---

(258) See § 194(1) ABGB; RIS-Justiz RS0119844.

(259) § 194(1) ABGB; RIS-Justiz RS0119844. The following is comparable: the adoptee took care of the adopter(s) (or vice versa); care or economic support services, for example through the participation of the adoptee in the adopter's business. See ErlRV 471 BlgNR XXII GP 28. For more details, see again Barth, Neumayr, '§ 180a' (n 253) paras 8–11.

(260) See RIS-Justiz RS0087008, RS0087006.

(261) § 194(2) ABGB.

(262) Such as inheritance or forced heirship rights, cf OGH 9 Ob 284/97y.

(263) Courts must hear: the minor adoptee unable to make informed decision; the parents of the adult adoptee; the foster parents or the head of the home where the adopted child is staying; the child and youth welfare service. See § 196 ABGB.

(264) They do not have to consent if they already concluded the adoption contract as the legal representative of the child, if one of the persons named in § 195(1)(1)–(4) ABGB is not only temporarily incapable of making informed decisions or if the whereabouts of one of the persons named under § 195(1)(1)–(3) ABGB has been unknown for at least six months.

(265) § 195(1) ABGB.

(266) § 86(1) AußStrG 2005.

(267) If it is not given or if some persons are not heard, the authorisation can be challenged. OGH 4 Ob 133/00p.

(268) § 87 AußStrG 2005.

Before the adoption can be effected, the court has to hear the (minor) child, ([269]) as well as the child and youth welfare services (*Kinder- und Jugendhilfeträger*). ([270]) The provision ensures that the respective parties are heard even if an adoption is effected under the applicable rules of a foreign law. ([271]) Minor children over 14 years of age have legal standing in adoption matters and can thus autonomously take part in the respective proceedings. ([272]) In the case of deviating actions being initiated by the child and its legal representative, courts have to consider both motions. ([273]) **69**

The adoption contract takes retroactive effect once the decision on the authorisation (*Bewilligungsbeschluss*) becomes final. ([274]) All legal consequences connected to the adoptive relationship (which correspond to those established under parenthood) take effect from that point as well. ([275]) Provided that the court authorises the adoption contract, the decision (*Beschluss*) has to include: 1) the authorisation of the adoption; 2) the declaration on the termination of the legal relationship between the adoptee and their biological parent(s) and an indication of the date on which the termination takes effect; 3) the name and surname of the adoptee and the adoptive parent(s), their date and place of birth, nationality, any affiliations to legally recognised churches; 4) the date from which the adoption takes effect; 5) upon request, any other information required for the registration of the adoption in foreign civil status registers. ([276]) Within the scope of application of the 1993 Hague Adoption Convention, further reference is to be made to the fact that the adoption was carried out in accordance with the provisions of the Convention, and in particular, when and by whom the consent of the central authorities to proceed with the adoption proceedings **70**

([269]) For further details on how the child can be heard, see § 105 AußStrG 2005.

([270]) § 89(2) AußStrG 2005. For this purpose, the competent court has to obtain a statement from the competent office of the State Government (*Landesregierung*).

([271]) Cf Ingmar Vinzenz, '§§ 90, 91' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 6.

([272]) § 90(2) AußStrG 2005 and § 104 AußStrG 2005. They are a subject of the proceedings, not their object, see Martin Spitzer, '§ 90' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 4.

([273]) § 104(2) AußStrG 2005. For this purpose, the competent court has to obtain a statement from the competent office of the state government (*Landesregierung*).

([274]) Or the decision replacing the refused consent of the adoptee's legal representative (OGH 7 Ob 7/03k).

([275]) § 171(1) ABGB.

([276]) § 89(1) AußStrG 2005.

was granted. (277) The decision is then transferred to the competent civil status offices for registration. (278)

b) *Revocation*

71 While the establishment of the adoptive relationship is at least partly (or in the abstract) an act of party autonomy, the adoptive parents and children cannot dissolve the adoption contract by way of an agreement. (279) For their legal relationship to end, a judicial authority has to become involved. The latter can either revoke the initial authorisation (*ex tunc*), (280) or annul the adoption altogether (*ex nunc*). (281)

72 The grounds for revocation, on the one hand, were modelled on the grounds leading to the nullity of a marriage. (282) A revocation can thus either take place *ex officio* or upon request of one of the contracting parties. One ground can, however, only be invoked by the adopters or adoptees and only within a specific time limit, ie the fact that the adoption contract was not concluded in writing, provided that no more than five years have lapsed since the authorisation became final. (283) The other grounds present some minor similarities to those found under the law of obligations. The authorisation can, consequently, be revoked if either the adopter(s) or the adoptee lacked decision-making capacity when entering the adoption contract, or if the contract was concluded as a mere fictitious act to circumvent certain legal provisions. (284) A revocation based on errors of one of the parties was, however, not included among the grounds in § 200 ABGB. (285)

---

(277) § 89(2) AußStrG 2005. For this purpose, the competent court has to obtain a statement from the competent office of the state government (*Landesregierung*).

(278) § 8(1), § 11(2) and § 7(1)(5) PStG 2013. On these matters, cf Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 13 September 2018, rdb.at) § 192 ABGB, para 2.

(279) § 203 ABGB.

(280) § 200 ABGB.

(281) § 201 ABGB.

(282) See Astrid Deixler-Hübner, '§ 203', in Andreas Kletečka, Martin Schauer, *ABGB-ON*[1.08] (15 September 2023, rdb.at) para 2.

(283) § 200(1)(5) ABGB.

(284) § 200(1) ABGB.

(285) See Barth, Neumayr, '§ 179a' (n 217) para 30; Martina Weixelbraun-Mohr, '§ 201–203 ABGB' in Peter Bydlinski, Stefan Perner, Martin Spitzer (eds), *ABGB. Kommentar (KBB)* (7th edn, Verlag Österreich 2023) para 2.

Legitimate expectations of the contracting and third parties (unaware of the existence of one (286) of the aforementioned grounds) are protected under § 200 ABGB as well. Pursuant to the provisions, a revocation can, for the contracting party, be limited to *ex nunc* effects, while, as regards third parties, others might not be able to invoke the revocation should the third party acting in good faith have acquired rights trusting in the effectiveness of the adoption. (287) **73**

The annulment of the adoption only operates *ex nunc*. It occurs when a contracting party, or a party that has to consent to the adoption, was induced to make their declaration or give their consent by deceit or fear as would be the case under contract law. (288) Errors concerning the motives for establishing the adoption are not relevant. (289) Another ground for annulment is the serious endangerment of the welfare of the adoptive child that is either not yet of age or not possessing decision-making capacity. (290) Courts can in this case act *ex officio*. The adoptee does, however, have to file an application if they consider the annulment to best serve their interests, after the breakdown of the marriage/registered partnership or death of the adoptive parent(s). (291) The last ground concerns the case in which both the adopter(s) and the adoptee request that the adoption be annulled. (292) In this case, specific reasons do not have to be alleged. (293) **74**

Despite certain similarities, the challenge of the adoption is, however, not considered to be contractual in nature. The claims under §§ 200ff ABGB are exhaustive and concern the adoption as a whole; contractual claims to contest the adoption contract are not admissible. (294) **75**

---

(286) For the contracting party, the rule does not apply in the case of § 200(1)(4) ABGB. Eg, if the adoption contract was concluded exclusively or predominantly with the intention of enabling the adopted child to use the surname of the adopter(s) or to only create the outward appearance of an adoption, while concealing unlawful sexual relations.

(287) See § 200(2) and (3) ABGB. A third party can, however, not claim the effects of the revocation to the detriment of one of the parties to the contract who was not aware of the reason for revocation when the adoption contract was concluded.

(288) See § 201(1)(1) ABGB. Under the law of obligations, the provision is § 870 ABGB.

(289) LGZ Wien 22.12.2005, 45 R 667/05d.

(290) See § 201(1)(2) ABGB.

(291) See § 201(1)(3) ABGB.

(292) See § 201(1)(4) ABGB.

(293) Cf Rudolf, 'Adoption' (n 224) 372.

(294) See § 203 ABGB and Vinzenz, '§§ 90, 91' (n 271) para 12; Peter Barth, Matthias Neumayr, '§ 185a' in Attila Fenyves, Ferdinand Kerschner, Andreas Vonkilch (eds), *Großkommentar zum ABGB – Klang Kommentar. §§ 137–267* (3rd edn, Verlag Österreich 2008) paras 1, 4.

4. *Qualifications under private international law*

76 Until (and if) the Proposal on a Regulation on the Recognition of Parenthood ([295]) enters into force, Austria's internal conflict-of-law rules apply to adoption matters. According to them, the jurisdiction of Austrian courts for the establishment and revocation of parent-child relationships in adoption matters is mainly based on the nationality of either of the parties involved; as a default, jurisdiction can further be established if both the adoptee and the adopter(s) have their habitual residence in Austria. ([296])

77 Foreign adoptions are recognised under §§ 91a–91d AußStrG 2005. ([297]) The provisions are only applicable if a case is not already covered by the Hague Adoption Convention or any other international agreement in the matter. Recognition generally occurs *ex lege* and/or *incidenter tantum*, ([298]) provided no grounds for refusal apply. ([299]) A judicial procedure can, however, be carried out upon request. ([300])

78 For there to be a 'decision' in adoption matters within the meaning of the provisions, only a minimum of public involvement is required. It suffices that the foreign public authority recorded or authenticated the establishment (or dissolution) of the adoptive relationship: a review as to the substance of the agreement and thus a constitutive (authoritative) decision is not necessary (*Dekretadoptionen*). ([301]) What the decision has to be, however, is final.

79 Private or merely contractual adoptions (*Vertragsadoptionen*) do not fall under the scope of application of the AußStrG 2005 but are governed by and

---

([295]) COM(2022) 695 final.

([296]) § 113b(1) JN. If one of the parties is stateless, the provision refers to the habitual residence or (if that was not established) the mere presence in Austria.

([297]) Introduced by the FamRÄG 2009, BGBl I 2009/75.

([298]) The incidental review can be carried out by all authorities, including those competent in matters of social security, visas, etc, see Robert Fucik, 'Muster – Anerkennung ausländischer Entscheidungen über die Annahme an Kindes statt' (2010) 65 ÖJZ 149, 149 n 5. If grounds of refusal appear to be present, courts should nevertheless be involved.

([299]) See Robert Fucik, 'Anerkennung ausländischer Adoptionsentscheidungen. Das neue Verfahren im Überblick' (2009) 4 iFamZ 271, 272; Robert Fucik, 'Muster' (n 298) 149. The grounds include (§ 91a(2) and (3) AußStrG 2005): incompatibility of the decision with the best interests of the child; decision given in violation of the right to be heard; the decision is irreconcilable with an Austrian decision or a prior decision that is recognisable; the issuing authority would not have been competent under the Austrian conflict-of-law rules; violation; rights of consent under the applicable law were violated.

([300]) The reasons for this approach are described by Fucik, 'Anerkennung ausländischer Adoptionsentscheidungen' (n 299) 272.

([301]) Cf the explanatory report of IA 673/A XXIV GP 31; Martin Spitzer, '§ 91a' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 2; Michael Vidmar, '§ 91a' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 4; Höllwerth, 'Adoption und Ehepakte' (n

incidenter tantum reviewed under the conflict-of-law rules in § 26 IPRG. (302) Whether these types of adoption might survive a public policy test, especially considering the best interests of the child, will have to be assessed on a case-by-case basis. (303)

D. *Parental responsibility*

80 Most aspects regarding parental responsibility are directly governed by the ABGB and thus by statutory rules. It is, however, possible to deviate from certain aspects concerning the rights and duties a person has in making decisions regarding a child's overall welfare (care and upbringing, legal representation, and management of the child's assets) by way of agreements. These can either be concluded in court or before a civil status authority (*Personenstandsbehörde*).

81 Should judicial involvement become necessary, cases in matters of parental responsibility and personal contact are tried under non-contentious proceedings that are a prerogative of the judiciary; pre-existing competences of senior judicial officers were abolished in 2013. (304)

1. *Statutory regime*

82 By law, parental responsibility is generally conferred on both parents of a child born in wedlock or to parents that marry after the child's birth. (305) The provisions also apply to parents that are in a registered partnership. (306) This role is, generally, maintained even after the marriage (or registered

---

254) 8; Fucik, 'Anerkennung ausländischer Adoptionsentscheidungen' (n 299) 272; Rudolf, 'Adoption' (n 224) 388. Also extendable to adoption matters, RIS-Justiz RS0121191.

(302) See Spitzer, '§ 91a' (n 301) para 6; Vidmar, '§ 91a' (n 301) para 4; Fucik, 'Anerkennung ausländischer Adoptionsentscheidungen' (n 299) 273; Rudolf, 'Adoption' (n 224) 388.

(303) See Spitzer, '§ 91a' (n 301) para 6.

(304) With the KindNamRÄG 2013.

(305) § 177(1) ABGB. If the parents only marry at a later stage, legal parenthood as to both parents will, however, have to be established prior to the automatic extension of parental responsibility, eg through an acknowledgement or a judicial decision. See Edwin Gitschthaler, '§ 177 ABGB' in Georg Kodek, Michael Schwimann (eds), *ABGB Praxiskommentar*, vol I (5th edn, Lexis Nexis 2018) para 1.

(306) See Johann Höllwerth, '§ 177 ABGB' in Peter Bydlinski, Stefan Perner, Martin Spitzer (eds), *ABGB. Kommentar (KBB)* (7th edn, Verlag Österreich 2023) para 1; Gitschthaler, '§ 177 ABGB' (n 305) para 1. References to married couples in this report should be understood as including registered partners.

partnership) is dissolved or the common household has ceased to exist. (307) With regard to children born out of wedlock, (308) however, only the mother is, in principle, entitled to exercise parental responsibility. (309)

2. *Agreements*

a) *Extra-judicial agreements*

83 Nevertheless, a 2001 reform introduced the possibility for unmarried mothers to enter into joint custody agreements with the father of the child. (310) The latter could be entrusted with custody in full or only with regard to certain matters, irrespective of whether or not both parents lived in the same household. (311) While these agreements could initially only be concluded before a judicial authority, the competence was eventually further extended to civil status authorities in 2013. (312) This non-judicial option is available irrespective of the parties' nationality. (313)

84 (1) *Procedural steps.* — In its core, the reform remained true to the initial idea of enabling unmarried parents to exercise parental responsibility together if they reached an agreement. (314) Under the remodelled § 177(2) ABGB, the

---

(307) § 179 ABGB. Spouses can, however, enter into a judicial agreement conferring parental responsibility on one of them (in full or in part). In any case, they have to decide in which household the child will primarily live.

(308) In 2022, over 40% of children were born out of wedlock, cf Statistik Austria, 'Soziodemographische Merkmale der Eltern von Geborenen (Weiterführende Daten)' <https://www.statistik.at/statistiken/bevoelkerung-und-soziales/bevoelkerung/geburten/soziodemographische-merkmale-der-eltern-von-geborenen> accessed 1 June 2025.

(309) § 177(2) ABGB.

(310) See KindRÄG 2001, BGBl I 2000/135.

(311) ErlRV 2004 BlgNR XXIV GP 24.

(312) Kindschafts- und Namensrechts-Änderungsgesetz 2013 (KindNamRÄG 2013), BGBl I 2013/15. Judicial agreements are still possible as well, see § 177(3) ABGB.

(313) Peter Barth, Georg Jelinek, 'Das neue Obsorgerecht' in Peter Barth, Astrid Deixler-Hübner, Georg Jelinek (eds), *Handbuch des neuen Kindschafts- und Namensrechts* (Linde 2013) 120. But provided that Austrian law is applicable and that a civil status event with regard to that child has to be registered in Austria, see Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 13 September 2018, rdb.at) I. Abschnitt: Personenstandsgesetz 2013 – ZPR DA 1.3.2.8: This would be the case if a minor had established their habitual residence in Austria (see Articles 15, 5 of the Hague Child Protection Convention; Lurger, Melcher, *Handbuch Internationales Privatrecht* (n 210) para 2/183 refer to Article 16 of the Convention). It would thus not be necessary that the applicants fall under one of the categories of § 35(2) PStG 2013 which lists cases in which civil status events have to be registered by Austrian authorities.

(314) ErlRV 2004 BlgNR XXIV GP 24.

consensual solution adopted by both parties before a registrar (*Standesbeamter*) is, however, not only a merely internal agreement between parents. The latter rather determine the terms of a legally binding and enforceable arrangement that has the same effects as an agreement reached in court. (315) For the agreement to take effect, both parents have to jointly appear before a registrar and personally (316) declare that they intend to jointly exercise parental responsibility. (317) Custody has to be conferred in full. (318) The declarations are recorded in three (319) separate (public) documents, signed by all parties, and registered. (320) In case both parents have different places of residence, the record must further state where the child mainly resides and indicate the primary caregiver. (321) The declarations can otherwise not take effect. (322) It is, however, no longer considered to be incompatible with the best interests of the child if the latter spends equal amounts of time with both parents (*Doppelresidenz*). (323)

Before making their declaration, the civil status officer has to inform both parents about the legal consequences of their declaration. (324) This is generally done by handing out an information leaflet to both parents who have to sign the respective procedural minutes. (325) Whether the arrangements are compatible with the best interests of the child in question is not

85

(315) See Astrid Deixler-Hübner, '§ 109' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 2: they do, however, not constitute judicial settlements (*gerichtliche Vergleiche*).

(316) No representation is possible. ErlRV 2004 BlgNR XXIV GP 24.

(317) See § 177(2) ABGB. The practical handbook for civil status registrars (printed in Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 30 August 2022, rdb.at) I. Abschnitt: Personenstandsgesetz 2013 – ZPR DA 1.3.2.1) further mentions the need for both parents to have their residence in Austria.

(318) See Höllwerth, '§ 177 ABGB' (n 306) para 3. If they intend to only assign some parental rights, parents have to opt for the judicial agreement.

(319) One for each parent, and one for the civil status authority; the court is automatically informed. Cf Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 30 August 2022, rdb.at) I. Abschnitt: Personenstandsgesetz 2013 – ZPR DA 1.3.2.5.

(320) See Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 30 August 2022, rdb.at) I. Abschnitt: Personenstandsgesetz 2013 – ZPR DA 1.3.2.5. The declarations are registered in the ZPR (*Zentrales Personenstandsregister*), a centralised digital public register on civil status matters.

(321) § 177(4) ABGB.

(322) ErlRV 2004 BlgNR XXIV GP 25.

(323) VfGH G 152/2015.

(324) Interestingly, parties do not have to be instructed in similar ways when they marry or recognise a child. See Barth, Jelinek, 'Das neue Obsorgerecht' (n 313) 116.

(325) See the practical handbook for registrars in: Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 30 August 2022, rdb.at) I. Abschnitt: Personenstandsgesetz 2013 – ZPR DA 1.3.2.5. The minutes are governed by § 14 AVG.

directly assessed. (326) Assessments in this regard have to be carried out by a judicial authority that is in any case informed of the agreement.

86 As for the requirements, the out-of-court option is only available once, and only if, custody has not already been settled in court. This includes foreign judicial arrangements on parental responsibility. (327) The agreement takes effect from the moment the two concurring declarations are made, recorded in writing, and signed before the registrar and can, for the most part, not be challenged without a corresponding authoritative (judicial) act. (328) Within the first eight weeks of these concurring declarations being made, however, parties can revoke their consent by way of a unilateral declaration made to the registrar: no justification is needed. (329) The declaration is registered in the civil status register (ZPR). After this 'cooling-off-phase', the arrangement can only be changed by means of a court decision. (330) This is one of the reasons why judicial authorities have to be informed of extra-judicial agreements in matters of parental responsibility. (331) Courts can then, if necessary, invalidate the arrangement and provide differently if the child's welfare would otherwise be jeopardised. (332) The provision was introduced after several parties had expressed the fear that mothers could be pressured into agreeing to joint custody so that fathers would recognise their paternity. (333)

87 (2) *Review procedures.* — If legal uncertainties, contradictions, objections, or other problems arise when accepting the declarations, registrars are required to inform the applicants of the possibility to refer the matter to a court. (334) Overall, agreements have to be rejected if they are considered to be inadmissible. The refusal is usually informal: a formal administrative act (*Bescheid*) is only issued upon express request. As for the respective grounds, an agreement cannot be received if the parties entering into it are not (yet)

---

(326) Cf Eva Ondreasova, '§ 177', in Peter Rummel, Meinhard Lukas, Andreas Geroldinger (eds), *Kommentar zum ABGB. §§ 137–230 ABGB* (4th edn, Manz 2022) para 22.

(327) Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 30 August 2022, rdb.at) I. Abschnitt: Personenstandsgesetz 2013 – ZPR DA 1.3.2.4.

(328) ErlRV 2004 BlgNR XXIV GP 24; Barth, Jelinek, 'Das neue Obsorgerecht' (n 313) 117. Ie, once the respective document is signed by both parents and the registrar.

(329) Acts of representation made before that point remain unaffected and thus valid. The revocation is recorded in three separate documents, one for the party revoking their consent, one for the civil status authority and one for the competent court. The other parent is entitled to be informed in writing.

(330) ErlRV 2004 BlgNR XXIV GP 24.

(331) See § 67(5) PStG 2013; § 109(3) AußStrG 2005.

(332) § 190(2) ABGB.

(333) ErlRV 2004 BlgNR XXIV GP 25.

(334) § 177(3) ABGB.

legally recognised as the child's parents. (335) The same applies if the child's legal parents are not present at the same time and in person, if the civil status authority was already in possession of a judicial settlement, or if it has doubts as to (one of) the parties' legal capacity (336). (337)
Otherwise, agreements can only be amended in court. **88**

(3) *Policy considerations.* — The idea behind the 2013 reform was to provide a simple and unbureaucratic means for unmarried parents to obtain joint custody in non-contentious settings and was based on the assumption that in most of these cases, children are born into marriage-like relationships. (338) In practice, only few parents had opted for the already possible judicial agreements. (339) The explanatory report accompanying the reform had referenced a number of potential reasons for this. While some parents might simply not have been aware of the in-court option (or did not know how parental responsibility was effectively established), the drafters further embraced the idea and highlighted that parents might be reluctant to go to court in order to establish joint custody. (340) To lower the potential threshold and to incentivise unmarried couples to enter into agreements on parental responsibility, the legislator decided to involve certain non-judicial authorities. Given that the birth of a child and acknowledgements of paternity were already registered by civil status authorities, the explanatory report concluded that it seemed sensible and appropriate to further transfer joint custody arrangements to registrars. (341) To further incentivise parents, the agreements can today be entered into before any civil status office, (342) and can be concluded free of charge within the first two years of the child's birth. (343) The possibility to both register civil status events and set the terms for exercising parental responsibility involves less bureaucracy and limits the **89**

---

(335) Cf Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 30 August 2022, rdb.at) § 177 ABGB, paras 7, 9; Ondreasova, '§ 177' (n 326) para 23. This means that the second parent has to previously have acknowledged the child.

(336) This could, eg, be the case if a parent was a minor and thus *ex lege* limited in exercising parental responsibility with regard to their child (see § 158(2) ABGB), cf Höllwerth, '§ 177 ABGB' (n 306) para 3; Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 30 August 2022, rdb.at) § 177 ABGB, para 7.

(337) Cf Ondreasova, '§ 177' (n 326) para 23; Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 30 August 2022, rdb.at) § 177 ABGB, para 7.

(338) ErlRV 2004 BlgNR XXIV GP 24.

(339) Ibid.

(340) Ibid 24–25.

(341) Ibid 25.

(342) § 67(5) PStG 2013.

(343) § 35(6) GebG.

need for courts to intervene. (344) Measures can in any case still be taken when the child's best interests are at stake. For this purpose, agreements concluded before civil status authorities have to be forwarded to the competent court at the child's place of residence that can then review the agreement on its own motion. (345) The notification further justifies removing the authorisation by a guardianship court (*Pflegschaftsgericht*) that had previously been required. (346) The authorisation had generally been reduced to a purely formal act given that both courts and welfare services (*Kinder- und Jugendhilfeträger*) (347) often had little or no information at hand (shortly after the child's birth) that would have allowed a sound assessment on the measures' compatibility with the child's best interests. Similarly, judicial decisions or agreements affecting parental responsibility that were either concluded or authorised in court also have to be electronically transmitted to the competent civil status authority.

b) *Judicial agreements*

90 Parents (348) can in any case also opt for a judicial arrangement. These types of agreement were still considered to be preferable in relation to contentious or complex matters by the report accompanying the 2013 reform. (349) Limitations of one parent's parental rights (*Teilobsorge*) can, for example, still only be addressed in court and thus remain a prerogative of the judiciary. (350) From a procedural standpoint, both parents can either propose an already drafted agreement or come to an agreement before the

---

(344) ErlRV 2004 BlgNR XXIV GP 25.

(345) § 67(5) PStG 2013; § 109(3) AußStrG 2005. Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 13 September 2018, rdb.at) § 109 Außerstreitgesetz, para 2 speak of a 'judicial review' ('*unterliegen der gerichtlichen Kontrolle*') in this context.

(346) ErlRV 2004 BlgNR XXIV GP 25. Today further specified in § 190(2) ABGB.

(347) The service can in any case be heard before adopting any measure in the field of care, education and personal contacts, see § 106 AußStrG 2005.

(348) Both for married and unmarried couples. With regard to married couples, parental responsibility only ends once the marriage is dissolved, see Astrid Deixler-Hübner, '§ 177' in Andreas Kletečka, Martin Schauer, *ABGB-ON*[1.08] (15 September 2023, rdb.at) para 11. The provision in § 177(3) ABGB is considered by some to only refer to unmarried couples as otherwise married parents could limit their parental responsibility, see Höllwerth, '§ 177 ABGB' (n 306) para 7. Others concluded that married parents should be entitled to enter into judicial agreements as well, see Gitschthaler, '§ 177 ABGB' (n 305) para 15; Barth, Jelinek, 'Das neue Obsorgerecht' (n 313) 120f; Hinteregger, Ferrari (n 90) 230.

(349) See ErlRV 2004 BlgNR XXIV GP 25 which mentions cases in which it was agreed that one parent could only exercise parental responsibility with regard to certain matters (eg, managing the child's assets). These should be left to courts.

(350) See Ondreasova, '§ 177' (n 326) para 31.

judge. (351) In any case, the latter has to draw up a separate document in the presence of both parents, stating the solution reached by all parties. The only aspect of the arrangement that is reviewed as to its subject matter is its compatibility with the best interests of the child. (352) If the court concludes that the agreement may harm the child, it can adopt any appropriate measures to safeguard the child's well-being. For this purpose, the child has to be heard, as is the case in any proceeding concerning their care, education, and personal contacts. (353) Other authorities or bodies might be involved in this procedural step as well. If a child has not reached the age of ten, for example, if it is indicated by the child's physical/mental state or if the child's statement might otherwise be influenced, the hearing can be carried out by the child and youth welfare services (*Kinder- und Jugendhilfeträger*), professionals assisting family courts (*Familiengerichtshilfe*), (354) or other experts (*Sachverständige*). (355) The child is, however, not heard if a hearing would not be felt to be in their best interests or if, in view of their ability to understand the ongoing proceedings, it is unlikely that they will provide a reasoned statement on the subject matter. (356)

3. *Judicial measures*

Parents that do not exercise parental responsibility can furthermore request **91**
that custody be (exclusively) transferred to them in court proceedings – especially when a case is contentious. (357) The same applies if parents fail to adopt or to agree on necessary measures after the dissolution of their marriage or registered partnership. (358) For a judge to intervene in these cases, the child's well-being does not necessarily have to be at stake. Parental

(351) A standard application can be accessed here, see Österreichische Bundesregierung, 'Formularauswahl. Obsorge - Antrag' <https://www.help.gv.at/at.gv.brz.linkaufloesung/help/applikation-flow?execution=e1s1> accessed 1 June 2025.

(352) Höllwerth, '§ 177 ABGB' (n 306) para 10.

(353) § 105 AußStrG 2005.

(354) Generally, psychologists and social workers are assigned to courts competent in matters of family law. They help judges in gathering relevant information for their decisions, assist all parties in reaching an amicable solution, and support judges when they have to inform the parties of, and during, the ongoing proceedings (§ 106a(1) AußStrG 2005).

(355) § 105(1) AußStrG 2005. Hearings can also be carried out by the services of the youth courts (*Einrichtungen der Jugendgerichtshilfe*).

(356) § 105(2) AußStrG 2005.

(357) § 180(1)(2) ABGB.

(358) § 180(1)(1) ABGB. Under § 179 ABGB, both parents generally maintain parental responsibility after a divorce. They can, however, decide to go to court to adopt new solutions. If their common household ceases to exist, they have to further decide on who the primary caregiver of that child will be. This has to be done in court as well.

responsibility is only transferred after provisionally conferring it on one parent (*Phase der vorläufigen elterlichen Verantwortung*). (359)

92 Similar changes may further take place if one or both parents are permanently or temporarily unable to exercise parental responsibility or if the child's welfare is at risk. (360) In these cases, the respective rights and obligations can be conferred on other parties, following a judicial proceeding. (361) Often, non-judicial authorities are involved. If a child's well-being is prejudiced by the conduct of the parents, for example, courts can generally take all measures required to safeguard the child. (362) This includes measures withdrawing or limiting parental responsibility. While custody is in such cases generally transferred to close relatives or foster parents, (363) certain public authorities competent in matters concerning the welfare of children (*Kinder- und Jugendhilfeträger*, KJHT (364)) can (generally as a last resort) be entrusted with the care of a child as well. (365) Parental rights are, however, only to be limited when and to the extent needed. In any case, judicial decisions relating to custody and access can be changed at any time if the welfare of the child so requires.

93 Procedurally speaking, children over the age of 14 can, in proceedings regarding their care, education, and personal contacts generally act themselves, make applications, and autonomously exercise all of their procedural rights. (366) All documents and decisions have to be served to them and they have to be summoned to all court hearings. (367) A child's legal representative can, however, continue to act on behalf of the child; if their conduct is incompatible with that of the child, judges have to take the motions of both parties into consideration. (368) If children involved in the proceedings have,

---

(359) See § 180(2) ABGB.

(360) Cf §§ 178, 181 ABGB.

(361) See § 178 ABGB. For further details, see Markus Huber, 'Rechte und Pflichten zwischen Eltern und Kindern' in Astrid Deixler-Hübner (ed), *Handbuch Familienrecht* (2nd edn, Linde 2020) 320–331.

(362) § 181(1) ABGB. Some measures are listed in § 107(3) AußStrG 2005.

(363) In particular, grandparents, see, eg, §§ 178, 204 ABGB. The provisions were, in part, declared unconstitutional by VfGH G 223/2022 (the decision takes effect from 1 January 2025).

(364) A list can, eg, be found under: Bundeskanzleramt, 'Träger der Kinder- und Jugendhilfe' <https://www.bundeskanzleramt.gv.at/agenda/familie/begleitung-beratung-hilfe/kinder-und-jugendhilfe/traeger-kinder-jugendhilfe.html> accessed 1 June 2025.

(365) Provided that other (less incisive) measures are considered to be inadequate; for further details, see Huber, 'Rechte und Pflichten' (n 361) 320–331.

(366) See § 104(1) AußStrG 2005.

(367) Astrid Deixler-Hübner, '§ 104' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) paras 2–3.

(368) See § 104(2) AußStrG 2005.

however, not yet reached the above-mentioned age, an additional representative (*Kinderbeistand*) has to be appointed. (369)

4. *Extra-judicial measures*

The child and youth welfare services (370) (KJHT) play an important role in **94**
proceedings regarding parental responsibility. (371) They are public bodies entrusted with informing, counselling, and assisting parents and families in the care and upbringing of their children as well as in assessing potential threats to a child's well-being. (372) Child and youth welfare services can be involved in the upbringing of a child in a number of ways. The measures they adopt are either based on an agreement with the persons exercising parental responsibility (*Erziehungshilfen aufgrund einer Vereinbarung*) or, in case no agreement can be reached, on the grounds of a judicial decision (*Erziehungshilfen aufgrund einer gerichtlichten Verfügung*). (373) Lastly, if the child's

---

(369) See § 104a AußStrG 2005. See Martin Menne, 'Kinderbeistand versus Verfahrensbeistand – ein Vergleich zweier innovativer Rechtsinstitute. Herleitung, Rechtsgrundlagen und Anwendungsbereich' (2023) 18 iFamZ 309–315.

(370) The KJHT correspond to the federal states (*Länder*)/municipalities (*Bezirksverwaltungsbehörden*), see originally § 10 B-KJHG 2013.

(371) As for the legal basis, see Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Bundes-Kinder- und Jugendhilfegesetz 2013 – B-KJHG 2013), BGBl I 2013/69. The federal states implemented the act as well: Gesetz vom 6. November 2013 über die Kinder- und Jugendhilfe (Tiroler Kinder- und Jugendhilfegesetz – TKJHG), LGBl 2013/150; Gesetz über die Kinder- und Jugendhilfe (Vorarlberger Kinder- und Jugendhilfegesetz – V-KJH-G), LGBl 2013/29; Gesetz über die Kinder- und Jugendhilfe im Land Salzburg (Salzburger Kinder- und Jugendhilfegesetz – S.KJHG), LGBl 2015/32; Gesetz vom 15. Oktober 2013 über die Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Steiermärkisches Kinder- und Jugendhilfegesetz – StKJHG), LGBl 2013/138; NÖ Kinder- und Jugendhilfegesetz (NÖ KJHG), LGBl 9270-0; Landesgesetz über die Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Oö Kinder- und Jugendhilfegesetz 2014 – Oö KJHG 2014), LGBl 2014/30; Gesetz vom 14. November 2013 über die Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Burgenländisches Kinder- und Jugendhilfegesetz – Bgld KJHG), LGBl 2013/62; Gesetz vom 21. November 2013 über die Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Kärntner Kinder- und Jugendhilfegesetz – K-KJHG), LGBl 2013/83; Wiener Kinder- und Jugendhilfegesetz 2013 – WKJHG 2013, LGBl 2013/51.

(372) See Astrid Deixler-Hübner, Jürgen Schmidt, 'Ausgewählte Fragen zur Obsorge und zum Kontaktrecht im Pflegekindschaftswesen. Insb zur verfahrensrechtlichen Stellung des Kinder- und Jugendhilfeträgers' (2015) 10 iFamZ 271, 271.

(373) Peter Wienerroither, 'Der Kinder- und Jugendhilfeträger als Gerichtsorgan? Anmerkungen zur verfahrensrechtlichen Stellung' (2016) 11 iFamZ 75, 75. A different viewpoint is expressed by Jürgen Schmidt, 'Der Kinder- und Jugendhilfeträger ist kein Gerichtsorgan, aber ... Grundsätzliche Anmerkungen' (2016) 11 iFamZ 76, 76-77.

welfare is at risk and it is presumed that their interests can better be guaranteed outside of their current environment, children can be physically removed from their family (*volle Erziehung*). (374)

95 As the authorities responsible for child and youth welfare, the *Kinder- und Jugendhilfeträger* have been entrusted with filing any application for court orders necessary to safeguard an endangered child. (375) In the event of imminent risks, they are further entitled to take any necessary measures concerning the care and upbringing of a child; the respective (provisional) measures are effective until a judicial decision is made. (376) Parental responsibility is in the aforementioned matters *ex lege* transferred to the competent service. (377) The court decision (confirming or rejecting the measure/decision of the KJHT) has to be requested within eight days; its legitimacy can moreover be reviewed upon request by the child and the person(s) exercising parental responsibility. (378) The child has to be heard during the judicial review. While the respective provision speaks, with regard to welfare services, of 'decisions', the latter are not considered to exercise public (sovereign) powers when taking the interim measures in question. (379) Some have expressed different opinions. (380) The child and youth welfare services are, however, generally not qualified as bodies of the judiciary or institutions of a court. (381)

96 Parties can further conclude binding agreements on maintenance payments before the child and youth welfare authorities or, if the latter were entrusted with parental responsibly, with them; a judicial authorisation is not re-

---

(374) Provided that the child and youth welfare organisation is fully entrusted with the care and upbringing. Details on all mentioned measures are contained in the regional acts accompanying the B-KJHG 2013, see n 370.

(375) § 211(1) ABGB.

(376) Ibid.

(377) Johann Höllwerth, '§ 211 ABGB' in Peter Bydlinski, Stefan Perner, Martin Spitzer (eds), *ABGB. Kommentar (KBB)* (7th edn, Verlag Österreich 2023) para 2.

(378) § 211(1) ABGB, § 107a(1) AußStrG 2005.

(379) VfGH B 881/06; OGH 1 Ob 211/20s. OGH 1 Ob 49/05w and 1 Ob 58/05v still considered them to be 'authoritative'.

(380) Eg, RIS-Justiz RS0120111.

(381) Wienerroither, 'Der Kinder- und Jugendhilfeträger als Gerichtsorgan?' (n 373) 75; Höllwerth, '§ 211 ABGB' (n 377) para 2; Hans Weitzenböck, '§ 211 ABGB' in Georg Kodek, Michael Schwimann (eds), *ABGB Praxiskommentar* vol I (5th edn, Lexis Nexis 2018) para 3. A slightly different viewpoint is expressed by Schmidt, 'Der Kinder- und Jugendhilfeträger' (n 373) 76f.

quired. (382) If the arrangements concern children, they have the same effects as enforceable court settlements. (383)

97 Child and youth welfare services further play an important role as regards foster care. Foster parents who intend to take care of a child from often difficult social/economic circumstances for a specific (or indefinite) period of time have to gain approval from the competent child and youth welfare services as to their eligibility and suitability (*Pflegebewilligung*). The approval is issued by the service, without the need for a judicial authority to become involved. (384) Such approval is generally only given when other close relatives cannot take the child temporarily into their custody.

98 Due to the high workload and range of overall competences, the government intended to relieve the public welfare services by introducing a new body competent for specific matters connected to parental responsibility, the so-called *Familiengerichtshilfe*. (385) The intention was to introduce a judicial (386) service composed of psychologists and social workers supporting family courts in various matters, in particular, helping them with collecting relevant information, carrying out inquiries, and thus factually laying the grounds for any potential judicial decisions. (387) Competences further include social work, drafting psychological reports, and opinions and attempting to find amicable agreements between all parties, while providing them with sufficient information on both custody and contact proceedings. (388) In relation to visitation rights, courts can further appoint them as mediators (*Besuchsmittler*). (389) The service, ie its professionals, carries out these tasks on behalf of the competent court and thus only acts if and insofar as it (they) has (have) been instructed to do so by the competent judicial

---

(382) § 210(2) ABGB. Cf Moritz Zoppel, 'Das Pflichtenprogramm des Kinder- und Jugendhilfeträgers beim Abschluss von Unterhaltsvereinbarungen' (2023) 1 ÖJA 66, 66ff.

(383) See also Article 2(1)(2) of the Maintenance Regulation. Cf Matthias Neumayr, 'Verbindlichkeit von Unterhaltsvereinbarungen vor dem KJHT' (2021) 16 iFamZ 84, 84.

(384) Cf Peter Barth, Martina Erlebach, *Kindschaftsrecht für Sozial- und Gesundheitsberufe* (Linde 2018) 20-21.

(385) § 106a AußStrG 2005.

(386) The service was qualified as an organ of the judiciary (*Organ der Justiz*), eg, by Wienerroither, 'Der Kinder- und Jugendhilfeträger als Gerichtsorgan?' (n 373) 75.

(387) § 106a(1) AußStrG 2005. See Astrid Deixler-Hübner, '§ 106a' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 3. The staff was to be recruited from among social workers, and psychologists by the competent agencies of the judiciary, see ErlRV 2004 BlgNR XXIV GP 10.

(388) See ErlRV 2004 BlgNR XXIV GP 7, 10, 35; Deixler-Hübner, '§ 106a' (n 387) para 3; Deixler-Hübner, Schmidt, 'Ausgewählte Fragen zur Obsorge' (n 372) 271.

(389) § 106b AußStrG 2005.

body. (390) For these purposes, they are entitled to visit individuals who could provide information about a child, to summon them for questioning, and to establish direct contact with the child; in any case, they have to comply with orders issued by the competent judicial authorities. (391) Coercive measures under § 79(2) AußStrG 2005 can only be taken by the latter. (392)

99 Specific obligations were further introduced in relation to the cooperation of other authorities. Welfare services, for example, are obliged to provide any relevant information to the experts assisting the family courts. (393) The same applies to the police, the public prosecutor's offices, courts and bodies in charge of the education, care and treatment of minors (eg schools, kindergartens, day nurseries and children's homes). (394) The reform further extended the rules on the rejection of an expert witness (*Sachverständiger*) to the professionals assisting family courts. (395)

100 While the number of professionals and courts was initially limited, it has gradually been extended to cover all districts. (396)

5. *Qualifications under private international law*

101 The European Commission was notified of the fact that, under Article 103 of the Brussels IIb Regulation, Austria's civil status authorities are bodies authorised to issue authentic instruments relating to parental responsibility. (397) The result of their activity in matters of parental responsibility of unmarried parents was thus not considered to qualify as an agreement under Article 2(2)(3) of the Regulation. Moreover, it was the district courts that were entrusted with issuing the 'certificates concerning an authentic instrument or agreement in matters of parental responsibility' provided for under Article 66 and Annex IX of the Regulation. If parents, consequently, wish to

---

(390) ErlRV 2004 BlgNR XXIV GP 35.

(391) Ibid.

(392) Ibid 36.

(393) § 106a(3) AußStrG 2005.

(394) Ibid. Only with regard to the child and youth welfare services, however, could the *Familiengerichtshilfe* not access the respective files.

(395) § 106a(4) AußStrG 2005. See also, §§ 355, 356 ZPO.

(396) See Astrid Deixler-Hübner, 'Vor § 106a' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 3; ErlRV 2004 BlgNR XXIV GP 1.

(397) Cf European Union, 'Brussels IIb Regulation - Matrimonial matters and matters of parental responsibility (recast)' <https://e-justice.europa.eu/37842/EN/brussels_iib_regulation-__matrimonial_matters_and_matters_of_parental_responsibility_recast_?AUSTRIA&member=1> accessed 1 June 2025. No authority was notified as being competent to issue agreements pursuant to Article (2)(2)(3).

obtain such a certificate, they have to request it at the competent district court. (398) It seems questionable whether this approach corresponds to the initial idea of the 2013 reform to cut red tape and to limit the need of parents to go to court. Regardless of the notification and the competence to draw up the respective certificates under the Brussels IIb Regulation, it might not be too far-fetched to assume that the agreements concluded before a civil status registrar (that are enforceable and entered into a national register) could circulate as agreements (399) under Brussels IIb – especially taking the latest case-law of the Court of Justice into consideration. (400)

Similar considerations concern interim measures adopted by child and youth welfare services. As stated before, if a child's well-being is at stake, the child and youth welfare services can adopt (provisionally) binding measures necessary to safeguard the child in question. Other competences relate to the placement of children, including the placement in another Member State. The Brussels IIb Regulation's definition of 'decision' includes such provisional measures, further adopting a functional definition of the concept of 'court'. (401) Nevertheless, in practice, the qualification of the child and youth welfare services as courts for the purposes of the Regulation remains ambiguous. (402)

102

(398) See §§ 109, 110 JN.

(399) The agreements concluded before a civil status registrar are enforceable as required under Article 65 Brussels IIb, see § 110(1)(3) AußStrG 2005.

(400) At least, when comparing what actually occurs in the present case with what is done by an Italian registrar in out-of-court divorce proceedings. See Case C–646/20 *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB* [2022] ECLI:EU:C:2022:879. The decision states that if a competent extra-judicial authority approved an agreement, after examining its substance matter, it would have to be recognised as a 'judgment'.

(401) See Article (1) Brussels IIb.

(402) The services were, however, qualified as 'courts' for the purposes of the Brussels IIa Regulation (especially when the persons exercising parental responsibility did not agree to the measure adopted by the KJHT) by Christine Miklau, 'Die Unterbringung Minderjähriger im Ausland unter Mitwirkung des Jugendwohlfahrtsträgers' (2010) 5 iFamZ 51, 52–54. Interestingly, different views were expressed by the welfare services themselves; they (and the department competent for matters of international family law at the Ministry of Justice) were contacted for the purposes of this report and expressed non-binding opinions. While the responses that were given varied, there seemed to be a consensus on the qualification of the service as an administrative authority. Some highlighted, however, that the latter would be considered as courts under Brussels IIb anyway and referred in particular to their competences under Article 82 of the Regulation that concerns the placement of a child in another Member State, and under the Hague Child Protection Convention. Others remained more cautious.

E. *Matrimonial property regimes*

1. *Statutory regime*

103 The statutory matrimonial (and partnership) regime in matters of relationship property is the separation of property. (403) Thus, if spouses (or partners) have not entered into any agreement on the use of their property, they retain their previous rights of ownership, and generally have no direct claims with regard to any assets acquired during the marriage by their partner. (404) Both parties are in general free to dispose of their assets, (405) are not bound by transactions entered into by their partner, (406) and are in principle only liable for debts they themselves incurred. (407)

2. *Agreements*

104 At any point during their relationship, spouses or registered partners can, however, deviate from the statutory regime by way of agreements (*Ehepakte*). (408) These agreements can, for the most part, only be entered into before a notary. (409) While the ABGB only showcases the community of

---

(403) § 1237 ABGB. If not otherwise specified, the mentioning of 'spouse' or 'marriage' includes 'partner' or 'partnership'.

(404) §§ 1233, 1237 ABGB. There are no legal presumptions as to the attribution of property. Furthermore, there is no legal obligation to draw up inventories regarding each spouse's property.

(405) Unless they limited their freedom in administering their property by entering into specific agreements with their spouse (§ 364c AGBGB). Other relevant provisions are, eg, § 13(4) WEG and § 97 ABGB.

(406) Spouses who run the joint household and who have no (or only a small) income can, however, represent the other spouse in everyday legal transactions concluded for the joint household and which do not exceed a level corresponding to the standard living conditions of the spouses (§ 96 ABGB). This scenario is referred to as 'agency implied in fact' (*Schlüsselgewalt*). See Susanne Beck, '§ 96 ABGB' in Edwin Gitschthaler, Johann Höllwerth (eds), *Ehe- und Partnerschaftsrecht. Kommentar* (2nd edn, Verlag Österreich 2022) paras 1ff.

(407) The so-called 'agency implied in fact' (*Schlüsselgewalt*) constitutes an exception to that rule. If third parties cannot recognise from the circumstances that the acting spouse is acting as a representative, then both spouses are jointly and severally liable.

(408) § 1217 ABGB. It should be stressed that all rules concerning relationship property agreements also apply to registered partners. For details, see the comments by Gregor Christandl and Christine Hampton in Attila Fenyves, Ferdinand Kerschner, Andreas Vonkilch (eds), *Großkommentar zum ABGB – Klang Kommentar. §§ 1217–1266 ABGB* (3rd edn, Verlag Österreich 2024).

(409) § 1 NotAktG.

property (*Gütergemeinschaft*), (410) and inheritance contracts (*Erbverträge*) as potential alternatives, (411) partners are generally free to adopt any solution they see fit: a *numerus clausus* does not exist. (412)

105 Spouses can furthermore draft binding (413) advance agreements (*Vorausvereinbarungen*) on the division of their savings or of the family home in case of divorce (or the dissolution of their registered partnership). (414) The same goes for the division of their common marital (partnership) property (*eheliches/partnerschaftliches Gebrauchsvermögen* (415)). Only in the first case (savings and family home), however, do notaries have to become involved, while, with regard to the latter, a written agreement suffices to meet the legal requirements. (416) When property is to be divided, the agreements are generally subject to a judicial review to counter any potential hardship the economically weaker partner might face. If disputes arise, the agreements have in any case to be enforced or challenged in contentious judicial proceedings. (417)

106 The agreements thus either take effect immediately (*Ehepakte*), in the event of death of one of the spouses (partners) (*Erbverträge*) or in the case of divorce (or dissolution of their registered partnership) (*Vorausvereinbarungen*). Given that the agreements are an expression of party autonomy, they can – again, in contentious proceedings – be reviewed under the general rules

---

(410) §§ 1233–1236 ABGB. The community can either be *inter vivos* (§ 1235 ABGB: concerning all [already existing and future] or only a part of the relationship property) or – generally – *mortis causa* (§ 1234 ABGB: spouses apply the separation regime until their death; once a partner dies, the assets become community property which, after having deducted any debts, is then divided into two halves).

(411) §§ 602, 1249–1254 ABGB. In them, one (or both) spouse(s) designate(s) the (or each) other as (the) heir(s). Spouses can, however, only dispose of three quarters of their estate.

(412) Parties only have to comply with mandatory rules, and can thus, for example, not waive their right to a division of the family chattels (*Gebrauchsvermögen*), see 673/A XXIV GP, 33.

(413) Courts are in principle bound by these advance agreements but can provide otherwise under certain conditions, see § 97(2) and (3) EheG; § 40(2) and (3) EPG; also, 673/A XXIV GP, 19 (explanatory report to the FamRÄG 2009).

(414) § 97(1) EheG; § 40 EPG; on these advance directives, see Michael Schwimann, 'Neues Recht für Vereinbarungen über nacheheliche Vermögensaufteilung' (2009) 5 Zak 323, 323ff; Edwin Gitschthaler, 'Die neuen Vorwegvereinbarungen nach dem FamRÄG 2009' (2010) 5 EF-Z 9, 9ff; Gerhard Hopf, 'Neues im Ehe- und Kindschaftsrecht. Änderungen des ABGB und des EheG durch das FamRÄG 2009' (2010) 65 ÖJZ 154, 154ff.

(415) Defined in § 81(2) EheG; § 24(2) EPG.

(416) § 97(1) EheG; § 40(1) EPG.

(417) Susanne Beck, '§§ 93–96 AußStrG' in Edwin Gitschthaler, Johann Höllwerth (eds), *Ehe- und Partnerschaftsrecht. Kommentar* (2nd edn, Verlag Österreich 2022) para 43.

of contract law (418) and are potentially subject to the specific rules (powers, obligations) governing the notarial profession, in particular the *Notariatsordnung* (NO 1871).

3. *Division of relationship property*

107 Relationship property has to be divided after the breakdown of the partners' relationship. (419) All parties are entitled to such a division within one year from the date on which the decision on the dissolution of their relationship became final. (420) The respective claim primarily aims to equally (and equitably) allocate any assets acquired during the relationship between both partners, further safeguarding the best interests of the child. (421) In addition, the aim is to avoid future property-related disputes between the ex-partners. (422)

108 If certain assets cannot be divided or assigned, parties are entitled to a payment instead. The division has to take the contribution (423) of both partners to the acquisition of the relationship property as well as to potential savings into account. (424) Procedurally, the division is governed by the AußStrG 2005. (425)

---

(418) Astrid Deixler-Hübner, 'Aufteilung des Ehevermögens' in Astrid Deixler-Hübner (ed), *Handbuch Familienrecht* (2nd edn, Linde 2020) 949.

(419) §§ 81–98 EheG; §§ 24–41 EPG. If the relationship ends due to the death of a spouse/registered partner, the rules of succession law and not those on the division apply; the separation of property is thus upheld. The rules of the EheG/EPG take precedence over the provisions of the ABGB (in particular, § 1266 ABGB), see RIS-Justiz RS0022395, RS0022434; Michael Bydlinski, '§ 1266 ABGB' in Peter Rummel, Meinhard Lukas (eds), *Kommentar zum ABGB. §§ 1175–1292 (GesbR, Vertragstypen III)* (4th edn, Manz 2019) para 4. This generally does not apply to the binding advance agreements of § 97 EheG and § 40 EPG.

(420) § 95 EheG; § 38 EPG.

(421) See Hinteregger, Ferrari (n 90) 141. Some exceptions to the equalisation are provided for with regard to the common dwelling. Spouses are not entitled to profit from increases in the value of assets of the other spouse/partner. The system was described as a *Zugewinnausgleich sui generis* by Hinteregger, Ferrari (n 90) 84 and Deixler-Hübner, 'Aufteilung des Ehevermögens' (n 418) 946.

(422) Cf § 84 EheG and § 27 EPG.

(423) The payment of maintenance, assistance in earning a living, unless otherwise compensated, the running of a common household, the care and upbringing of common children and any other assistance is also deemed to be a contribution, see § 83(2) EheG; § 26(2) EPG.

(424) § 83 EheG; § 26 EPG.

(425) In particular, §§ 93–96 AußStrG 2005. The rules apply to registered partnerships respectively, see § 43(1)(2) EPG.

a) *Non-judicial division*

109 The non-judicial and consensual division of assets belonging to the partners was envisaged as the preferred method as regards the distribution of relationship property at the end of a marriage or registered partnership. (426) Only if no contractual agreement (*Aufteilungsvereinbarung*) could be reached did spouses (or registered partners) still have to resort to (non-contentious) judicial proceedings. (427) While the 2009 family law reform favoured agreements concluded during divorce proceedings, it further extended the options available to spouses (and partners) when they intended to conclude advance agreements for the division of their relationship property. (428) For these purposes, it was decided that the former type of agreement (ie those concluded during divorce/dissolution proceedings) generally did not have to meet any formal requirements. (429) The general rules on the law of obligations were to apply; not, however, the rules on the judicial review set in place for advance agreements. (430) Only if agreements were entered into outside of divorce (or partnership) proceedings (and thus in the case of the above-mentioned advance agreements) did specific requirements have to be met. Courts were nevertheless generally bound by the solutions adopted by the partners. (431)

110 While advance agreements are in principle binding for the parties as well and take effect with the divorce/dissolution of the registered partnership, they can be challenged under the general rules of contract law and on declarations of intent. (432) If matters become contentious, regardless of whether agreements were previously reached or not, courts always have to become involved.

---

(426) See the explanatory report, 673/A XXIV GP, 33, and Deixler-Hübner, 'Aufteilung des Ehevermögens' (n 418) 947, 948; Beck, '§§ 93–96 AußStrG' (n 417) para 45.

(427) § 85 EheG; § 28 EPG.

(428) See FamRÄG 2009. Cf its explanatory report: 673/A XXIV GP, 33. Former reforms include the Bundesgesetz vom 15. Juni 1978 über Änderungen des Ehegattenerbrechts, des Ehegüterrechts und des Ehescheidungsrechts (EheRÄG 1978), BGBl 1978/280 and the 6. Durchführungsverordnung zum Ehegesetz vom 21. Oktober 1944 (6. DVEheG), RGBl I S 56.

(429) See § 97(5) EheG; § 40(5) EPG. OGH 7 Ob 685/85.

(430) Deixler-Hübner, 'Aufteilung des Ehevermögens' (n 418) 955–956. § 97(2)–(4) EheG and § 40(2)–(4) EPG consequently do not apply to agreements concluded in the course of divorce/dissolution agreements.

(431) See § 97(2) and (3) EheG; § 40(2) and (3) EPG.

(432) Cf Astrid Deixler-Hübner, '§ 97 EheG' in Edwin Gitschthaler, Johann Höllwerth (eds), *Ehe- und Partnerschaftsrecht. Kommentar* (2nd edn, Verlag Österreich 2022) para 33; Johannes Stabentheiner, Joachim Pierer, '§ 97 EheG' in Peter Rummel, Meinhard Lukas (eds), *Kommentar zum ABGB. §§ 44–136 (Eherecht)* (4th edn, Manz 2021) para 4; Gerhard Hopf, Georg Kathrein (n 62) § 97 EheG, para 9; Hinteregger, Ferrari (n 90) 132.

b) *Judicial division*

111 In case no agreement could be reached or if disputes arise, parties have to resort to judicial proceedings for the division of their relationship property (*Aufteilungsverfahren*). (433) Similar considerations justify a judicial involvement in cases in which the arrangements adopted in advance agreements are deemed harmful to one of the spouses (partners); advance (and other) agreements are otherwise to be preferred over the statutory division rules. (434)

112 The judicial division requires the competent district court (435) to define the property relations between both parties and to equally allocate the assets originally forming the relationship property. (436) The property orders thus adopted shape the property consequences of the divorce/dissolution of the registered partnership and constitute enforceable titles. (437) This constitutes one of the reasons why spouses (partners) have to be represented by a lawyer in the respective proceedings. (438) When dividing commonly used assets (*Gebrauchsvermögen*), courts exercise a range of discretionary powers. They can, for example, order the transfer of ownership of movable property or remainders thereto as well as the transfer of ownership and other rights regarding immovables, (439) which can further be subject to rights *in rem* or obligations in favour of one of the spouses (partners). (440) Similar rules apply to the allocation of the family home. (441)

113 When it comes to the division of savings, courts can either proceed to transfer specific assets from one party to the other or establish rights

---

(433) The proceedings are oral, see § 94(1) AußStrG 2005.

(434) See § 97 EheG; § 40 EPG. Also cf Bydlinski, '§ 1266 ABGB' (n 419) para 4; Deixler-Hübner, 'Aufteilung des Ehevermögens' (n 418) 946.

(435) See § 104a JN. Competence thus generally lies with the district court of the (last) common residence of the spouses/partners. For further details: Deixler-Hübner, 'Aufteilung des Ehevermögens' (n 418) 959–961; Astrid Deixler-Hübner, 'Vor 93' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) paras 2–3.

(436) Johannes Stabentheiner, Joachim Pierer, '§ 93 EheG' in Peter Rummel, Meinhard Lukas (eds), *Kommentar zum ABGB. §§ 44–136 (Eherecht)* (4th edn, Manz 2021) para 1; OGH 6 Ob 586/80.

(437) See Gerhard Hopf, Georg Kathrein (n 62) § 93 EheG, para 1.

(438) § 93(1) AußStrG 2005.

(439) See § 86(1) EheG; § 29(1) EPG. If the assets used by both partners during their relationship belonged to a third party, the latter has to consent to any measure that a court intends to adopt, see § 86(2) EheG; § 29(2) EPG.

(440) See § 86(1) EheG; § 29(1) EPG.

(441) § 87 EheG; § 30 EPG. Specific rules are further contained in § 88 EhG and § 31 EPG, should the family home be connected to an employment situation of one of the partners.

concerning the use of an apartment. (442) In any case, immovables should only be transferred and rights *in rem* only be created if an equitable solution could otherwise not be found. (443)

114 To ensure that no asset is withdrawn before the relationship property can be divided by way of an agreement or a judicial decision, judges are moreover required to take the value of any seemingly withdrawn assets into consideration. (444) The same applies if relationship assets or savings were introduced into an enterprise of one or both of the spouses (partners). In that case, the value of the respective assets generally has to be considered during the division. (445) In its decision, courts should indicate how and when their property orders are to be implemented and fulfilled. (446) Indications and solutions can furthermore be found in judicial settlements (*gerichtliche Vergleiche*). (447)

115 Should the latter not be possible or feasible, courts can resort to the ordering of compensatory payments (*Ausgleichszahlung*). (448)

4. *Qualifications under private international law*

116 The functions that Austrian notaries carry out in matters of relationship property, especially as regards agreements, are generally not considered to be judicial in nature. (449) Legal writings by Austrian scholars thus in principle do not assume that notaries fall under the definitions of 'court' in Article 3(2) of the EU's Matrimonial Property Regulation and the Property Regulation of Registered Partners; they are consequently not bound by the respective provisions on jurisdiction. (450) In contentious settings, cases ultimately end up before an institutionalised judicial authority, the district court. (451)

---

(442) See § 89 EheG; § 32 EPG.

(443) See § 90(1) EheG; § 33(1) EPG.

(444) § 91(1) EheG; § 34(1) EPG.

(445) § 91(2) and (3) EheG; § 34(2) and (3) EPG.

(446) § 93 EheG; § 36 EPG.

(447) See § 55a(2) EheG (*Scheidungsfolgenvereinbarung*); § 15(5) EPG. An authorisation by a court competent in matters for the protection of children, ie, the guardianship court (*Pflegschaftsgericht*), is for these purposes no longer required, see § 190(2) ABGB.

(448) § 94 EheG; § 37 EPG.

(449) See Bea Verschraegen, 'Art 3 EuEhegüterVO' in Edwin Gitschthaler (ed), *Internationales Familienrecht* (Verlag Österreich 2019) para 23.

(450) See Verschraegen, 'Art 3 EuEhegüterVO' (n 449) para 23; Barbara Köllensperger, 'Annahme und Vollstreckbarkeit öffentlicher Urkunden und gerichtlicher Vergleiche' in Stefan Arnold, Simon Laimer (eds), *Die Europäischen Güterrechtsverordnungen. Internationales Ehegüterrecht und Güterrecht für LebenspartnerInnen in Europa* (Verlag Österreich 2019) 306, para 12; Florian Heindler, '§ 19 IPRG Anh' in Peter Rummel, Meinhard Lukas, Andreas

117 This is further in line with the official stand taken by Austria that did not inform the Commission of any non-judicial authorities or legal professionals pursuant to Article 65 of both Regulations respectively. (452) Both marriage contracts (*Ehepakte*) and advance agreements (*Vorausvereinbarungen*) drawn up by Austrian notaries are rather to be qualified as mere public documents. (453) Both are moreover covered by the definitions of matrimonial (partnership) property agreements under the Regulations. (454)

118 Court settlements in relationship property cases can in Austria – for the purposes of the Regulations (455) – generally only be entered into before judicial authorities. (456) Notaries are not competent in these matters. (457) The settlements are governed by § 30 AußStrG 2005 and also cover settlements initiated upon request of one of the interested parties (*prätorischer Vergleich*) (458) or settlements restating the contents of agreements previously reached in mediation procedures (*Mediationsvergleich*). (459) (460)

Geroldinger (eds), *Kommentar zum ABGB. IPR*, vol I (4th edn, Manz 2023) para 17; Brigitta Lurger, Karl Stöger, Romina Herz, 'JuWiLi Study 2022. Legal Part' (n 18) 49; Daphne-Ariane Simotta, 'Die internationale Zuständigkeit nach den geplanten Europäischen Güterrechtsverordnungen' in Bernhard König, Peter G Mayr (eds), *Europäisches Zivilverfahrensrecht in Österreich* vol IV (Manz 2015) 86 seemingly comes to the same conclusion. Without specific reference to the role of Austrian notaries: Alexander Meisinger, 'Zuständigkeit, Anerkennung und Vollstreckung nach den EU-Güterrechtsverordnungen. Kritische Analyse „prozessualer" Fragestellungen' (2018) 13 iFamZ 48, 51. With regard to Austrian notaries not being bound by the rules on jurisdiction of the Regulation, see also Österreichische Notariatskammer, 'Couples in Austria' <https://www.coupleseurope.eu/couples-in-austria> accessed 1 June 2025.

(451) § 49(2)(2b) and (2d) JN as well as § 104a JN. See Simotta, 'Die internationale Zuständigkeit' (n 450) 86.

(452) See European Union, 'Matters of matrimonial property regime. Finding Competent Courts/Authorities' <https://e-justice.europa.eu/559/EN/mattersof_matrimonial_property_regimes?AUSTRIA&init=true&member=1> accessed 1 June 2025; and European Union, 'Matters of the property consequences of registered partnerships. Finding Competent Courts/Authorities' <https://e-justice.europa.eu/560/EN/matters_of_the_property-_consequences_of_registered_partnerships?AUSTRIA&member=1> accessed 1 June 2025.

(453) See Köllensperger, 'Annahme und Vollstreckbarkeit' (n 450) 305, para 8.

(454) Article 3(1)(b) of the Matrimonial Property Regulation; Article 3(1)(c) of the Property Regulation of Registered Partners. On the qualification, see Luca Baldovini, 'Die europäischen Güterrechtsverordnungen Anwendungsbereich, Abgrenzung und Kollisionsrecht' (2018) 13 iFamZ 39, 46.

(455) Article 3(1)(f) of the Property Regulation of Registered Partners; Article 3(1)(e) of the Matrimonial Property Regulation.

(456) Köllensperger, 'Annahme und Vollstreckbarkeit' (n 450) 306, para 12.

(457) See § 1(2)(2) GKG.

(458) See § 433 ZPO, § 30(3) AußStrG 2005.

(459) See § 433a ZPO.

III. Succession law

A. *Notaries as court commissioners in Austrian succession proceedings*

Succession rights describe situations in which certain individuals – heirs – are entitled to acquire entire estates or specific parts of them from a deceased. (461) While the succession right is acquired at the moment of death, (462) in Austria, the estate is not immediately transferred to the heirs, who legally acquire the inheritance only with the so-called *Einantwortung*. (463) The devolution of the estate does, consequently, not take place *ipso jure* at the moment of death of the *de cuius* but only at the end of formal proceedings (*Verlassenschaftsverfahren*). (464) Only at that point, and if the parties have accepted the inheritance and provided proof of their legal title, is the estate legally transferred to them. (465) It is this transfer that is referred to as *Einantwortung*. (466) Up to that point and from the moment of death, the estate (*Verlassenschaft* (467)) is 'ownerless' and considered to be a separate legal person. (468) **119**

While the transfer formally constitutes, and ultimately remains, a judicial decision, most steps leading to it are not carried out by a court, but by non-judicial actors, in particular, notaries, who prepare the judicial decision. When carrying out tasks in succession proceedings on behalf of courts, notaries act as so-called 'court commissioners'. **120**

While the latter were never considered to be courts in the institutional sense of the word (and for the purposes of the *Bundes-Verfassungsgesetz* (B-VG), the Austrian Constitution (469)), they were – from the 1850s onward – **121**

---

(460) Cf Köllensperger, 'Annahme und Vollstreckbarkeit' (n 450) 307, para 13.

(461) Cf § 532 ABGB. Several heirs form a community of heirs (*Erbengemeinschaft*); the share of each co-heir is based on their share in the inheritance (§ 550 ABGB).

(462) Provided that it was not subject to a condition (§§ 696, 703 ABGB).

(463) Cf OGH 4 Ob 130/30.

(464) §§ 547, 797 ABGB; § 184 AußStrG 2005. In case the estate is heirless (*erblose Verlassenschaft*), it is transferred to the State by means of a judicial decision (*Übergabebeschluss*). The procedure is referred to as *Aneignung durch den Bund*, see §§ 750, 823–824, 1487a ABGB.

(465) See Susanne Ferrari, 'Der Erwerb der Erbschaft' in Susanne Ferrari, Gundula Maria Likar-Peer (eds), *Erbrecht. Handbuch* (2nd edn, Manz 2020) para 12.1.

(466) Explicitly defined in § 797(1) ABGB: 'Übergabe in den rechtlichen Besitz der Erben'.

(467) Defined in § 531 ABGB as the rights and liabilities of the deceased that are not of a highly personal nature.

(468) See § 546 ABGB.

(469) Bundes-Verfassungsgesetz (B-VG), BGBl 1930/1. The delegation of tasks to notaries is viewed by some as unproblematic from a constitutional point of view, see Edgar

entrusted with carrying out tasks that were traditionally considered to be judicial. (470) Over 150 years later, in 2023, just under 90,000 deaths were recorded in Austria. In many of these cases, court commissioners have to get involved. (471) Today, notaries thus play a vital role in the non-judicial administration of justice in succession matters.

122 The administration itself is governed by a number of provisions. Rules of substantive succession law are codified in the ABGB. Procedural provisions, on the other hand, are to be found both in the AußStrG 2005 (472) and the *Gerichtskommissärsgesetz* (GKG) (an Act governing the Functions of Notaries in Succession Proceedings).

1. *Policy considerations*

123 Initially, back in the 1850s, practical considerations led to the transfer of tasks from courts to notaries. It was held that courts – already having to deal with a high caseload after a restructuring of the judicial system and with State courts widely taking over from so-called (private) patrimonial courts (*Patrimonialgerichte*) (473) – were not to be further burdened with private (and non-contentious) affairs of citizens. (474) Notaries were considered apt to step up and to exercise certain functions originally falling within the competences of the courts. (475) This gave new life to the notarial profession that had been ignored for decades. The delegation thus primarily intended to discharge

---

Triebnigg, 'Die Bundesverfassung, die Notare und die Rechtspfleger' (1961) 93 Österreichische Notariats-Zeitung 50, 52 and, in particular, Kurt Wagner, Gerhard Knechtel, *Notariatsordnung. Kommentar* (6th edn, Manz 2006) Vor § 1 GKG, paras 2–4 which both list numerous references. Extensively on both views also Manfred Stelzer, 'Verfassungsrechtliche Fragen der Übertragung richterlicher Entscheidungsbefugnisse auf Notare im Verlassenschaftsverfahren' in Peter G Mayr (ed), *Außerstreitreform – in der Zielgeraden* (Manz 1999) 57–90.

(470) Cf Triebnigg, 'Die Bundesverfassung' (n 469) 52.

(471) See Statistik Austria, 'Demographic characteristics of deceased' <https://www.statistik.at/en/statistics/population-and-society/population/deaths/demographic-characterstics-of-deceased> accessed 1 June 2025.

(472) See Bundesgesetz über das gerichtliche Verfahren in Rechtsangelegenheiten außer Streitsachen (Außerstreitgesetz – AußStrG), BGBl I 2003/111.

(473) Kaiserliche Entschließung vom 14. Juni 1849, womit die Grundzüge der neuen Gerichtsverfassung genehmigt werden, RGBl 1849/278.

(474) Cf the comments of then-Minister of Justice *Dr Anton Ritter von Schmerling* in MR. v. 30.4.1850/VI, ÖMR. II/2, Nr. 333. The minutes of the Council of Ministers were published by the Austrian Academy of Sciences and are available at <https://mrp.oeaw.ac.at/pages/index.html> accessed 1 June 2025.

(475) See MR. v. 30.4.1850/VI, ÖMR. II/2, Nr. 333. It was explicitly stated that these were originally 'judicial' tasks.

courts from selected time-consuming activities that concerned non-contentious aspects of succession proceedings.

124 Another justification for the shift in the administration of justice was, however, that the legislator considered notaries to possess legal competences similar to those of judges and held that they could more easily operate in areas that were outside the geographical reach of local courts. (476) The benefit of using notaries that relieved judicial authorities of lengthy tasks and enabled the legal transfer of estates was repeatedly acknowledged in later years. (477)

125 When the delegation was initially considered, it was also held that the use of notaries would be financially preferable for the parties (or rather: the State (478)), as they would no longer have to pay and wait for far-away courts to take up their case. (479) This financial angle might have helped in consolidating the role of notaries in succession proceedings from a State perspective. (480) Especially the presumed economic burden on the parties was, however, also criticised and used throughout the years (until the early 20th century) when assessing whether to review (ie limit) the competences of notaries as court commissioners. (481)

---

(476) See *Schmerling*'s comments/speech in Siebenundvierzigstes Beilage=Heft zum allgemeinen Reichs-Gesetz- und Regierungsblatte für das Kaisertum Oesterreich, Jahrgang 1850 zu Nr 366 im CXXVIII. Stücke des Reichsgesetzblattes, S 250.

(477) A speech of his before the annual assembly of notaries was reprinted in: 'Notariat und Rechtspflege. Rede des Bundesministers für Justiz Univ.-Prof. Dr. Hans Klecatsky vor der Vollversammlung des Delegiertentages der Österr. Notariatskammern am 9. Oktober 1968' (1969) 101 Österreichische Notariats-Zeitung 1, 3. The relief of judicial authorities was mentioned throughout the proceedings and in the debates, as well as in the report of the competent judicial parliamentary committee, see JAB 192 BlgNR XII GP 1.

(478) Johann B Zugschwerdt, 'Zur Erläuterung der Notariatsordnung. Ueber die §§. 176 und 178 der Notariatsordnung' (1851) 2 Allgemeine österreichische Gerichts-Zeitung 81, 81 (Beilage zu Nr. 192, 15. August 1851) rightly highlights that the respective savings were first of all favourable for the State.

(479) MR. v. 30.4.1850/VI, ÖMR. II/2, Nr. 333. Indeed, when courts were in charge of succession proceedings, they did not do so free of charge. Parties had to pay travel expenses, and a small compensation, Julius Schimkowsky, *Das Notariat. Ein Beitrag zur Geschichte und Revision desselben* (Karl Petschner 1862) 40.

(480) See MR. v. 24.4.1852/V, ÖMR. III/1, Nr. 5.

(481) Christian Neschwara, *Geschichte des österreichischen Notariats*, vol II/1 (Manz 2017) 447–448. See also, *ex multis*, Antrag des Abgeordneten Peitler und Genossen, 28.5.1897 (1034 der Beilagen zu den stenographischen Protokollen des Abgeordnetenhauses – XI. Session): nationalisation of the notarial profession; Antrag des Abgeordneten Bojko und Genossen, betreffend die Aufhebung des Institutes der k. k. Notare, 28.5.1897 (173 der Beilagen zu den stenographischen Protokollen des Abgeordnetenhauses – XII. Session). The

2. *Historical developments: 1970 to 2005*

126 Currently, discussions on the purpose of court commissioners have come to an end. The competences of notaries in succession proceedings are now no longer directly governed in the Acts governing the Notarial Profession (*Notariatsordnung* [NO]; of 1850, 1855, and 1871 (482)). Now, rules on the competences of court commissioners are to be found in a 1970 act, the so-called '*Gerichtskommissärsgesetz*' (GKG) (Act on Court Commissioners) (483) and, partly, in the *Außerstreitgesetz*, an Act Governing Non-contentious Proceedings. The GKG has been changed a number of times, especially after the 2003 reform in the matter of non-contentious proceedings (that led to the AußStrG 2005) and the entry into force of the Succession Regulation.

127 Already in the 1970 proposal, the drafters of the GKG had argued that the use of court commissioners had proven its worth, both in urban and rural areas. (484) In the latter, it had become common practice to delegate all tasks – that could under the previous regimes (especially of the NO 1871) legally be assigned – to notaries. Where the delegation potentially meant particular hardship for the parties involved (historically speaking, one of the main arguments against the use of notaries as court commissioners), the government intended to ease the financial hurdles by applying adjusted fees. (485) These were established in a separate act in 1971. (486)

---

criticisms are examined more closely in Leone Roncali, *Notarenstand und Notariat in Oesterreich* (Sallmayer und Comp. 1867) 18ff.

(482) Kaiserliches Patent vom 29. September 1850, wirksam für Oesterreich unter und ob der Enns, Salzburg, Steiermark, Kärnthen, Krain, Götz, Gradiska und Istrien, die Stadt Triest mit ihrem Gebiete, Tirol und Vorarlberg, Böhmen, Mähren, Ober= und Nieder=Schlesien womit für diese Kronländer eine Notariats=Ordnung erlassen wird, RGBl 1850/366 (NO 1850); Kaiserliches Patent vom 21. Mai 1855, wirksam für das Erzherzogthum Oesterreich unter und ob der Enns, die Herzogthümer Salzburg, Steiermark, Kärnthen, Krain, Ober= und Nieder=Schlesien, das Königreich Böhmen, die Markgraffschaften Mähren und Istrien, die Stadt Triest mit ihrem Gebiete, die gefürsteten Graffschaften von Görz, Gradiska und Tirol, mit dem Lande Vorarlberg, womit für diese Kronländer eine neue Notariatsordnung vorgeschrieben, und vom 1. August 1855 angefangen in Wirksamkeit gesetzt wird, RGBl 1855/94 (NO 1855); Gesetz vom 25. Juli 1871, betreffend die Einführung einer neuen Notariatsordnung, RGBl 1871/75 (NO 1871).

(483) Bundesgesetz vom 11. November 1970 über die Tätigkeit der Notare als Beauftragte des Gerichtes im Verfahren außer Streitsachen (Gerichtskommissärsgesetz – GKG), BGBl 1970/343.

(484) ErlRV 132 BlgNR XII GP 6.

(485) ErlRV 132 BlgNR XII GP 6. Now provided for under § 11 GKG.

(486) Bundesgesetz vom 3. März 1971 über die Gebühren der Notare als Beauftrage des Gerichtes (Gerichtskommissionstarifgesetz – GKTG), BGBl 1971/108. See the discussions in

a) *Competences of court commissioners*

128 While the range of competences remained in their core (mostly) unchanged from the 1850s onwards, and included tasks such as the recording of a person's death (*Todfallsaufnahme*; the meaning of this will be explained later on), urgent activities connected to it, as well as other official acts required in the course of succession proceedings, some relevant aspects were reformed with the new act. (487) After more than a century, courts were finally obliged to delegate the tasks listed in the act to notaries, irrespective of the fact that they were located in an urban or a rural area. (488) This had been a highly contentious point since an 1860 Regulation of the Ministry of Justice. (489) The only exception to that rule was the *Todfallsaufnahme*, the delegation of which only became mandatory if probate courts (*Abhandlungsgerichte*) were required to initiate inquiries into a deceased's personal and economic affairs (490) and (at least initially (491)) in districts in which notaries were established.

129 As for their competences, the explanatory report of the GKG further specified that notaries could also be entrusted with the publication of wills and could hear the parties on contradictory declarations regarding the acceptance of an inheritance. (492)

130 Outside of succession proceedings, on the other hand, the competences of court commissioners included appraisals, and the sale of movable and

---

36. Sitzung NR XII. GP – Stenographisches Protokoll, S. 2837–2841 and 300. Sitzung BR – Stenographisches Protokoll vom 25. März 1971, S. 8106.

(487) See § 1(1)(1) GKG.

(488) See § 2(1) GKG.

(489) Verordnung des Justizministeriums v. 7. Mai 1860, wirksam für alle Kronländer, in welchen die Notariatsordnung vom 21. Mai 1855, Nr. 94 des Reichs=Gesetz=Blattes, in Wirksamkeit steht, betreffend die Verwendung der Notare als Gerichtscommissäre und die Zahl der Notare, RGBl 1860/120 (JMV 1860). For the discussions on the regulation, cf MK. v. 24. 12. 1859/VI, ÖMR. IV/1, Nr. 84; MK. v. 27. 12. 1859/I, ÖMR. IV/1, Nr. 85 and MK. v. 29. 12. 1859/I, ÖMR. IV/1, Nr. 86.

See also JME v. 26. 11. 1904, Z. 25601; Erlaß des Bundesministeriums für Justiz v. 8. Januar 1921, betreffend die Heranziehung von Notaren zu gerichtskommissionellen Geschäften, JABl 1921/2; Erlaß des Bundesministeriums für Justiz v. 4. Februar 1922, betreffend die Heranziehung von Notaren zu gerichtskommissionellen Geschäften, JABl 1922/8; Erlaß v. 4. Dezember 1931 über die Heranziehung der Notare als Beauftragte des Gerichtes, JABl 1931/32.

(490) Which referred to § 21 AußStrP and § 105 JN.

(491) This second requirement was later abolished by Article III of the Bundesgesetz über Änderungen der Notariatsordnung, des Notariatsprüfungsgesetzes und des Gerichtskommmissärsgesetzes (Notariatsordnungs-Novelle 1993), BGBl 1993/692.

(492) ErlRV 132 BlgNR XII GP 7. Hermann Schneeweiß, 'Über die Zuständigkeit der Notare als Gerichtskommissäre zur Kundmachung letztwilliger Anordnungen' (1977) 109

immovable property and inventories. (493) Nevertheless, parties were at any given moment entitled to draw up relevant declarations, applications, or certificates themselves (in writing) and could submit them directly to the competent judicial authority (now known as *schriftliche Abhandlungspflege*) or make use of authorised representatives such as lawyers or (other) notaries. (494) The rules followed initiatives of the previous acts and were adapted to modern times.

b) *Prerogatives of the judiciary*

131 Even more relevant than the list of competences was, however, the list of tasks that court commissioners were expressly not entrusted with. Notaries were and are under the GKG in any case not entitled to take judicial decisions (*gerichtliche Entscheidungen*), (495) to conduct formal hearings (*förmliche Vernehmungen*), (496) or to request legal assistance abroad (*Ersuchen um Gewährung von Rechtshilfe*). (497) These activities remain a prerogative of the judiciary. As for the meaning of 'judicial decision', the explanatory report to the 2015 succession law reform shed some light on the term. (498) In the report, the delegation of the issuance of the European Certificate of Succession (ECS) to notaries was justified with the fact that the ECS would only certify an already established legal situation rather than

---

Österreichische Notariats-Zeitung 35, 36 argued that the publication had in any case to be carried out by court commissioners.

(493) See § 1(1)(2) GKG.

(494) § 3(1) GKG; already in § 3 JVM 1860; § 29 AußStrP 1854. Only lawyers and notaries could be used as representatives if the estate was worth more than 100,000 Schilling. The amount was later changed to € 7,260 by Article 53 of the 1. Euro-Umstellungsgesetz – Bund, BGBl I 2001/98, then to € 4,000 after the reform of the AußStrG in 2003 (see *infra* n 527).

(495) This was to also to include orders that had to be preceded by a judicial decision, see ErlRV 132 BlgNR XII GP 7.

(496) The term refers to hearings in procedural settings and does not cover obtaining information from hearings during which the parties are not obliged to tell the truth, see ErlRV 132 BlgNR XII GP 7.

(497) § 1(2) GKG.

(498) Bundesgesetz, mit dem das allgemeine bürgerliche Gesetzbuch, das Anerbengesetz, das Außerstreitgesetz, das Gerichtsgebührengesetz, das Gerichtskommissärsgesetz, das Gerichtskommissionstarifgesetz, das allgemeine Grundbuchsgesetz 1955, das IPR-Gesetz, die Jurisdiktionsnorm, das Kärntner Erbhöfegesetz 1990, die Notariatsordnung, das Rechtspflegergesetz, das Tiroler Höfegesetz, das Wohnungseigentumsgesetz 2002 und die Kaiserliche Verordnung über die dritte Teilnovelle zum allgemeinen bürgerlichen Gesetzbuch geändert werden (Erbrechts-Änderungsgesetz 2015 – ErbRÄG 2015), BGBl I 2015/87.

shaping it. (499) Thus (*e contrario*), judicial decisions – at least for the purposes of the GKG – seem to require a change in the legal situation of parties.

Regardless of these limitations, court commissioners were in the GKG qualified as public officials. (500) This had implications also on a criminal law level, both regarding the protection of court commissioners during the exercise of their office and regarding their own criminal liability. (501) **132**

c) *Distribution of cases*

As for the distribution of cases, the proposal followed an approach that had already been developed in 1860. (502) Court commissions were to be objectively divided among notaries based on pre-established distribution rules (the so-called *Verteilungsordnung*). (503) These were drawn up by the presidents of the respective first instance courts at the end of each year and after having heard the local chamber of notaries. If only one notary worked in a court district, court commissions automatically had to be delegated to them. (504) However, in case more than one notary had established their office in the same district, courts had to try to assign the tasks as equally as possible between them. Districts consequently had to either be divided into different sectors, (505) according to a time-based system (eg, depending on the date on which the *de cuius* died), or based on a combination of the two. (506) Also, pre-existing distribution rules (ie best practices) were to be considered. (507) The proposal, however, no longer contained a rule on a general mandate to **133**

(499) ErlRV 688 BlgNR XXV GP 46.

(500) § 1(3) GKG. The text refers to definition of public official in the Criminal Code (*Strafgesetzbuch*), in particular, § 74(1)(4) StGB.

(501) See, eg, Bernd Alber, Felix Bodingbauer, '§ 1 GKG' in Christian Zib, Michael Umfahrer (eds), *Kommentar zur Notariatsordnung* (2nd edn, Manz 2023) para 15.

(502) § 2 JVM 1860; § 4 GKG.

(503) § 5 GKG. For an in-depth analysis, see F Wilhelm Kremzow, 'Die Verteilungsordnung für das Gerichtskommissariat' (1972) 104 Österreichische Notariatszeitung 74–78.

(504) At the time the proposal was introduced, the following districts did not have any notaries established in them: *Althofen*, *Eisenerz*, *Eisenkappel*, *Hopfgarten*, *Matrei in Osttirol*, *Montafon*, *Ried im Oberinntal*, *St. Gilgen*, *Steinach*. See ErlRV 132 BlgNR XII GP 8. In these cases, notaries from neighbouring districts were to be appointed, see § 4(1)(3) GKG.

(505) In this case taking various factors into account, such as local circumstances, traffic conditions and population density.

(506) § 4(2) GKG. In practice, cases were also divided based on the initials of the deceased or the date of death.

(507) § 4(3) GKG.

certain court commissioners, still found in the provisions of the 1850s. ([508]) From then on, commissioners had to be appointed separately for every proceeding.

d) *Judicial rules for court commissioners*

134 Following a 1911 draft for a new *Notariatsordnung*, ([509]) the act further extended the rules for the recusal and abstention of judges to court commissioners. ([510]) The appointing/delegating judges were entrusted with the respective review processes. These were, however, not the only relevant provisions that were extended to notaries. When acting as court commissioners, notaries generally had to apply the statutory provisions applicable to courts and could refer to the postal service or to courts for the serving of documents. ([511]) In regions in which minority languages had been recognised as official languages, court commissioners had to further apply the rules established for judges, mainly concerning the use of said language. ([512])

e) *Judicial supervision*

135 As for the removal of notaries from their office, the act held that commissions could be revoked when there were violations of the rules established for the respective activities. ([513]) Courts further had to set deadlines within which the assigned tasks had to be carried out. ([514]) Extensions were possible. ([515]) If the notary was in default, however, and remained so even after an extension (knowing that the commission was to be revoked in the case of non-compliance), a new court commissioner had to be appointed. ([516]) In

---

([508]) General mandates were, eg, possible under § 184(2) NO 1855.

([509]) § 209(1) of the 1911 draft.

([510]) § 6(1) GKG. The provision refers to §§ 19–25 JN.

([511]) § 9 GKG. This includes, eg, also the rights of courts when making enquiries under § 31 AußStrG 2005, see Bernd Alber, Felix Bodingbauer, '§ 9 GKG' in Christian Zib, Michael Umfahrer (eds), *Kommentar zur Notariatsordnung* (2nd edn, Manz 2023) para 1.

([512]) § 21 VoGrG extended the acts §§ 13-20 to court commissioners.

([513]) § 6(2) GKG.

([514]) § 7(1) GKG.

([515]) Reasons can be: the search for heirs, cross-border scenarios, the need for expert opinions, difficulties in determining the assets of the estate, etc. See Bernd Alber, Felix Bodingbauer, '§ 7 GKG' in Christian Zib, Michael Umfahrer (eds), *Kommentar zur Notariatsordnung* (2nd edn, Manz 2023) para 2.

([516]) § 7(2) GKG.

any case, all activities had to be accounted for, and recorded, in separate registers. (517)

The new act further introduced several (minor) amendments to the 1854 Act Governing Non-contentious Proceedings. (518) At the same time and after a century, the provisions on court commissioners in the 1855 NO and the 1860 ministerial regulation were abolished. (519) **136**

f) *Other developments*

The GKG was gradually adapted in the following years. A first change concerned the access of court commissioners to land registers. When notaries granted parties access to the register (which they were obliged to do in the same way as courts competent in that matter [*Grundbuchsgerichte*] were (520)), they were legally considered to be acting as court commissioners. (521) It also became possible to access the registers in succession proceedings, in order to make inquiries regarding the assets of the deceased. (522) There were also similar developments with regard to company registers. (523) **137**

---

(517) § 10(1) GKG.

(518) § 12 GKG.

(519) § 15 GKG.

(520) ErlRV 334 BlgNR XV GP 19.

(521) § 2a GKG. The provision was introduced by § 26 of the Bundesgesetz vom 27. November 1980 über die Umstellung des Grundbuchs auf automationsunterstützte Datenverarbeitung und die Änderung des Grundbuchsgesetzes und des Gerichtskommissärsgesetzes (Grundbuchsumstellungsgesetz – GUG), BGBl 1980/550, and later changed by Article III of the Bundesgesetz, mit dem das ABGB, das Grundbuchsumstellungsgesetz, das Gerichtskommissärsgesetz und das Vermessungsgesetz geändert werden und das Gesetz vom 24. Februar 1905 RGBl Nr 33 aufgehoben wird (Grundbuchsnovelle 1997 – GBNov 1997), BGBl I 1997/30.

(522) § 6(2) GUG, changed by Article II GBNov 1997.

(523) See Article XIX of Bundesgesetz: Firmenbuch und Änderungen des Handelsgesetzbuchs, des Aktiengesetzes 1965, des Gesetzes über Gesellschaften mit beschränkter Haftung, des Gesetzes über Erwerbs- und Wirtschaftsgenossenschaften, des Erwerbsgesellschaftengesetzes, der Vierten Verordnung zur Einführung handelsrechtlicher Vorschriften im Lande Österreich, des Amtslöschungsgesetzes, des Umwandlungsgesetzes, des Versicherungsaufsichtsgesetzes, des Außerstreitgesetzes, der Jurisdiktionsnorm, des Gerichtsorganisationsgesetzes, der Exekutionsordnung, der Konkursordnung, der Ausgleichsordnung, des Geldinstitutezentralegesetzes, des Rechtspflegergesetzes, des Gerichtskommissärsgesetzes, des Gerichtsgebührengesetzes und der Gewerbeordnung 1973, BGBl 1991/10 which introduced § 2b GKG. Also Article VI of Bundesgesetz über Änderungen des Handelsgesetzbuchs, des Aktiengesetzes, des Gesetzes über Gesellschaften mit beschränkter Haftung, des EWIV-Ausführungsgesetzes, des Firmenbuchgesetzes, des Gerichtskommissärsgesetzes, der Jurisdiktionsnorm, des Genossenschaftsverschmelzungsgesetzes, des Gerichtsgebührengesetzes, des

138 As stated before, under the GKG, the *Todfallsaufnahme* (on the term below) had initially to be delegated to court commissioners only if the respective inquiries had to be initiated by probate courts and if the deceased had established their residence in a municipality in which a notary exercised their profession. (524) The latter of the two requirements was removed in 1993. (525) In the explanatory report, it was argued that the change was due to the increased mobility of citizens. (526)

139 A larger number of changes came, however, only with the long-awaited reform of the 1854 Act on Non-contentious Proceedings in 2003 (which entered into force in 2005), (527) the adoption of the European Succession Regulation (2012), and the succession law reform of 2015.

3. *Historical developments: 2005–present*

140 In particular, the introduction of the new AußStrG 2005 on non-contentious proceedings played an important role in reforming court commissions. (528) While many of the changes only concerned the terminology that had been used in the 1970 GKG, others were more substantial in nature. (529)

Bankwesengesetzes, des Sparkassengesetzes, des Versicherungsaufsichtsgesetzes und der Rechtsanwaltsordnung zur EU-bedingten Anpassung des Handels- und Gesellschaftsrechts sowie über die Spaltung von Kapitalgesellschaften und über die Umwandlung von Handelsgesellschaften (EU-Gesellschaftsrechtsänderungsgesetz – EU-GesRÄG), BGBl 1996/304 which introduced § 2c GKG.

(524) § 2(1) GKG.

(525) Article III of the Bundesgesetz über Änderungen der Notariatsordnung, des Notariatsprüfungsgesetzes und des Gerichtskommmissärsgesetzes (Notariatsordnungs-Novelle 1993), BGBl 1993/692.

(526) ErlRV 1133 BlgNR XVIII GP 25.

(527) Various proposals had circulated with regard to the role that notaries had to play in non-contentious proceedings. Walter Rechberger, *Zur Reform des Außerstreitverfahrens – Rechtsfürsorgeverfahren* in *Veröffentlichungen des Ludwig Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen*, vol II (Zur Reform des Außerstreitverfahrens – Dokumentation einer Enquete) (Manz 1984) 25, 30, for example, had early on proposed to distribute competences in non-contentious proceedings not based on the activities that were to be carried out but rather on the interests that needed to be protected. When it came to protecting the rights of minors or vulnerable adults in succession proceedings, cases should be assigned to courts of judicial officers (*Rechtspfleger*); while there were other interests at play if the latter were not involved.

(528) See, in particular, Article XVIII oft the Außerstreit-Begleitgesetz (AußStr-BegleitG), BGBl I 2003/112.

(529) Cf ErlRV 225 BlgNR XXII GP 25.

a) *Competences of court commissioners*

The competences of court commissioners remained mostly untouched. Notaries were still mainly entrusted with inquiries into the personal and economic affairs of the deceased (now called: *Todesfallaufnahme* (530)) and could carry out urgent acts connected to them. (531) Furthermore, court commissioners could be entrusted with any other act required in the course of succession proceedings. (532) All party submissions (now) had to be addressed to the competent court commissioner. (533) Written submissions to the court and the use of qualified representatives remained, however, possible even after the reform of the AußStrG. (534) This did, however, not concern official tasks that did (and do) in any case need to be carried out by court commissioners, such as the above-mentioned inquiries, taking over testamentary dispositions, drawing up inventories, issuing certifications on the parties' powers of representation and the European Certificates of Succession. (535) **141**

b) *Prerogatives of the judiciary*

The scope of their competences was, however, limited in certain regards. Not only could notaries (still) not take any judicial decisions (536) (*richterliche Entscheidungen*) and request legal assistance abroad (*Rechtshilfeersuchen*), but they were also excluded from taking the minutes of judicial settlements **142**

---

(530) The new terminology was proposed by the *Ludwig-Boltzmann-Instituts für Rechtsvorsorge und Urkundenwesen*, cf also ErlRV 224 BlgNR XXII GP 95.

(531) § 1(1)(a) GKG.

(532) § 1(1)(b) GKG, see Wagner, Knechtel, *Notariatsordnung* (n 469) § 1 GKG, para 5. These acts include the lifting of limitations to the access to the estate (§ 149 AußStrG 2005), mediation in case of conflicting declarations of acceptance (§ 160 AußStrG 2005), the issuance of certificates regarding the power of representation of the estate of heirs (§ 172 AußStrG 2005), recording agreements as to the division of the estate (§ 181 AußStrG 2005). On these tasks, *infra*.

(533) § 144(1) AußStrG 2005. Except for the 'schriftliche Abhandlungspflege' (see above). They were, however, also considered to be in time if they were sent to a court. Submissions could also be presented via e-mail, see OGH 2 Ob 212/16i.

(534) § 3(1) GKG. See also the remarks *supra* on the 1970 version of the GKG. A difference was that parties now had to be informed of the possibility to make use of other professionals, § 3(3) GKG. Furthermore, if not all heirs agreed to the *schriftliche Abhandlungspflege*, the tasks had to be carried out by a court commissioner, cf RIS-Justiz RS0059375; Bernd Alber, Felix Bodingbauer, '§ 2 GKG' in Christian Zib, Michael Umfahrer (eds), *Kommentar zur Notariatsordnung* (2nd edn, Manz 2023) para 2.

(535) Cf Linda Oswald, '§ 143' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 8; Alber, Bodingbauer, '§ 2 GKG' (n 534) para 4.

(536) On the meaning, see above n 498 and its context.

(*Protokollierung gerichtlicher Vergleiche*) ([537]) and taking coercive measures ([538]) (*Zwangsmaßnahmen*) required throughout the proceedings. ([539]) The qualification as a public official was, however, maintained. Court commissioners were consequently also subject to the provisions on the responsibility of public authorities. ([540]) In line with these prerogatives, appeals, responses to appeals or other requests aiming at a judicial decision still had to be addressed to the competent courts. The submissions were, however, deemed to be made in due time if they were presented to a court commissioner instead. ([541]) It was thus in any case made clear that succession proceedings ultimately remained a responsibility of the courts. ([542])

c) *Judicial supervision*

143 The 2003 reform had further introduced new provisions, explicitly stating that in order to supervise the activities of court commissioners, judges could issue directives, obtain reports and conduct investigations. ([543]) Court commissioners have to follow instructions. ([544]) A controversial issue in this regard concerned potential review procedures of the actions of court com-

---

([537]) For a definition, see § 30 AußStrG 2005. Settlements entered into before a court commissioner were thus not considered to be judicial in nature and could not be enforced accordingly, see OGH 1 Ob 138/53. At the same time, heirs may request a court commissioner to record agreements on the division of the estate, the use of the estate's assets as well as agreements on care services or the deferral of the compulsory portion (§§ 766ff ABGB). These agreements have, according to § 181(1) AußStrG 2005, the effect of a judicial settlement. On this duality, see Ludwig Bittner, 'Das neue Verlassenschaftsverfahren' (2004) 15 ecolex 927, 928; Ludwig Bittner, 'Vor § 143' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 30.

([538]) Regarding those in § 79 AußStrG 2005: fines (*Geldstrafen*); coercive detention (*Beugehaft*); compulsory attendance (*zwangsweise Vorführung*); the taking of documents, movable property (*Abnahme von Urkunden, Auskunftssachen und anderen beweglichen Sachen*); the appointment of curators in order to perform fungible acts at the expense and risk of the party in default (*Bestellung von Kuratoren*).

([539]) § 1(2) GKG.

([540]) Bundesgesetz über die Haftung der Gebietskörperschaften und der sonstigen Körperschaften und Anstalten des öffentlichen Rechts für in Vollziehung der Gesetze zugefügte Schäden (Amtshaftungsgesetz – AHG), BGBl 1952/60. Court commissioners were in particular considered to be 'institutions' (*Organe*) of the court under § 1(2) AHG, see OGH 1 Ob 2309/96.

([541]) § 144(2) AußStrG 2005. Different under OGH 2 Ob 76/55.

([542]) ErlRV 225 BlgNR XXII GP 27.

([543]) § 7a(1) GKG. Court commissioners could not initiate any review procedures regarding directives coming from judges; already established in GlU 11958 (15 September 1886); GlU 13501 (2 December 1890) stated that only an administrative complaint could be issued; GlU 14286 (1 June 1892).

([544]) Wagner, Knechtel, *Notariatsordnung* (n 469) § 9 GKG, para 6.

missioners. A traditional appeal was not feasible due to the lack of decision-making powers. (545) Other means of redress had to be identified. With the solution that was eventually adopted, parties that raised objections with regard to certain measures or the conduct of court commissioners could refer the matter to a court, which, after having heard the commissioner, was entitled to address and resolve potential issues. (546) During the review process, notaries are not allowed to take any measures that would prejudice the outcome of the respective proceedings. (547) Some held that it remained questionable whether court commissioners are entitled to appeal against the remedial measures adopted by the deciding court. (548)

144 The reform further introduced certain incompatibilities. (549) While best practices had already been developed in this regard, they had not been legally binding. (550) The legislator thus intended to explicitly exclude notaries from both acting as party representatives and court commissioners in the same proceedings as well as from entering into transactions with the estate. (551)

d) *Geographical reach*

145 As for potential geographical limitations, the reform highlighted that court commissioners are not confined to their district but can carry out tasks throughout Austria; (552) this especially includes the taking of evidence (*Beweise aufnehmen*), and the making of inquiries (*Erhebungen pflegen*) as well as the serving of documents – either personally, via courts, or the postal service – and any necessary publications (*öffentliche Verlautbarungen*) in connection with the proceedings. (553) However, court commissioners are also entitled to request the assistance of judicial or administrative authorities

(545) ErlRV 225 BlgNR XXII GP 27.

(546) § 7a(2) GKG. The procedure was inspired by similar mechanisms in insolvency proceedings, see ErlRV 225 BlgNR XXII GP 27.

(547) § 7a(3) GKG.

(548) Bernd Alber, Felix Bodingbauer, '§ 7a GKG' in Christian Zib, Michael Umfahrer (eds), *Kommentar zur Notariatsordnung* (2nd edn, Manz 2023) para 7.

(549) § 6a GKG.

(550) ErlRV 225 BlgNR XXII GP 27. Some had been elaborated by courts, see OGH (Disziplinarsenat) 11.7.1907, Z 6140, Allgemeine österreichische Gerichts-Zeitung 1908, 115 (Heft vom 4. April 1908) that concerned the incompatibility of powers of attorney and a court commission.

(551) ErlRV 225 BlgNR XXII GP 27.

(552) The limitation to Austria might cause issues when a case is cross-border and some assets of the estate are situated abroad, see Bernhard Motal, 'EU-Erbrechtsverordnung: Anpassungsbedarf im Außerstreitgesetz' (2015) 10 EF-Z 62, 66.

(553) § 9(1) GKG.

and other notaries (*rectius*: court commissioners) if the acts have to be carried in distant districts. (554)

e) *Judicial rules for court commissioners*

146 Regarding the taking of evidence, the 2003 reform extended certain obligations (eg, to appear in court and to give evidence (555)) and rights (eg when persons could refuse to testify (556)) that persons heard as either parties, witnesses (*Auskunftspersonen*) or experts (*Sachverständige*) generally have in relation to their deposition before a court in non-contentious proceedings. (557) Notaries have to observe the same provisions as courts, (558) especially the general provisions of the AußStrG 2005. (559) Thus, insofar as court commissioners are entrusted with ascertaining the truth and investigating facts in succession matters, they possess the same powers as probate courts. (560)

f) *Mandatory use*

147 Other amendments concern the mandatory use of court commissioners. Beginning in 2005, inquiries into the personal and economic affairs of the deceased (*Todesfallaufnahme*) also have to be delegated to notaries according to the established distribution rules; in urgent cases, notaries can even take relevant measures before a case is officially assigned to them by a court. (561) It was the first time that court commissioners were expressly entitled to act *ex lege*. (562) 'Other acts' in succession proceedings could initially only be

---

(554) § 9(3) GKG.

(555) ErlRV 225 BlgNR XXII GP 28.

(556) In particular, §§ 320 ZPO, see ErlRV 225 BlgNR XXII GP 28.

(557) See § 9(2) GKG.

(558) § 9(5) GKG. Court commissioners can thus, eg, also electronically access certain registers of the courts (categories C, Cg, Cga, Cgs, E and A; for reasons data protection reasons, Ub, BAZ, St, StA, OStA, Gn, Gs, Gw, NSt and the Supreme Court registers Ob, ObA, ObS, Os were not included), see ErlRV 303 BlgNR XXIII GP 38. It also follows that court commissioners have to correct obvious errors in their minutes/protocols/records, as is the case with court records. Court commissioners are further subject to judicial secrecy pursuant to § 58 RStDG. Cf Alber, Bodingbauer, '§ 9 GKG' (n 511) paras 12–13.

(559) ErlRV 225 BlgNR XXII. GP. 28.

(560) § 9(3) GKG. Cf Stephan Verweijen, '§ 145' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 34.

(561) § 2(1) GKG, § 145(1) AußStrG 2005. Urgent matters could, eg, concern securing the estate, see ErlRV 225 BlgNR XXII GP 26.

(562) Cf Grün, '§ 143' (n 7) para 1; Bittner, 'Vor § 143' (n 537) para 30; Alber, Bodingbauer, '§ 2 GKG' (n 534) para 1.

delegated if the use of court commissioners – due to the complexity and scale of the tasks or the need for extensive preparatory works – seemed preferable for all parties involved. (563)

148 Only as of late have some voices started to call for the complete (or extended) delegation of succession proceedings to notaries. (564)

B. *Devolution of the estate*

149 Succession proceedings are today governed by the AußStrG 2005 and fall under the jurisdiction of the district court of residence of the deceased. (565) They consist of preliminary inquiries (*Vorverfahren*), followed by a more substantial phase (*Verlassenschaftsabhandlung*) that ultimately tends to enable the legal transfer of the estate to the heirs (*Einantwortung*) and a third one that may take place after the transfer (*Verfahren außerhalb der Abhandlung*). Only the preliminary phase always takes places. The proceedings are characterised by the desire to relieve the burden on courts and to strengthen the role of non-judicial actors, namely notaries. (566)

150 The proceedings are (for the most part) non-contentious in nature. The functions of courts and notaries (as court commissioners) are closely intertwined.

1. *Preliminary tasks in succession proceedings*

151 The proceedings, that are mostly non-contentious in nature, are initiated *ex officio* (567) as soon as the competent court becomes aware of the passing of

---

(563) § 2(2) GKG.

(564) Brigitta Lurger, Karl Stöger, Romina Herz, 'JuWiLi Study 2022. Legal Part' (n 18) 107.

(565) §§ 104, 105 JN. If no habitual residence in Austria could be identified, or if the deceased had multiple residences, competence lies with the court in whose district the majority of the deceased's assets are located, or otherwise with the District Court of the Inner City of Vienna (*Bezirksgericht Innere Stadt Wien*). Cf Ferrari, 'Der Erwerb der Erbschaft' (n 465) para 12.2.

(566) Kristin Nemeth, '§ 750 ABGB' in Georg Kodek, Michael Schwimann (eds), *ABGB Praxiskommentar* vol IV (5th edn, Lexis Nexis 2018) para 1; Rudolf Welser, *Der Erbrechts-Kommentar. §§ 531–824 ABGB* (Manz 2019) Vor § 797 ABGB, para 1; Claus Spruzina, '§ 797' in Andreas Kletečka, Martin Schauer, *ABGB-ON*$^{1.02}$ (1 January 2017, rdb.at) para 9; Verweijen, *Verlassenschaftsverfahren* (n 837) 82.

(567) § 143(1) AußStrG 2005. Proceedings are – according to § 143(2) AußStrG 2005 – however, only initiated upon request if the estate is located exclusively abroad, or – regarding movable property located in Austria – if the requirements of Articles 10(2), 11 Succession Regulation are met.

the deceased. ([568]) For this purpose, several individuals ([569]) and institutions are legally required to inform the competent civil status authorities of such occurrence; the latter then involve the judicial bodies that have to be seized in succession matters. ([570]) Only at this point do notaries generally become involved. Their roles are closely intertwined with those of courts. Many tasks are, however, directly entrusted in notaries. The latter are in succession proceedings (as stated above) appointed as court commissioners, based on the pre-established distribution rules (*Verteilungsordnung*), ([571]) and *ex lege* entrusted with a number of inquiries. ([572])

a) *Inquiries into the deceased's personal and economic affairs*

152 Particularly relevant in this phase are the inquiries into the deceased's personal and economic affairs (*Todesfallaufnahme*). ([573]) Court commissioners (notaries) are required to gather all relevant information regarding the *de cuius*, the estate and potential heirs. These inquiries lay the groundwork for all following procedural steps and establish the facts pertinent to a case. ([574])

153 Notaries are entrusted with acquiring the following information: 1) the name and surname, marital status, nationality, occupation, date and place of birth and death of the deceased, their last domicile or place of habitual residence

---

([568]) § 143(1) AußStrG 2005: either through a public document (mostly, the death certificate) or in another unequivocal manner, cf Oswald, '§ 143' (n 535) para 5; Thomas Schatzl, Claus Spruzina, '§ 143' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) paras 3–4.

([569]) Among them are the head of the hospital in which the person died; the doctor carrying out the post-mortem; the authority or security agency conducting an enquiry into the person's death; the spouse/registered partner or other family members; landlords or other persons that provided accommodation to the deceased; and lastly other persons who personally know about the death (§ 28(2) PStG 2013).

([570]) The respective obligation is established in § 49 PStG 2013.

([571]) Current distribution rules can be found here: Österreichische Notariatskammer, 'Verteilungsordnungen' <https://ihr-notariat.at/informationen/bekanntmachungen/verteilungsordnungen/> accessed 1 June 2025.

([572]) Only with their appointment (taken with a *Beschluss*) do notaries become court commissioners, see LGZ Wien 25.1.1979, 43 R 28/79. If a court refused to appoint a notary as court commissioner, the latter has no means to appeal, see OGH 2 Ob 1077.

([573]) The term *Todesfallaufnahme* refers both to the inquiries and to the public document (§ 292 ZPO) in which the relevant information is recorded, see Andrea Grün, '§ 145' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 5.

([574]) A court commissioner thus seems to be empowered to establish facts that are not clear and obvious, a factor mentioned in Case C-80/19 *E.E.* [2020] ECLI:EU:C:2020:569, para 53.

and any other circumstances relevant for establishing jurisdiction; (575) 2) any assets that were left, (576) rights and/or liabilities; 3) funeral costs, further identifying the individuals who may have advanced potential expenses; (577) 4) documents relating to testamentary dispositions (wills) and their revocation, agreements as to legacies, an inheritance or compulsory portions, agreements as to the waiver of an inheritance or a compulsory portion, the revocation of these agreements, as well as the names and surnames and addresses of witnesses to oral testamentary dispositions; 5) the names and surnames, addresses and dates of birth of the legal heirs and the heirs appointed in testamentary dispositions; as well as 6) the names and surnames, addresses and dates of birth of those who were legally represented by the deceased. (578)

For these purposes, both heirs, relatives, and other persons having information on the deceased or estate can be heard. (579) At the beginning of the inquiries, district courts generally provide notaries with the respective probate file (*Verlassenschaftsakt*) that can indicate first contact points for the commissioner. (580) As for the estate's assets, court commissioners can access land and company registers, obtain information from banks, and, if necessary, other public registers and databases. (581) For their inquiries and in the presence of two witnesses, they are further allowed to access the deceased's

154

(575) Eg, social security number, legal representatives. Cf Thomas Schatzl, Claus Spruzina, '§ 145' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) paras 16, 18.

(576) The value of the assets had to be determined as simply as possible, eg, by carrying out interviews, and not by initiating extensive surveys, and, if possible, without consulting an expert. The provision was initially contained in § 145(3) AußStrG 2005, now in a separate § 145a AußStrG 2005. It now contains references to the use of the land and company register (*Grundbuch und Firmenbuch*), the Austrian Central Register of Wills (*Österreichisches Zentrales Testamentsregister*) and the Register of Wills of Austrian Lawyers (*Testamentsregisters der österreichischen Rechtsanwälte*).

(577) See Rudolf Welser, '§ 549' in Peter Rummel, Meinhard Lukas (eds), *Kommentar zum ABGB. §§ 531–824 ABGB* (4th edn, Manz 2014) para 6; Kristin Nemeth, '§ 549 ABGB' in Georg Kodek, Michael Schwimann (eds), *ABGB Praxiskommentar*, vol IV (5th edn, Lexis Nexis 2018) para 4.

(578) § 145(2) AußStrG 2005.

(579) Cf Ferrari, 'Der Erwerb der Erbschaft' (n 465) para 12.7.

(580) Grün, '§ 145' (n 573) para 2; Hansjörg Sailer, Ulfried Terlitza, '§ 797 ABGB' in Peter Bydlinski, Stefan Perner, Martin Spitzer (eds), *ABGB. Kommentar (KBB)* (7th edn, Verlag Österreich 2023) para 4. They may also result from hospital documents, Oswald, '§ 143' (n 535) para 6.

(581) § 145a AußStrG 2005; Spruzina, '§ 797' (n 566) para 17. Bank secrecy does not apply here, see § 38(2)(3) BWG and Bernd Alber, Felix Bodingbauer, '§ 1 GKG' (n 501) para 4.

home, (582) their business premises, safes, wardrobes, and other belongings. (583)

155 These preliminary steps are taken for every succession case. (584) Court commissioners are, however, free as to how to structure their activities, as long as they are pertinent to establishing the relevant facts of a specific case. (585) And not every possible measure has to be taken. With regard to the determination of heirs, for example, court commissioners are considered to have fulfilled their duty if they reached out to the competent civil status and social security authorities. (586)

b) *Security measures*

156 With some exceptions, one of the main objectives of the preliminary stages of the proceedings remains securing the estate. If the court commissioner fears that certain assets might be withdrawn, or if the presumed heirs, close relatives or cohabitants are unable or unwilling to take custody of the assets, commissioners have to secure the estate by adopting other measures. (587) Which measures to take (and whether or not to take them) is, however, left to their discretion. (588) The respective costs are in any case to be borne by the estate. (589) Parties to the proceedings can file an application for redress under § 7a GKG if the court commissioner fails to act and thus to secure the estate. (590)

157 Security measures can only be taken for assets belonging to the estate or

---

(582) Heirs were not entitled to deny access to the immovable, see OGH 4 Ob 236/31.

(583) § 146(1) AußStrG 2005. Other belongings, eg, refers to desks and briefcases, see ErlRV 224 BlgNR XXII GP 95. The provision still applies if the courts of other Member States have jurisdiction under the Succession Regulation (with regard to assets situated in Austria), see § 147(4) AußStrG 2005.

(584) ErlRV 224 BlgNR XXII GP 94. The reform thus removed the rule that had stated that the inquiries did not have to take place when the deceased was a minor, without relevant means.

(585) Ibid 95.

(586) Stephan Verweijen, '§ 158' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 6. They could, however, also appoint genealogists as experts to identify potential heirs, see OGH 3 Ob 228/13w.

(587) § 147(1) AußStrG 2005.

(588) Margit Winkler, '§ 147' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 7; Thomas Schatzl, Claus Spruzina, '§ 147' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) paras 5, 6. According to ErlRV 224 BlgNR XXII GP 96, it was intended to create rules as flexible as possible.

(589) § 147(2) AußStrG 2005.

(590) Cf OGH 3 Ob 260/09w; Winkler, '§ 147' (n 588) para 3.

which were in the possession of the deceased at the moment of death. (591) The rights of third parties can, in any case, not be interfered with. (592)

158 Among the security measures are the blocking (*Versperren*), sealing (*Versiegelung*) of the estate, or its safekeeping with the court commissioner or a custodian. (593) In practice, commissioners frequently proceeded to change the locks of immovables or other premises belonging to the *de cuius*. (594) If third parties, in particular relatives and cohabitants, are entrusted with (temporarily) safekeeping the estate, they are required to refrain from disposing of any of its assets. (595) A court commissioner can only release certain assets from the estate to cover funeral costs. (596) Similar scenarios arise if assets only appear to belong to the estate, when actually they (at least partly) belong to third parties (eg joint accounts; rights of co-tenants, etc). (597) In these cases, court commissioners are entitled to set aside security measures that were already taken. (598) The same applies to accounts that had been blocked (*Banksperre*) after the death of the *de cuius*, in particular to acquire funds necessary to pay for funeral arrangements; (599) the release does not have to be approved by a court. (600) Court commissioners can, however, not overcome blocking measures adopted by judicial authorities. (601)

159 At other times, assets have to be returned to their rightful owner. Third-party funds, cash keys, documents or files relating to the deceased's work in the public service, for example, have to be secured and handed over to the respective public authority. (602) Court commissioners are further required to inform public authorities of the death of the *de cuius* if they received ongoing public payments from them (eg, pensions, social security, etc). (603)

---

(591) Cf OGH 1 Ob 47/99i.

(592) Cf OGH 4 Ob 583/69.

(593) § 147(2) AußStrG 2005.

(594) Already mentioned in ErlRV 224 BlgNR XXII GP 96. These measures can be taken even if jurisdiction lies with foreign courts under the Succession Regulation whose Article 19 is implicitly referenced by § 147(4) AußStrG 2005.

(595) § 147(3) AußStrG 2005.

(596) § 148(1) AußStrG 2005.

(597) ErlRV 224 BlgNR XXII GP 97.

(598) § 148(2) AußStrG 2005.

(599) § 148(3) AußStrG 2005. Also see § 149 AußStrG 2005.

(600) ErlRV 224 BlgNR XXII GP 97.

(601) Thomas Schatzl, Claus Spruzina, '§ 149' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 2.

(602) § 146(2) AußStrG 2005.

(603) § 146(3) AußStrG 2005. Cf Stephan Verweijen, '§ 146' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar*, (Linde 2019) para 12.

160 If no Austrian court is competent to deal with succession proceedings, however, there generally is no court commissioner either that would carry out the above-mentioned acts in foreign proceedings. (604) After the Succession Regulation, the 2015 legislator thus proceeded to extend the competences of notaries to include the adoption of security measures concerning assets situated in Austria in the event that foreign courts had jurisdiction to deal with a succession case. (605)

c) *Testamentary dispositions*

161 Regarding the publication of testamentary dispositions, notaries are today obliged to inform the appointed court commissioners of wills and agreements as to succession drawn up by them or in their possession and are to provide the commissioners with the respective documents. (606) Similar duties apply to people aware of the passing of the deceased that were in possession of any will or testament. (607)

162 While court commissioners have no general duty to investigate whether there are any testamentary dispositions, (608) they have to receive the dispositions submitted to them and have to include a certified copy in the probate file. (609) They have no authority to assess the substantive validity of the disposition. (610) When receiving them, however, a record is created (*Übernahmeprotokoll*) specifying all circumstances potentially relevant for assessing the authenticity and validity of the document (eg whether it was sealed, any external distinctive features, etc). (611) The record – a public document (612) – replaced the previous publication procedure (*Kundmachung*). (613)

163 To guarantee the parties' right to be heard, court commissioners are further required to inform all potential legal heirs of the discovered dispositions,

---

(604) ErlRV 688 BlgNR XXV GP 46.

(605) Now in § 1(1)(1)(c) GKG.

(606) § 111 NO 1871 as changed by Article I AußStr-BegleitG.

(607) § 151 AußStrG 2005. The original has to be submitted, see Margit Winkler, '§ 151' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 1.

(608) Cf Winkler, '§ 151' (n 607) para 2.

(609) § 152 AußStrG 2005. The original has to be kept at the local court.

(610) Margit Winkler, '§ 152' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 10; Andreas Tschugguel, 'Zur Testamentszustellung durch den Gerichtskommissär' (2014) 9 EF-Z 259, 259; Andrea Grün, '§ 152' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 3.

(611) § 152(1) AußStrG 2005.

(612) Grün, '§ 152' (n 610) para 1.

(613) Spruzina, '§ 797' (n 566) para 19.

submitting an uncertified copy. (614) When recording an oral testament, however, the right of heirs to be heard is generally guaranteed by the fact that they can at any time access the judicial records and the above-mentioned *Übernahmeprotokoll*. (615) The provisions are particularly relevant in cases in which wills or testaments have not been registered in public registers. (616)

2. *The proceedings*

164 The substantive phase of succession proceedings (*Abhandlung*) begins after the preliminary inquiries are complete, and potential security measures were taken. The primary goal of this phase is to acquire declarations of acceptance (or waivers) from potential heirs, and to determine the succession rights of all parties, before proceeding to legally transfer the estate. The phase is, however, not always reached, depending on the results of the preliminary inquiries. After the 2003 reform (which entered into force in 2005) if 1) there are no assets in the estate; 2) if their value does not exceed € 5,000; or 3) if the inheritance is to be acquired by operation of law under the applicable *lex successionis* and no entries in public registers were required, (617) succession proceedings do not have to take place, unless a party makes a specific application. (618) Especially with smaller estates, proceedings can thus be terminated in a simplified manner after the preliminary steps described above. (619) If an estate appears to be in debt, on the other hand, both a transfer of the estate in lieu of payment to the creditors (*Überlassung an Zahlungs statt*), (620) or (slightly more complicated) insolvency proceedings (*Verlassenschaftsinsolvenz*) can take place. Parties do not have to be informed of the respective decision not to proceed and of the consequent stay in the

---

(614) § 152(2) AußStrG 2005.

(615) Winkler, '§ 152' (n 610) para 2.

(616) See n 575.

(617) If Austrian law is applicable to the succession, on the other hand, courts are required to authorise those whose rights (demonstrably) appear to be proven to take over all or parts of the estate's assets, see § 153(2) AußStrG 2005.

(618) (§ 153 AußStrG 2005). In the past, many proceedings did not ever lead to the legal transfer of the estate (*Einantwortung*) but were terminated due to the lack of assets, cf ErlRV 224 BlgNR XXII GP 99.

(619) § 153 AußStrG 2005.

(620) §§ 154–155 AußStrG 2005. Before proceeding to the transfer in this case, the court commissioner has to inform all heirs and give them a chance to be heard. The obligation does not apply when the value of the assets does not exceed € 5,000 or if the whereabouts of creditors or heirs or persons entitled to a compulsory portion are unknown. See Spruzina, '§ 797' (n 566) para 27. The decision on the transfer (*Überlassungsbeschluss*) is a judicial one, see § 798 ABGB.

proceedings. (621) They can, however, always request that the proceedings be reinstated regardless of the size of the estate. (622)

a) *Declarations in matters of succession law*

165 If the proceedings do, however, take place, and transition into their second phase, the position and intents of the legitimate heirs have to be further assessed. The preliminary inquiries (*Todesfallaufnahme*) provide the necessary information and a starting point for this purpose. Court commissioners again play a decisive role; the role of courts is limited. (623) While the latter can address potential matters of representation (*Vertretungsvorsorge*), it is notaries that are entrusted with obtaining declarations of intent (*Erbantrittserklärungen*) from the potential heirs identified during the preliminary inquiries. (624) The purpose of these declarations is to assess whether heirs aspire to accept or waive the inheritance, as they do not *ipso jure* acquire the estate at the moment of death but have to expressly state their intentions, further providing evidence of their legal title (*Erbrechtsausweis*). (625) Regardless of their content, both types of declaration are primarily received by a court commissioner, (626) and either recorded or submitted in writing. (627) The declarations are generally initiated by notaries that have to request that the potential heirs submit their declarations within a reasonable period of

(621) Cf Hansjörg Sailer, '§ 153' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 8. Technically, there is thus no judicial decision that could be appealed, cf OGH 4 Ob 73/08a.

(622) § 153(1) AußStrG 2005; Ferrari, 'Der Erwerb der Erbschaft' (n 465) para 12.12.

(623) Cf Bittner, 'Vor § 143' (n 537) para 16.

(624) § 157 AußStrG 2005. See also § 156 AußStrG 2005 and ErlRV 224 BlgNR XXII GP 102.

(625) § 799 ABGB. According to § 533 ABGB, potential titles are: the law, a testament, agreements as to succession. In the case of an intestate succession, the title can be proved by presenting the relevant civil status documents (birth certificate, marriage certificate, acknowledgement of paternity, court-authorised adoption, death certificate, etc), in the case of testamentary dispositions by presenting a formally valid will, and in the case of an agreement as to succession by presenting a copy of the notarised contract. See Claus Spruzina, '§ 799' in Andreas Kletečka, Martin Schauer, *ABGB-ON*$^{1.02}$ (1 January 2017, rdb.at) para 3; Rudolf Welser, '§ 800' in Peter Rummel, Meinhard Lukas (eds), *Kommentar zum ABGB. §§ 531–824 ABGB* (4th edn, Manz 2014) para 17. The title can later be changed (eg, if a testament turns out to be invalid) until the estate is transferred, cf RIS-Justiz RS0007933.

(626) Even if they could also be directed to a court, see § 144(1) AußStrG 2005.

(627) OGH 2 Ob 53/09x.

time. (628) If heirs identified during the preliminary inquiries are not involved, the proceedings can be rendered void. (629)

The general rules on declarations of intent (and how they can be challenged) do not apply if the inheritance is accepted, as heirs are merely considered to express their intention to take part in the respective proceedings, acquiring the status of party to the succession proceedings. (630) Waivers (*Erbentschlagung*, *negative Erbantrittserklärung*), on the other hand, are presumed to be substantial in nature and can therefore be contested in contentious-proceedings on the grounds of potential vitiating factors. (631) **166**

If heirs decide to accept an inheritance, the respective declarations can either be unconditional (*unbedingte Erbantrittserklärung*) or conditional (*bedingte Erbantrittserklärung*). (632) While an unconditional acceptance leads to the personal liability of heirs to all creditors of the deceased as well as to all legatees (even if the estate is insufficient to cover their claims), (633) the conditional acceptance potentially provides more security for heirs. It requires an inventory to be drawn up by a court (*rectius*: court commissioner), at the expense of the estate. (634) Heirs are then only liable to the creditors and legatees within the value of the assets of the estate. (635) **167**

Regardless of their type, acceptances always have to contain the following: 1) **168**

---

(628) § 157(1) AußStrG 2005.

(629) OGH 7 Ob 48/08x.

(630) See OGH 4 Ob 80/00v; Kristin Nemeth, '§ 799 ABGB' in Georg Kodek, Michael Schwimann (eds), *ABGB Praxiskommentar*, vol IV (5th edn, Lexis Nexis 2018) para 4. Further cf RIS-Justiz RS0113461; Welser, *Erbrechts-Kommentar* (n 566) § 800 ABGB, para 24; Spruzina, '§ 799' (n 625) para 11. The general rules are found in §§ 869ff ABGB.

(631) See OGH 1 Ob 127/71; Claus Spruzina, '§ 805' in Andreas Kletečka, Martin Schauer, *ABGB-ON*$^{1.02}$ (1 January 2017, rdb.at) para 8. Other grounds would be the lack of legal capactiy (*Geschäftsfähigkeit*); OGH 7 Ob 2398/96i), and error (OGH 4 Ob 80/00v). Furthermore, if conditions or time limits are added, the waiver becomes invalid and is inadmissible according to OGH 6 Ob 193/98w; Egon Weiß, '§ 805' in Heinrich Klang (ed), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, vol III (2nd edn, Verlag der Österreichischen Staatsdruckerei 1952) 1001–1002. The validity is either contested in the *Verfahren über das Erbrecht* (§§ 160–164 AußStrG 2005) or as part of the *Erbschaftsklage* (§ 823 ABGB), see Ferrari, 'Der Erwerb der Erbschaft' (n 465) para 12.33.

(632) § 800 ABGB.

(633) See §§ 801, 820–821 ABGB. The liability arises once the transfer has become final, cf Claus Spruzina, '§ 801' in Andreas Kletečka, Martin Schauer, *ABGB-ON*$^{1.02}$ (1 January 2017, rdb.at) para 2.

(634) See § 802 ABGB.

(635) And thus, not *ultra vires* but *pro viribus*. Welser, *Erbrechts-Kommentar* (n 566) § 802 ABGB, para 1. This might, however, not always be the case as shown by Gregor Christandl, '„Ultra vires-Haftung" des beschränkt haftenden Erben (Teil 1 und 2)' (2023) 18 EF-Z 195–199 and 257–260.

the name and surname, the date of birth and the address of the party making the declaration (*Erbansprecher*); 2) a reference to the legal title based on which the inheritance is to be acquired; 3) the express declaration to accept the inheritance; 4) the express declaration on whether the inheritance is accepted unconditionally or conditionally; 5) if possible, the share; and 6) the signature of the party or of their representative (636). (637) The acceptance cannot be made under a condition or time-limit. (638)

169 When accepting the inheritance, the parties making the declaration do not immediately become heirs (ie acquire the estate) – something that only occurs with the legal transfer of the estate – but express their intent to seek universal succession within the proceedings. (639) They do, however, acquire certain rights of representation with regard to the estate. If a party waives their rights to an inheritance, on the other hand, they express their intention to disclaim the accrual of the estate and consequently lose their position as heir.

170 Regardless of whether the inheritance is accepted or rejected, the declaration – once made – cannot be revoked. (640) Still, the limitation especially applies to situations in which heirs waived their succession rights, (641) as declarations of acceptance can potentially be (at least slightly) adapted under § 160 AußStrG 2005 in the case of conflicting declarations (see *infra*). (642) Furthermore, heirs cannot change their unconditional acceptance into a conditional one (however, they can change a conditional one to an unconditional one (643)) or reserve the right to draw up the inventory. (644) The title based on which heirs claim a part of the inheritance can, however, be changed. (645)

171 The somewhat static nature of the declarations justifies eligible heirs not having to decide immediately but being given a period of at least four weeks

---

(636) If a representative intends to waive or accept the inheritance unconditionally, a special power of attorney is required (§ 1008 ABGB), cf OGH 3 Ob 566/90.

(637) § 159 AußStrG 2005.

(638) Cf RIS-Justiz RS0013003, RS0110927.

(639) ErlRV 224 BlgNR XXII GP 102.

(640) § 806 ABGB; Spruzina, '§ 799' (n 625) para 24.

(641) The waiver can no longer be revoked once the court or court commissioner is informed of the declaration, see OGH 4 Ob 58/99d. A waiver only refers to a specific legal title, eg, the law. If a testament is later found, the inheritance can still be accepted, see RIS-Justiz RS0015487.

(642) Claus Spruzina, '§ 806' in Andreas Kletečka, Martin Schauer, *ABGB-ON*[1.02] (1 January 2017, rdb.at) para 1.

(643) Cf Welser, *Erbrechts-Kommentar* (n 566) § 806 ABGB, para 1.

(644) § 806 ABGB.

(645) RIS-Justiz RS0007933.

to reflect. (646) Under certain circumstances, the time period can be further extended but it cannot exceed one year in total. (647) If the parties miss the deadline assigned to them, they do not lose their rights to the inheritance but are merely no longer considered in the proceedings. Nevertheless, the declaration can still be made at a later stage, at least, until the estate is definitively transferred (with *res judicata* effects). (648)

172 In order to ensure that potential heirs can take an informed decision, court commissioners have to inform them about the consequences of not making any declaration and – if the parties are not represented by a lawyer or notary – the consequences connected to (un)conditional declarations of acceptance. (649)

173 In the event that no potential heirs were identified in the preliminary stages of the proceedings, or if some could not yet be identified, court commissioners have to issue a public notice (*Edikt*), (650) in which any other potential heirs are invited to bring their claims forward within six months. (651) The estate can only then be transferred. (652) If no heirs could, however, be identified, the State has to be informed. For this purpose, court commissioners are required to notify the competent office, the *Finanzprokuratur*, a body working under the Federal Ministry of Finance responsible for providing legal advice and representation in the interests of the State. (653)

174 Given that heirs cannot be required to make the above-mentioned declarations if a succession is governed by a foreign law (in particular, how the estate

---

(646) § 157(2) AußStrG 2005.

(647) Ibid. Eg, if companies are involved in the estate and potential debts need to be assessed in more detail, cf ErlRV 224 BlgNR XXII GP 102.

(648) § 157(3) AußStrG 2005; Stephan Verweijen, '§ 157' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar*, (Linde 2019) paras 11–13; Spruzina, '§ 805' (n 631) para 2. If the deadline was missed by the legal representative of a vulnerable person, the competent court (*Pflegschaftsgericht*) has to be informed by the court commissioner who is in charge of the proceedings at this stage, see Hansjörg Sailer, '§ 157' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 6.

(649) § 157(1) AußStrG 2005. The same goes for the fact that the estate may be acquired by the State if no other heirs are found, see § 184(3) AußStrG 2005.

(650) Online, in the so-called *Ediktskartei* (<www.edikte.justiz.gv.at> accessed 1 June 2025), and potentially in newspapers. Against the publication in newspapers, due to the high costs, Verweijen, '§ 158' (n 586) para 9.

(651) § 158(1) AußStrG 2005.

(652) § 158(2) AußStrG 2005. The judicial decision has the same content as the *Einantwortungsbeschluss*, see Gerold Maximilian Oberhumer, 'Aneignung durch den Bund (Erblose Verlassenschaft)' in Susanne Ferrari, Gundula Maria Likar-Peer (eds), *Erbrecht. Handbuch* (2nd edn, Manz 2020) para 7.9.

(653) Nemeth, '§ 750 ABGB' (n 566) para 4; Oberhumer, 'Aneignung durch den Bund' (n 652) para 7.6.

is transferred, and who is liable for its debts), specific rules were introduced in 2015 to accommodate cross-border scenarios after the Succession Regulation. The Austrian rules governing declarations of acceptance can now potentially still be applied, however, only to the extent required both to protect the rights of the parties involved and the transfer of rights under the applicable inheritance law. (654)

175 Up to this point, most tasks connected with declarations of heirs are directly carried out by a court commissioner. Courts, however, have to become involved if the declarations (of acceptance) that were issued by the different parties are in any way conflicting (*widersprechende Erbantrittserklärungen*) – eg as to the shares, or legal titles (655) – or incompatible with statements (656) of the *Finanzprokuratur*. At this point the proceedings can become contentious. (657) However, before courts have to become involved, court commissioners have to try to reach an amicable solution that ensures that the succession rights of one party are recognised by another, often during a hearing. (658) Any results are then recorded as minutes by the court commissioner. (659) The minutes, however, do not constitute a settlement. Even the final decision is in any case left to the court, which is not bound by any declaration (recognition) made to (or before) the court commissioner. (660) The parties, on the other hand, are bound by the mediation attempt once the decision on the judicial determination of heirs (*Beschluss über die Feststellung des Erbrechts*) becomes final. (661)

176 If a succession right is recognised by another party, declarations that can no longer lead to the legal transfer of the estate have to be (formally) rejected;

---

(654) § 181a AußStrG 2005.

(655) See Spruzina, '§ 799' (n 625) para 24.

(656) Eg, regarding the validity of testamentary dispositions or of any heirs are deemed to be debarred from inheriting (*Erbunwürdigkeit*), see ErlRV 224 BlgNR XXII GP 104.

(657) This may be the case if two of the potential heirs declare that they will accept the entire inheritance.

(658) § 160 AußStrG 2005; ErlRV 224 BlgNR XXII GP 104: eg, one party recognises the succession rights of the other.

(659) See Linda Oswald, '§ 160' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 7. NB: the record does and cannot constitute a judicial settlement. This would be the case if the recognising party is entitled to a payment for their declaration.

(660) Johann Höllwerth, '§ 160' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 22; Oswald, '§ 160' (n 659) paras 11, 19.

(661) OGH 2 Ob 220/18v.

the succession rights of the heirs that were recognised as such, on the other hand, are then established by the competent court. (662)

177 If the attempt to find an amicable solution fails, the question is, in any case, submitted to the competent court.

b) *The judicial determination of heirs*

178 Given the uncertainties regarding the legal transfer of the estate in the case of conflicting declarations of acceptance, courts are entrusted with definitively establishing who may seek universal succession. (663) The decision, ie the determination of heirs, is either taken when legally transferring the estate (*Einantwortung*) or – if necessary – separately (664) at a prior stage. (665) In this decision, courts judicially determine the legitimate heirs (the 'best succession right' [*das beste Erbrecht*]) and reject other, incompatible declarations of acceptance. (666)

179 The proceedings are judicial in nature and based both on the findings of the preliminary inquiries of the court commissioner and the potential amicable (non-binding) solutions reached by the latter and the parties involved. Due to the contentious character of the oral (667) proceedings, parties can only be represented by a lawyer (and not by a notary). (668) The decision is taken based on the parties' submissions; courts are not allowed to take evidence against the will of the parties. (669) Stays (*Ruhen des Verfahrens*) are possible, provided that court commissioners are informed. (670) The need arises given

---

(662) Spruzina, '§ 799' (n 625) para 25; Andrea Grün, '§ 160' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 5; Verweijen, *Verlassenschaftsverfahren* (n 837) 229-231.

(663) The decision on conflicting declarations of acceptance cannot be taken by a senior judicial officer (*Rechtspfleger*), see § 18(2)(2)(b) RPflG. The only requirement for initiating the proceedings are conflicting declarations of acceptance, cf OGH 2 Ob 194/14i.

(664) This generally occurs if an inventory has to be drawn up, see ErlRV 224 BlgNR XXII GP 105.

(665) § 161(1) AußStrG 2005.

(666) Cf Johann Höllwerth, '§ 161' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 27.

(667) Cf Johann Höllwerth, '§ 162' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 3.

(668) § 162 AußStrG 2005. If the value of the estate exceeds € 5,000 (initially: € 4,000), the representation becomes mandatory.

(669) § 161(1) AußStrG 2005.

(670) § 163(1) AußStrG 2005 which extends the cases mentioned in §§ 25–29 AußStrG 2005 to the present scenario.

that the latter can still carry out certain tasks during the proceedings before the court (eg inventories, security measures). (671)

180 The determination might have to be repeated if new declarations of acceptance are made after the succession rights have been judicially established but before the estate is legally transferred, eg by potential heirs not contacted by the court commissioner under § 157 AußStrG 2005. (672) The non-involvement of persons entitled to a compulsory portion, on the other hand, renders the proceedings null and void. (673)

c) *Inventory*

181 After having acquired all relevant declarations as to the acceptance or waiver of the inheritance (and after having solved any potential conflicts), the focus of the proceedings shifts to the assets of the estate. The tool used in such cases is – as was traditionally the case – an inventory, which constitutes a public document (674) listing 'all' assets and debts of an estate that is drawn up by a notary. While in practice an inventory might not always be truly complete (especially with regard to debts), it is presumed to be correct in the same manner as a public document. (675) The assets listed in it are considered to belong to the estate; presumptions as to the legal ownership are, however, not established. (676)

182 An inventory is to be drawn up – mostly *ex officio* – in the following cases (677): 1) the potential heirs (even only one of the co-heirs (678)) have declared their conditional acceptance of the inheritance; (679) 2) the people that are entitled to a compulsory portion are either minors or have a legal representative for other reasons; 3) courts ordered that the estate be sepa-

---

(671) § 161(2) AußStrG 2005.

(672) § 164 AußStrG 2005. Cf Stephan Verweijen, '§ 164' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 10.

(673) Verweijen, '§ 164' (n 672) para 14.

(674) Defined as a public document, see Bittner, 'Vor § 143' (n 537) para 21; Stephan Verweijen, '§ 166' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) paras 1–2. It is not a decision (*Beschluss*) as the explanatory report stated, see ErlRV 224 BlgNR XXII GP 109.

(675) § 292 ZPO; Claus Spruzina, '§ 166' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 3; Verweijen, '§ 166' (n 674) para 2.

(676) Spruzina, '§ 166' (n 675) para 3.

(677) § 165(1) AußStrG 2005.

(678) § 807 ABGB. In this case, the limited liability extends even to the heirs that had originally accepted the inheritance unconditionally.

(679) In this case, court commissioners further have to involve all creditors of the estate (*Verlassenschaftsgläubiger*), see § 165(2) AußStrG 2005.

rated from other assets of the heirs *(Absonderung der Verlassenschaft vom Vermögen der Erben*) (680); 4) if a subsequent succession (*Nacherbschaft*) (681) has to be taken into account or if a private foundation was established; 5) if the estate could be devolved to the State; (682) 6) if a person entitled to do so (eg a forced heir (683)) or their representative make an application in this regard; or 7) if the applicable succession law (or a declaration by a heir) limits the responsibility of heirs to the value of the estate.

183 In all other cases, it is the heirs that have to describe and appraise the estate's assets as would be the case under an inventory (*Vermögenserklärung*). (684)

184 The inventory serves as a complete list of the estate, namely all tangible assets, rights and liabilities of the deceased, and of their value at the time of death. (685) Court commissioners do not have to search for assets whose existence (as part of the estate), at that point in time, is unclear. (686) The parties (heirs who have accepted the inheritances, administrators of the estate, persons entitled to a compulsory portion) necessarily have to be summoned when appraising the assets of the estate, unless they have waived the respective right. (687) Other parties to the proceedings, on the other hand, do not need to be present when the inventory is drawn up, even if the final document has to be served to them. (688)

185 While the inventory does not have to be approved by a judge, (689) and is binding, at least for the probate proceedings (not for any future contentious proceedings though), (690) some functions still exclusively fall to courts. If it is disputed whether an item is part of the estate, for example, it is for a judge and not for the notary (court commissioner) to decide if the asset should be

---

(680) § 812 ABGB. The decision on separating the estate cannot be taken by a senior judicial officer (*Rechtspfleger*), see § 18(2)(2)(a) RPflG.

(681) Subsequent successions are governed by §§ 604-617 ABGB.

(682) § 184 ABGB.

(683) See Claus Spruzina, '§ 804' in Andreas Kletečka, Martin Schauer, *ABGB-ON*[1.02] (1 January 2017, rdb.at) para 2; Welser, *Erbrechts-Kommentar* (n 566) § 804 ABGB, para 4.

(684) § 170 AußStrG 2005. Previously known as: *eidesstattliche Vermögenserklärung*. Heirs must confirm the accuracy and completeness of their declaration with their signature. False declarations may lead to criminal prosecution. The declaration takes the place of the inventory in the proceedings. See Ferrari, 'Der Erwerb der Erbschaft' (n 465) para 12.37.

(685) Cf § 166(2) AußStrG 2005.

(686) OGH 4 Ob 112/12t.

(687) § 168(1) AußStrG 2005. See Ludwig Bittner, Philip Gruber, '§ 168' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 5.

(688) § 169 AußStrG 2005.

(689) Ibid. In any case, court commissioners are liable for any mistakes made during the drafting of the inventory (*Amtshaftung*), cf OGH 1 Ob 190/10p. Spruzina, '§ 166' (n 675) paras 3, 3/1.

(690) ErlRV 224 BlgNR XXII GP 109; RIS-Justiz RS0006465; RS0007784.

included in the inventory or not. (691) Third parties are, in this regard, obliged to grant access to the respective items and to allow their inspection and description. (692)

186 The reform further introduced specific rules on how to determine the value of assets, limiting the margin of discretion of court commissioners. (693) Appraisals, consequently, only have to be made on rare occasions.

187 When drafting an inventory, court commissioners have the same powers as when recording a person's death. This particularly includes certain authoritative functions, such as the access to certain assets of the estate. Court commissioners are further entitled to rely on other experts, especially when tasks have to be carried out in other court districts, (694) and to request parties to pay the respective fees directly to them without the need for a judicial decision in that regard. (695) The costs for the inventory are borne by the estate. (696)

188 Given that it can be unclear whether the estate is in debt or not, heirs can request that all creditors be publicly notified of the proceedings (*Aufforderung der Verlassenschaftsgläubiger*). The notification has to take place if the inheritance was accepted conditionally or if the estate is to be transferred in lieu of payment with assets exceeding € 25,000. (697) Creditors are asked to register their claims. (698) While the notification is judicial in nature, important steps are again taken by court commissioners. If a hearing is scheduled in connection with the request, for example, its date has to be publicised by the commissioner. (699) The latter further has to summon the presumed heirs, everyone that is entitled to a compulsory portion, and any administrators and executors of the estate. (700) Regarding the hearing itself, the commissioner has to attempt to reach an agreement on the claims that were filed by the creditors. (701)

189 Similar activities are expected of court commissioners if a legacy is claimed based on care services carried out for the deceased in the years prior to their

---

(691) § 166(2) AußStrG 2005. If the item was last in the possession of the deceased, it should only be excluded if unequivocal documents prove that it is not (or no longer) part of the estate.

(692) § 166(3) AußStrG 2005.

(693) § 167 AußStrG 2005.

(694) ErlRV 224 BlgNR XXII GP 108.

(695) § 168(2) AußStrG 2005.

(696) § 168(3) AußStrG 2005.

(697) §§ 155(2) and 165(2) AußStrG 2005.

(698) § 813 ABGB.

(699) § 174(1) AußStrG 2005.

(700) Ibid.

(701) § 174(2) AußStrG 2005.

death (*Pflegevermächtnis*). (702) Notaries are legally obliged to try to reach an agreement on its fulfilment. (703) For this purpose, they are further entrusted with inquiries into care allowances of the deceased and other relevant information in this regard. (704)

3. *The legal transfer of the estate*

a) *Preliminary steps*

190 The transfer of the estate (*Einantwortung*) constitutes a particular feature of Austrian succession law and describes a decision by the probate court that legally leaves the estate to the heirs, ending the succession proceedings. (705) Heirs thus do not acquire the inheritance at the moment of death of the *de cuius* but have to have the estate legally transferred to them by a court. Heirs are (for the most part (706)) not allowed to take possession of the estate or its assets prior to the transfer. (707) The *Einantwortung* constitutes the last procedural step in succession proceedings. Before a court can proceed to the transfer, however, a number of requirements have to be met (*zur Einantwortung erforderliche Nachweise*).

191 In particular, all heirs and their shares must have been previously determined. (708) Consequently, the inheritance must necessarily have been accepted, a legal title must have been provided. (709) Before proceeding to 'handing over' the estate, parties additionally have to prove that 'all other requirements' have been met. (710) These 'other requirements' refer to the request to make a declaration of acceptance under § 157 AußStrG 2005, the expiry of the time-period mentioned in § 158 AußStrG 2005 as well as the potential decision on an application for the separation of the estate under § 812 ABGB. (711)

192 Furthermore, all non-heirs entitled to a part of the inheritance (eg legatees

---

(702) §§ 677–678 ABGB.
(703) § 174a AußStrG 2005.
(704) Ibid.
(705) § 797 ABGB.
(706) See *infra* on the administration of estates.
(707) § 797(1) ABGB. See Manfred Wenckstern, 'Inheritance, Acceptance and Disclaimer' <https://max-eup2012.mpipriv.de/index.php/Inheritance,_Acceptance_and_Disclaimer> accessed 1 June 2025.
(708) § 177 AußStrG 2005.
(709) See Ferrari, 'Der Erwerb der Erbschaft' (n 465) para 12.92.
(710) § 177 AußStrG 2005. The *Einantwortung* is defined in § 797 ABGB.
(711) Welser, *Erbrechts-Kommentar* (n 566) § 798 ABGB, para 1.

and forced heirs ([712])) must have been informed of their potential claims in the estate. ([713]) If minors or other vulnerable parties (*Pflegebefohlene*) are involved, the transfer can only be initiated after their claims have been satisfied or after securities have been provided for these purposes. ([714]) The latter can be deposited with a court commissioner. ([715]) Courts can issue specific orders in this regard.

193 Still, the estate is not transferred in any case. This is, for example, the case when no heirs were identified (*erblose Verlassenschaft*); ([716]) if the estate was insolvent; in the event that some assets of the estate were transferred to creditors in lieu of payment; if the succession proceedings did not take place due to the lack of assets or if their value did not exceed € 5,000; or if an already performed transfer had been challenged by an inheritance action under § 823 ABGB. ([717])

b) *The transfer*

194 The transfer of the estate is ordered by means of a constitutive court decision (*Einantwortungsbeschluss*). ([718]) With it, heirs *ipso jure* acquire legal title of the estate's assets, they become creditors of claims belonging to the estate and debtors of the estate's liabilities. ([719]) Only the transfer completes the universal succession.

195 The judicial decision functions as a sort of 'certificate of succession', containing the most important information on both the inheritance and the heirs, and in particular ([720]): 1) the designation of the estate, indicating the name and surname of the deceased, their date of birth and death and their last place of residence; 2) the designation of heirs, giving their name and surname, their date of birth and address; 3) the heirs' title to the estate, their shares in the inheritance and, potentially, reference to agreements on the division of the estate; 4) the type (conditionally, unconditionally) of acceptance.

196 Other information is only potentially included. This, especially, concerns potential restrictions of the rights of the heirs, eg by subsequent succes-

---

([712]) ErlRV 224 BlgNR XXII. GP. 111.

([713]) § 176(1) AußStrG 2005.

([714]) These can consist in assets of the estate, see § 176(3) AußStrG 2005.

([715]) § 176(2) AußStrG 2005.

([716]) § 750 ABGB.

([717]) See Spruzina, '§ 797' (n 566) para 6; Welser, *Erbrechts-Kommentar* (n 566) Vor § 797 ABGB, para 2.

([718]) On this form of judicial decision, §§ 36–44 AußStrG 2005.

([719]) See Ferrari, 'Der Erwerb der Erbschaft' (n 465) para 12.114.

([720]) § 178(1) AußStrG 2005.

sions, (721) or indications as to immovable properties that belonged to the estate and require changes in the land registers as a result of the transfer. (722)

197 Together with the decision, courts are required to tie up any potential loose ends of the proceedings, which include the cancellation of measures adopted to secure the estate (*Sperren, Sicherstellungen*), and the determination of the fees to be paid to the court commissioner. (723) If the courts do not provide in that regard, copies of the decision, whose *res judicata* effects were confirmed, suffice to overcome measures adopted during the proceedings. (724) The clarification was necessary due to practical issues in the implementation of the legal transfer of the estate. Banks, in particular, had often requested additional documentation before granting access to accounts of the deceased. (725)

198 The *Einantwortungsbeschluss* has to be served to all parties involved and to everyone that has a legitimate interest in the case. (726) If it can be demonstrated that the privacy of the deceased or of the parties would otherwise be impaired, courts can further proceed to issue separate copies of the decision. (727) Similar limitations can be adopted if the courts stated the reasons that led to a particular determination of succession rights. In this case, copies intended for persons who were not a party to the proceedings are issued without reference to the reasons. (728)

199 Non-contentious proceedings, generally, do not provide for the immediate enforcement of decisions after they have been issued. The effects of the decision (its binding nature, enforceability, and changes in legal situations) do not take effect until it becomes legally binding. (729) Only when parties waive their right to appeal the decision before its adoption, and provided that the core points of the decision correspond to or meet the parties' initial requests, (730) can the decision immediately be enforced. (731) The decision otherwise acquires (formal) *res judicata* effects (*formelle Rechtskraft*) once it

---

(721) See §§ 707–709 ABGB.
(722) § 178(2) AußStrG 2005.
(723) § 178(3) AußStrG 2005.
(724) § 179 AußStrG 2005. See also Bittner, 'Vor § 143' (n 537) para 25.
(725) ErlRV 224 BlgNR XXII GP 113.
(726) § 178(5) AußStrG 2005. Eg, creditors.
(727) § 178(4) AußStrG 2005.
(728) § 178(6) AußStrG 2005.
(729) See Bittner, 'Vor § 143' (n 537) para 25.
(730) § 180(1) AußStrG 2005.
(731) Cf Hansjörg Sailer, '§ 180' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 1.

is issued. (732) The material effects (*materielle Rechtskraft*) – whose existence (when it comes to the transfer) is denied by some (733) – only follow once the decision is served to the parties. (734) The decision can, however, still be reviewed at a later stage by submitting an inheritance claim (*Erbschaftsklage*). (735) With the claim, a plaintiff generally asserts an inheritance right against an heir – designated as such in the decision on the transfer of the estate – not having been taken into account of in the *Einantwortung*. The action is the only legal remedy for enforcing inheritance rights after the transfer of the estate has become final. (736)

200 Particular issues regarding the transfer of the estate may arise when cross-border elements are involved. These are connected to the fact that jurisdictions generally apply their own procedural rules, even in international cases. The Austrian rules in matters of non-contentious proceedings are, however, closely intertwined with their substantive counterparts, particular with regard to the *Einantwortung*. Thus, if foreign law governs a case, it is likely that the applicable substantive rules do not match the specific procedural provisions set out in the AußStrG 2005. (737) Courts (and consequently court commissioners) can, therefore, only apply the provisions of the Act Governing Non-contentious Proceedings to the extent that they are compatible with the applicable inheritance law. Specific rules in this regard were introduced in 2015. (738) If an inheritance is acquired under a foreign law (or if the liability for debts of the estate is governed by a foreign law), (739) the Austrian rules governing the legal transfer of the estate now expressly only apply to the

---

(732) See OGH 10 Ob 28/11.

(733) For more information, see Patrick Schweda, '§ 797' in Attila Fenyves, Ferdinand Kerschner, Andreas Vonkilch (eds), *Großkommentar zum ABGB – Klang Kommentar. §§ 797–824* (3rd edn, Verlag Österreich 2021) para 3. Eg, doubted by RIS-Justiz RS0008383 and Spruzina, '§ 797' (n 566) para 1.

(734) OGH 5 Ob 74/09 g; Sailer, '§ 180' (n 731) para 1; Ludwig Bittner, Philip Gruber, '§ 180' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 1.

(735) See § 823(1) ABGB.

(736) Cf Welser, *Erbrechts-Kommentar* (n 566) § 824 ABGB, para 5; OGH 1 Ob 155/46. Due to the existence of the remedy, some voices in academia and a number of court decisions held that the *Einantwortung* never acquired (substantive) *res iudicata* effects, see RIS-Justiz RS0008378 and Claus Spruzina, '§ 819' in Andreas Kletečka, Martin Schauer, *ABGB-ON*$^{1.02}$ (1 January 2017, rdb.at) para 3.

(737) If, for example, the applicable foreign law does not provide for separation of the estate, the latter cannot be ordered in the proceedings pending before an Austrian court (§ 175 AußStrG 2005).

(738) The rules can found in § 181a AußStrG 2005, introduced with the ErbRÄG 2015.

(739) Cf Article 23(2)(d) and (g) Succession Regulation. Eg, if the deceased chose their *lex patriae* under Article 22 Succession Regulation.

extent required both to protect the rights of the parties involved and the transfer of rights under the applicable inheritance law. (740) This same rationale is further expressed in §§ 160a, 182(4) AußStrG 2005.

c) *The division of the estate*

201 How the estate is to be divided among heirs is generally not a part of the decision on the legal transfer of the estate. Heirs (and other parties to the succession proceedings (741)) can thus already enter into specific contractual agreements that concern the division of the estate or the use of its assets (*Erbteilungsübereinkommen*) before the estate is legally transferred. The option is still available after the transfer but has always to be unanimous. (742)

202 The agreements can, in particular, be entered into before (and recorded by) a court commissioner. (743) The same applies to agreements on care services and agreements on the deferral of a compulsory portion (*Stundung des Pflichtteils*). (744) The multilateral contracts between co-heirs deal with the dissolution of the community of heirs and the distribution of all assets, and further often regulate the internal distribution of debts. They only relate to the relationship between co-heirs and do not affect the legal relationship with third parties, in particular creditors. (745) The parties are not bound by indications given by the deceased. (746)

203 While notaries can, in their capacity as court commissioners, generally not record any judicial settlements, (747) in this context, the agreements entered into before them have the same effects as settlements concluded in court and are enforceable as such. (748) Only if individuals that are in need of particular protection are involved, such as minors, does the agreement need to be approved by a judge. (749)

---

(740) § 181a AußStrG 2005. See also *supra*.

(741) § 181(3) AußStrG 2005. The explanatory report mentions legatees and forced heirs as well as creditors of the estate, see ErlRV 224 BlgNR XXII GP 114.

(742) Kristin Nemeth, '§ 550 ABGB' in Georg Kodek, Michael Schwimann (eds), *ABGB Praxiskommentar*, vol IV (5th edn, Lexis Nexis 2018) para 6; Ludwig Bittner, Philip Gruber, '§ 181' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 1.

(743) § 180(1) AußStrG 2005.

(744) §§ 766–768 AußStrG 2005.

(745) Ferrari, 'Der Erwerb der Erbschaft' (n 465) para 12.108.

(746) See, eg, Matthias Neumayr, '§ 550 ABGB' in Peter Bydlinski, Stefan Perner, Martin Spitzer (eds), *ABGB. Kommentar (KBB)* (7th edn, Verlag Österreich 2023) para 4.

(747) § 1(2)(2) GKG.

(748) § 181(1) AußStrG 2005.

(749) § 181(2) AußStrG 2005.

204 In any case, the agreements can also be concluded before a judge. (750) Furthermore, if no agreement can be reached, heirs necessarily have to initiate court proceedings, leaving it for a judge to decide how to divide the estate (*Erbteilungsklage*). (751)

d) *After the transfer*

205 Typically, the legal transfer of the estate makes changes in the land registries necessary. These are not made automatically, but only upon request of the interested party. Generally, the decision on the legal transfer of the estate (or the certificate drawn up under § 178(7) AußStrG 2005) serves as a legal title. (752) European Certificates of Succession are, however, also accepted. (753)

206 Applications filed by heirs are decided on by a specialised court (*Grundbuchsgericht*). (754) To guarantee the accuracy of the registers in cases in which no such requests are made within a reasonable period of time (755), court commissioners (and not courts, as had previously been the case) are entrusted with filling in and making the respective applications for heirs. (756) Issues can arise, however, if the transfer of the estate is not governed by Austrian but by foreign law. With succession proceedings pending before a foreign court, no court commissioner can generally be appointed to represent heirs who, for some reason or another, did not request the necessary changes. Consequently, with the ErbRÄG 2015 (the 2015 succession law reform), the above-mentioned provisions on the subsidiary role of court commissioners were extended to cross-border settings (to the extent that they are applicable in a specific case). (757)

207 When changes to the land registers become necessary not due to the transfer of the estate to the legitimate heirs, but to legatees or to people who otherwise acquired assets of the estate, different solutions have to be adopted. With the consent of all heirs, the heirs can file an application with the probate court (and not the *Grundbuchsgericht*) for a decision confirming

---

(750) Nemeth, '§ 550 ABGB' (n 742) para 6.

(751) § 830 ABGB. Also, Ferrari, 'Der Erwerb der Erbschaft' (n 465) paras 12.111–12.112.

(752) § 33(1)(d) GBG.

(753) Ibid.

(754) § 182(1) AußStrG 2005.

(755) Meaning not significantly exceeding one year after the decision on the transfer became final (§ 182(2) AußStrG 2005).

(756) § 182(2) AußStrG 2005; ErlRV 224 BlgNR XXII GP 114.

(757) § 182(4) AußStrG 2005; ErlRV 688 BlgNR XXV GP 44.

that nothing stands in the way of their rights being registered. (758) The same applies for entries in business registers.

208 Courts further remain competent in matters of adapting rights *in rem* unknown in Austria. If a person invoked such a right to which they were entitled under the law applicable to the succession, a judge has to adapt the right to the closest Austrian equivalent. (759)

209 Changes after the transfer of the estate has become final may, however, also be necessary due to new events influencing either the consistency of the estate, the number of heirs or the title on which the inheritance was claimed.

210 If new assets are found, for example, all parties generally have to be informed; new declarations of acceptance are, however, not necessary. (760) The authority charged with the task of informing all parties is again a court commissioner. (761) The latter is, however, also involved in a number of subsequent steps. If an inventory had been drawn up for the estate, for example, court commissioners are further (and again) entrusted with adding the new assets to the list. (762) The same applies to heirs that had accepted the inheritance unconditionally and had drafted a separate declaration listing any assets of the estate (*Vermögenserklärung*). The judicial decision on the transfer generally does not need to be changed when new assets surface. (763) Only if no proceedings took place altogether (eg due to the initial lack of assets) does it have to be re-assessed whether or not the newly surfaced assets now require further steps to be taken and a probate proceeding needs to be initiated. (764)

211 Different interests are at play, however, if new testamentary dispositions surface. In such cases, court commissioners must again take over any wills or testaments, draft a report to be added to the probate file (*Verlassenschaftsakt*) and provide copies of the dispositions to the legal heirs. (765) The transfer itself can, however, not be challenged. Parties that claim to be heirs can only bring an action under § 823 ABGB to challenge the previous transfer. (766) These proceedings are purely judicial in nature.

---

(758) § 182(3) AußStrG 2005.

(759) Article 31 Succession Regulation and § 182a AußStrG 2005.

(760) ErlRV 224 BlgNR XXII GP 115.

(761) § 183(1) AußStrG 2005.

(762) § 183(2) AußStrG 2005.

(763) The provision of § 178(2) AußStrG 2005 does, however, apply, see *supra*.

(764) See §§ 153ff AußStrG 2005 and above.

(765) ErlRV 224 BlgNR XXII GP 115.

(766) See Georg Kodek, '§ 183' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 10.

C. *Certificates of succession*

1. *The European Certificate of Succession*

212 While the estate is legally transferred by a court whose decision functions as a kind of national certificate confirming the position of heirs, a different approach was taken when it came to cross-border succession cases within the European Union. Chapter VI of the Succession Regulation introduced a European Certificate of Succession (ECS) but had left it to Member States to determine the body that was to issue it. Austria decided to entrust notaries, and not judges, with the issuance of the certificate. (767)

213 The explanatory report that accompanied the respective 2015 succession law reform (ErbRÄG 2015) justified the decision with the purpose of the ECS. Given that the European Certificate of Succession only intended to certify and not shape a legal situation, it did not constitute a judicial decision for the purposes of the GKG. (768) If it had, the task could not have been delegated to notaries. (769) The issuance was thus also expressly listed among the competences of court commissioners. (770)

214 It was consequently necessary that the legal position of heirs had, in one way or another, been pre-established, either based on a declaration (771) or a court decision. (772) This meant that applications for an ECS could be filed by heirs to whom the estate had already been transferred, by applicants who had received the estate in lieu of payment or again if the ECS was intended to attest the powers of representation of a curator appointed under § 173 AußStrG 2005 or of heirs under § 810 ABGB. (773)

---

(767) § 1(1)(1)(d) GKG. Motal, 'EU-Erbrechtsverordnung' (n 552) 63 was of the view that courts should be entrusted with the issuance.

(768) ErlRV 688 BlgNR XXV GP 46.

(769) § 1(2)(1) GKG.

(770) § 1(1)(1)(d) GKG. While the issuance is an official act in probate proceedings, it did not fall under § 1(1)(1)(b) GKG ('official act required in the course of succession proceedings'), given that the ECS is issued only upon request. See ErlRV 688 BlgNR XXV GP 46.

(771) Declaration refers to valid declarations of acceptance, which can become relevant under § 810 ABGB for the purposes of administering and representing the estate, tasks that might have to be certified in an ECS if they have to be carried out abroad. See Robert Fucik, '§ 181b AußStrG' in Astrid Deixler-Hübner, Martin Schauer (eds), *EuErbVO. Kommentar zur EU-Erbrechtsverordnung* (2nd edn, Manz 2020) para 2.

(772) ErlRV 688 BlgNR XXV GP 44: 'Soll das ENZ eine Rechtsstellung bestätigen, die materiell besteht, sei es auf Grund einer wirksamen Erklärung, sei es auf Grund einer gerichtlichen Entscheidung, so hat es der Gerichtskommissär auszustellen [...]'.

(773) The examples are stated in ErlRV 688 BlgNR XXV GP 44.

However, issues could arise if the applicable law provided that the inheritance was to be devolved *ex lege* to the potential heirs. The characteristic decision (ie the requirement of a pre-established position of the applicant) mentioned in the explanatory report would then be lacking. Based on the initial government proposal, some scholars argued that the rules in § 1(1)(1)(d) GKG and § 181b AußStrG 2005 intended to provide a broad range of competences to notaries when it came to the ECS. (774) Others advocated for a more conservative approach, requiring court commissioners to seek a judicial decision in cases of an *ex lege*-transfer of the estate under the applicable foreign law. (775) The question remains ambiguous. Given, however, that court commissioners were generally entrusted with the issuance of the ECS, while still being able to refer cases to court in cases of doubts as to the position of heirs (as will be discussed below), the same should hold true in the event of an automatic accrual under the *lex successionis*. **215**

Court commissioners can only proceed to the issuance of the ECS if all respective requirements are met by the applicant. (776) If they are not met (ie if the court commissioner considers that the legal status to be certified does not exist), notaries are required to involve courts and to submit the respective application to the competent judge. (777) They do, however, have a considerable margin of appreciation in this regard and they are not entitled to simply dismiss an application without involving judicial authorities, given that a refusal would constitute a decision. (778) If courts are involved, they have to judicially determine whether the necessary prerequisites are fulfilled by the applicant. Even then, however, the ECS is still issued by a notary. (779) The court commissioner is, however, bound by the judicial decision once it becomes final. **216**

---

(774) Christoph Mondel, Andreas Tschugguel, 'Art 64' in Alfred Burgstaller, Matthias Neumayr, Andreas Geroldinger, Gerhard Schmaranzer (eds), *Die EU-Erbrechtsverordnung* (Lexis Nexis 2016) para 5.

(775) Linda Oswald, '§ 181b' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 7; Ludwig Bittner, '§ 181b' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 10.

(776) The assessment is called substantial/content-related by Gabriele Meusburger-Hammerer, 'Erfahrungen der Praxis mit dem Europäischen Nachlasszeugnis aus österreichischer Perspektive' in Thomas Garber, Katharina Lugani (eds), *10 Jahre EuErbVO. Rück- und Ausblick zur EU-Erbrechtsverordnung* (Verlag Österreich 2023) para 2/15.

(777) ErlRV 688 BlgNR XXV GP 44.

(778) Ludwig Bittner, Philip Gruber, '§ 181b' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 9. Otherwise, parties could act under § 7a GKG.

(779) ErlRV 688 BlgNR XXV GP 44.

217 As for the review procedure envisaged by Article 72 Succession Regulation, once the ECS is issued, parties are referred to the general measures provided for under the GKG, that is, the action for redress under § 7a(2) GKG. (780) Against the judicial decision that has to be issued in this case, parties can file an appeal (*Rekurs*). (781) The AußStrG 2005, however, does not explicitly regulate how to correct, amend or revoke the European Certificate of Succession. Under Article 71 of the Succession Regulation, the respective competence was delegated to the issuing authority, a solution to be upheld on a national level. (782)

218 The Succession Regulation introduced several procedural rules on the issuance of the certificate. Chapter VI, consequently, does not only contain provisions on the content and effects of the ECS but also on the establishment of relevant facts and the parties that necessarily have to be involved before being able to proceed to the issuance. Insofar as these rules do not suffice (eg, with regard to the time limits of a redress procedure under Article 72 Succession Regulation), however, the 2015 reform plainly referred notaries to the rules of the AußStrG 2005 in order to fill in gaps left by the Succession Regulation. (783)

2. *Other certificates*

219 While the position of heirs is definitively determined by a judicial decision, some aspects can, even in the course of probate proceedings, be certified by non-judicial actors. (784) Notaries are, in particular, entrusted with drawing up public documents confirming the powers of representation of heirs (*Amtsbestätigung*). (785) The issuance of the certificates was in its entirety delegated to notaries, excluding any judicial competences in the matter. (786)

220 For the certificate to be issued, heirs primarily need to prove their legal title. (787) The existence of the latter is then evaluated by the court commis-

---

(780) Ibid; Fucik (n 7) 168.

(781) ErlRV 688 BlgNR XXV GP 44.

(782) Fucik, '§ 181b AußStrG' (n 771) para 7. Eg, when assessing the applicant's requirements.

(783) § 181b(1) AußStrG 2005.

(784) On the decision that constitutes a kind of 'certificate of succession' and its contents, see *supra*.

(785) §§ 172 and 173(1) AußStrG 2005. Also, § 292 ZPO. The certificate does not circulate as a decision under the Succession Regulation, see, eg, Lurger, Melcher, *Handbuch Internationales Privatrecht* (n 210) para 3/126.

(786) OGH 10 Ob 3/07z.

(787) Cf Ludwig Bittner, Philip Gruber, '§ 172' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 4.

sioner, a step that requires a quasi-judicial (namely an evidentiary and inferential) assessment of the applicant's legal position. (788) If reservations surface during the assessment, court commissioners have to refer the parties to the competent probate court. The certificate is, however, even in this case eventually issued by a notary, and has to bear their official seal. (789) Content-wise, the certificates have to identify the estate, together with the name, address, date of birth of all parties that expressed their intent to accept the inheritance and have to indicate the date and type of the declaration, legal titles and, potentially, the shares claimed. (790) The certificate further establishes which heirs will be entitled to administer and represent the estate. Its effects are, however, not constitutive as the powers of administration and representation automatically derive from the acceptance of the inheritance. (791)

221 Certificates can further be issued with regard to the above-mentioned *Einantwortungsbeschluss*. (792) The respective documents contain some or all of the contents of the decision on the transfer. (793) In this case, however, the certificate is issued by a court. Legal writings identified a primary purpose of the certificate in the enforcement of succession rights abroad. (794) Since the introduction of the European Certificate of Succession, however, its functionality, at least within the scope of application of the Succession Regulation, remains limited. (795) Furthermore, the effects of the confirmation are not as far-reaching as those of the ECS. The decision on the transfer, which, as stated before, is judicial in nature, should in any case circulate freely under the Succession Regulation and suffice to prove the position and shares of any potential heirs.

D. *Administration of estates*

222 The estate is, until its legal transfer to the legitimate heirs, a legal person on

(788) Claus Spruzina, 'Rechtsnatur und Bedeutung notarieller Bestätigungen' (2010) 142 NZ 97, 102ff; Hansjörg Sailer, '§ 172' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 7.

(789) § 9(4) GKG.

(790) Furthermore, the confirmations have to be dated and signed. Cf Bittner, Gruber, '§ 172' (n 787) para 5; Sailer, '§ 172' (n 788) para 8.

(791) The powers of representation are provided *ex lege* by § 810 ABGB.

(792) § 178(7) AußStrG 2005, which references § 186(1) AußStrG 2005.

(793) ErlRV 224 BlgNR XXII GP 113.

(794) Stephan Verweijen, '§ 178' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 15.

(795) Ibid.

its own. ([796]) This raises questions as to its representation and administration. While they play a central role in succession proceedings, court commissioners do not function as representatives of the estate and are thus generally – with the exception of § 148 AußStrG 2005 – not entitled to dispose of its assets. ([797]) Testators consequently have to appoint executors for these purposes or rely on the pre-established default rules. These delegate the administration and representation of the estate to the potential heirs. A judicial authorisation or appointment is not necessary. ([798]) The judicial involvement in the administration of estates is thus, at least in theory, limited. ([799])

223 Once the potential heirs have informed ([800]) the competent court commissioner or court that they have accepted the inheritance (being additionally able to sufficiently prove their rights to the estate ([801])), they become entitled to use and administer the estate's assets and can (with regard to third parties) represent the estate. ([802]) Prior to the acceptance, acts of administration or representation as well as all sales of assets of the estate that do not qualify as everyday activities/transactions ([803]) require judicial authorisation. ([804]) The latter cannot be given if the act would be detrimental to the estate. ([805]) Once the inheritance is accepted and the respective right is sufficiently proven, only the sale of assets of the estate needs to be approved by a court. ([806])

([796]) § 546 ABGB.

([797]) See Margit Winkler, '§ 148' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 1. Under § 148 AußStrG 2005, court commissioners can release certain assets from the estate to pay the costs of a simple funeral. Furthermore, if a third party demonstrably has rights in assets that seem to belong to the estate, they can continue to exercise these rights during the proceedings.

([798]) Ludwig Bittner, Philip Gruber, '§ 171' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 2.

([799]) See Bittner, Gruber, '§ 171' (n 798) para 2.

([800]) § 171 AußStrG 2005.

([801]) See n 624.

([802]) § 810 ABGB.

([803]) Eg disposing of accounts and savings accounts of the deceased (for purposes of administrating the estate, paying creditors). What would not be included: the request to initiate insolvency proceedings (OGH 8 Ob 298/00 g); renting assets of the estate (OGH 6 Ob 2104/96 x) or relinquishing tenancy rights belonging to the estate (LGZ Graz, 5 R 11/13 v). For other examples, see Bittner, Gruber, '§ 172' (n 787) para 2.

([804]) § 810(2) ABGB.

([805]) Ibid.

([806]) Welser, *Erbrechts-Kommentar* (n 566) § 810 ABGB, paras 10–11.

Upon request, court commissioner have to issue official certificates to the concerned parties, attesting their powers of representation. (807) The effects of the certificates are, however, only declaratory. (808) **224**

The rules on administration also apply when multiple heirs have issued declarations of acceptance. In principle, they can decide on how to divide different tasks among themselves; however, decisions have to be taken unanimously. (809) If no solution can, however, be reached, courts have to intervene. (810) This particularly concerns issues on how to represent the estate or on what measures to take. **225**

In general, heirs can only administer and represent the estate as long as probate courts do not intervene. This, however, does not only occur in the event of disagreements between the heirs on how to administer the estate. An intervention might also become relevant in cases of conflicting declarations of acceptance or when the shares that heirs intended to claim are incompatible with one another. The same rationale applies when the heirs to an estate are unknown, if existing heirs do not exercise their rights, or – if urgent measures need to be taken – known heirs have not yet submitted their declarations of acceptance. (811) In these cases, a probate court can appoint a curator (*Verlassenschaftskurator*). The decisive factor for the appointment is not the interests of individual heirs, but the objective interest of the estate. With the appointment, the rights of the presumptive heirs cease. (812) Generally, courts are, however, required to appoint a person designated by the deceased to represent the estate. (813) The chosen party is then supervised by a court; their rights are determined by the judicial appointment. (814) Due to their limited (non-decision-making-powers), the Austrian Supreme Court has held that they would not constitute a 'court' within the meaning of Article 3(2) Succession Regulation. (815) **226**

If the deceased had appointed an administrator (*Verlassenschaftsverwalter, Testamentsvollstrecker*), the latter is entitled to administer and represent the **227**

---

(807) § 172 AußStrG 2005; § 810 ABGB.

(808) Claus Spruzina, '§ 810' in Andreas Kletečka, Martin Schauer, *ABGB-ON*$^{1.02}$ (1 January 2017, rdb.at) para 15; Bittner, Gruber, '§ 172' (n 787) para 1.

(809) See Ludwig Bittner, Philip Gruber, '§ 173' in Walter H Rechberger, Thomas Klicka (eds), *Außerstreitgesetz* (3rd edn, Verlag Österreich 2021) para 1.

(810) § 176(1) AußStrG 2005.

(811) OGH 4 Ob 2376/96g.

(812) Claus Spruzina, '§ 810' (n 808) para 11.

(813) § 156(2) AußStrG 2005.

(814) Ibid.

(815) See OGH 2 Ob 59/18t; Christoph Mondel, *Das Recht der Kuratoren* (3rd edn, Manz 2021) para 2.8. The same applied to the Italian counterpart, the *curatore dell'eredità giacente*.

estate; (816) however, heirs can challenge the appointment and the executor's decisions. (817) The latter can thus be relieved of their duties if all heirs act jointly, provided that the *de cuius* had not provided otherwise. (818)

E. *Notaries (court commissioners) as courts for the purposes of the Succession Regulation*

1. *Opinions in Austrian legal writings*

228 The qualification of court commissioners under the Succession Regulation remains ambiguous. Austrian legal scholars have, so far, developed different approaches. Many of them are functional in nature and advocate for a characterisation of court commissioners as courts for the purposes of the Succession Regulation. Most writings on the matter, however, do not go into much detail as to why the solution seems appropriate, or do not specify which tasks carried out by notaries under the GKG would 'fit' the definition of 'court' of the Regulation. (819)

---

(816) § 816 ABGB.

(817) Ferrari, 'Der Erwerb der Erbschaft' (n 465) para 12.74.

(818) OGH 1 Ob 233/14 t. This meant that a deceased could exclude the § 810 ABGB administration by testamentary disposition with binding effect for the court, Welser, *Erbrechts-Kommentar* (n 566) § 810 ABGB, para 26.

(819) For the qualification as courts under Article 3(2): Lurger, Melcher, *Handbuch Internationales Privatrecht* (n 210) para 3/31; Susanne Ferrari, 'Erbfälle mit Auslandsbezug' in Susanne Ferrari, Gundula Maria Likar-Peer (eds), *Erbrecht. Handbuch* (2nd edn, Manz 2020) para 16.11; Wolfgang Faber, Stefan Grünberger, 'Vorschlag der EU-Kommission zu einer Erbrechts-Verordnung' (2011) 143 NZ 97, 100; Anna-Zoe Steiner, 'EU-Verordnung in Erbsachen sowie zur Einführung eines europäischen Nachlasszeugnisses' (2012) 144 NZ 2012, 104, 107 n 32 and 108; Astrid Deixler-Hübner, 'Die Zuständigkeiten für internationale Erbfälle nach der EU-Erbrechtsverordnung' (2016) 78 Österreichisches Anwaltsblatt 243, 244 (a more nuanced approached was later developed); Alice Perscha, 'Schnittpunkte des Firmenbuchs mit dem Verlassenschaftsverfahren' (2018) 10 ÖRPfl 28, 28 n 3; Melanie Kiener, 'EuErbVO: Zuständigkeit und Zuständigkeitswahl' (2015) 11 Zak 284, 284; Claudia Rudolf, 'Die Erbrechtsverordnung der Europäischen Union. VO zum Internationalen Erb- und Erbverfahrensrecht in Kraft – ein Überblick' (2013) 145 NZ 225, 228; Robert Fucik, Alexander Klauser, Barbara Kloiber, *Österreichisches und Europäisches Zivilprozessrecht. ZPO Taschenkommentar* (13th edn, Manz 2023) Art 3 EuErbVO; Robert Fucik, 'Anerkennung und Vollstreckung' in Martin Schauer, Elisabeth Scheuba (eds), *Europäische Erbrechtsverordnung (2012/650/EU vom 4. Juli 2012)* (Manz 2012) 60 and 62 n 16; Martin Schauer, 'Europäisches Nachlasszeugnis' in Martin Schauer, Elisabeth Scheuba (eds), *Europäische Erbrechtsverordnung (2012/650/EU vom 4. Juli 2012)* (Manz 2012) 86; Linda Oswald, *Grenzüberschreitende Erbrechtsfälle unter besonderer Berücksichtigung der Europäischen Erbrechtsverordnung* (Manz 2016) 101; Walter H Rechberger, Friedrich Kieweler, 'Das Europäische Nachlasszeugnis' in Walter H Rechberger, Brigitta Zöchling-Jud (eds), *Die EU-Erbrechtsverordnung in Österreich*

Only a few scholars have provided a more comprehensive assessment of the requirements set out by the Regulation. (820) While still qualifying notaries exercising court commissions as 'courts', the extent of the specific tasks actually meeting the requirements vary. Some profess that all competences delegated to Austrian notaries can be characterised as judicial. (821) Most have, however, remained more cautious, taking a nuanced stand. While considering that Article 3(2) Succession Regulation could apply to notaries, they conclude that, in most matters, notaries do not exercise judicial functions due to their lack of decision-making powers. (822) The only instances in which the rules could, indeed, apply would be when court commissioners take security measures or the few cases in which they are allowed to release assets from an estate. (823)

(Verlag Österreich 2015) 272f, para 8 (called 'authorities in functional terms'); Bernhard Motal, 'Art 3 EuErbVO' in Simon Laimer (ed), *IPR Praxiskommentar* (Lexis Nexis 2024) para 45.

(820) Eg, Astrid Deixler-Hübner, 'Art 3 EuErbVO' in Astrid Deixler-Hübner, Martin Schauer (eds), *EuErbVO. Kommentar zur EU-Erbrechtsverordnung* (2nd edn, Manz 2020) para 46; Motal, 'EU-Erbrechtsverordnung' (n 552) 68; Linda Oswald, '§ 184a' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 5 n 10. More recently, Brigitta Lurger, Karl Stöger, Romina Herz, 'JuWiLi Study 2022. Legal Part' (n 18) 15 came to the same conclusion. The work is based on an Austrian country report drafted by *Romina Herz* and *Alice Perscha* that is available online at <https://ihr-notariat.at/fileadmin/user_upload/Notariatskammer/JuWiLi/Legal_Study_JuWiLi_.pdf> accessed 1 June 2025. Its authors state that it is difficult to argue that court commissioners can be qualified as courts under the Succession Regulation given that they cannot take judicial decisions. Only a broad understanding of Recital 20 of the Regulation would enable the qualification: 'Austrian notaries acting as court commissioners in succession proceedings always act within the judicial framework and therefore – like the court – are bound by the rules of the SR on international jurisdiction'. On the project: Stöger, 'Das Gerichtskommissariat' (n 18) 209.

(821) Stand taken by Deixler-Hübner, 'Art 3 EuErbVO' (n 820) para 46, which references all competences mentioned in § 1(1) GKG.

(822) Florian Heindler, 'Art 3 EuErbVO' in Peter Rummel, Meinhard Lukas, Andreas Geroldinger (eds), *Kommentar zum ABGB. IPR*, vol I (4th edn, Manz 2023) para 35; Margit Winkler, 'Österreichische Zuständigkeit und italienisches Verfahren bei Erbannahme' (2019) 74 ÖJZ 973, 974; Marco Nademleinsky, 'Art 39' in Alfred Burgstaller, Matthias Neumayr, Andreas Geroldinger, Gerhard Schmaranzer (eds), *Die EU-Erbrechtsverordnung* (Lexis Nexis 2016) para 4. That notaries cannot take judicial decision is expressly stated by § 1(2)(1) GKG.

(823) In particular, §§ 146–149 AußStrG 2005, which include, eg, the access to premises, immovables; security measures to secure the estate; the release of certain assets from the estate. Cf Marco Nademleinsky, 'Art 39' (n 822) para 4; Motal, 'EU-Erbrechtsverordnung' (n 552) 70; Oswald, '§ 184a' (n 820) para 5 n 10. Heindler, 'Art 3 EuErbVO' (n 822) para 35 raises, however, doubts that even the latter could justify a characterisation under Article 3(2) Succession Regulation.

230 Only a minority holds that court commissioners cannot be defined as 'courts' for the purposes of the Regulation. ([824]) The main arguments backing the hypothesis are derived from the Court of Justice case-law on Article 3(2) and its understanding of 'judicial functions'. ([825]) Be it deliberate or not, Austria itself did not include court commissioners in their list of 'other authorities and legal professionals' referred to in the above-mentioned provision, sent to the Commission pursuant to Article 79. ([826]) While nothing can legally be inferred from the notification, ([827]) some have at least interpreted the failure as an indication of the official position taken by Austria. ([828])

231 The possible interpretations are in fact manifold, as different readings of the definition appear feasible when considering the legislative procedure, the definition's interpretation by the Court of Justice and the solutions offered by scholars. While the Council documents, for example, seem to indicate that drafters indeed had court commissioners in mind when outlining the definition, ([829]) other factors raise doubts as to whether the latter can be considered as 'courts' under the Succession Regulation.

([824]) Eg, Susanne Frodl, Friedrich Kieweler, 'Historische Entwicklung und Anwendungsbereich der Verordnung' in Walter H Rechberger, Brigitta Zöchling-Jud (eds), *Die EU-Erbrechtsverordnung in Österreich* (Verlag Österreich 2015) 41, para 72 given that they cannot take any judicial decision that would correspond to those of the probate court (both with regard to the appeal/review procedure and the effects of the decision). Also Christiane Fink, Michael Otti, 'Rechtsfragen zur Anerkennung und Vollstreckung im Rahmen der EuErbVO' in Thomas Garber, Katharina Lugani (eds), *10 Jahre EuErbVO. Rück- und Ausblick zur EU-Erbrechtsverordnung* (Verlag Österreich 2023) para 7/44 which come to this conclusion based on the Court of Justice case-law and the fact that Austria did not include court commissioners in the list of 'other authorities' mentioned in Article 79 Succession Regulation (while acknowledging that the list itself is not binding, not including notaries would still be an indication as to the intention of the Austrian legislator). Seemingly also not qualifying court commissioners as courts, see Thomas Traar, Ulrich Pesendorfer, Christoph Mondel, Andreas Tschugguel, 'Art 3' in Alfred Burgstaller, Matthias Neumayr, Andreas Geroldinger, Gerhard Schmaranzer (eds), *Die EU-Erbrechtsverordnung* (Lexis Nexis 2016) para 26.

([825]) In particular: Case C-658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444; Case C-80/19 *E.E.* [2020] ECLI:EU:C:2020:230.

([826]) Cf European Union, 'Finding Competent Courts/Authorities' <https://e-justice.europa.eu/380/EN/succession?AUSTRIA&init=true&member=1> accessed 1 June 2025.

([827]) See Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444, para 47.

([828]) In combination with other factors: Christiane Fink, Michael Otti, 'Rechtsfragen' (n 824) para 7/44.

([829]) See Council document 9677/11, 5, which expressly states that Austrian court commissioners are considered to exercise judicial functions.

2. *The definition*

The definition of 'court' for the purposes of the Succession Regulation is enshrined in Article 3(2). While it might be ambiguous whether court commissioners can be qualified as exercising judicial functions (given that they are excluded from taking judicial decisions ([830])) or acting pursuant to a delegation of power by a judicial authority (given that the tasks are not delegated by a court but are established by operation of law ([831])), they fit the requirement of acting under the control of a judicial authority. ([832]) **232**

The next step would be assessing whether court commissioners offer guarantees with regard to i) impartiality and ii) the right of all parties to be heard. **233**

The first requirement does not pose particular issues. ([833]) Safeguards are, for example, offered by the pre-established distribution rules that objectively determine the notary competent for a specific case. Parties and the courts seized do not have a say in which commissioner is assigned to them. On an institutional level, notaries are appointed by the Ministry of Justice and cannot be removed or transferred *ex officio*. ([834]) Beyond that, a number of rules applicable to judges are expressly extended to the role of notaries in succession proceedings, such as those on the exclusion of, and objection to, judges. ([835]) Reasons that would exclude judges from their office or would cast doubts on their impartiality consequently also apply to notaries acting on behalf of probate courts. Court commissioners who become aware of their **234**

([830]) § 1(2)(1) GKG and ErlRV 688 BlgNR XXV GP 46. Also Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444, para 56 ('an authority must be regarded as exercising judicial functions where it may have jurisdiction to hear and determine disputes in matters of succession' which is not the case for court commissioners).

([831]) § 2(1) GKG ('*notwendiges Gerichtskommissariat*'). The tasks in § 1(1)(1) GKG necessarily have to be carried out by court commissioners; courts have no choice but to appoint a notary under the pre-established distribution rules (*Verteilungsordnung*). The use of notaries in these cases is consequently mandatory.

([832]) The activities of court commissioners are, in accordance with § 7a(1) GKG, in fact supervised by judicial authorities. Judges can issue directives, obtain reports and conduct investigations for these purposes; their instructions are binding (Wagner, Knechtel, *Notariatsordnung* (n 469) § 9 GKG, para 6). Courts further have to assign deadlines to notaries when they carry out court commissions (§ 7(1) GKG).

([833]) Brigitta Lurger, Karl Stöger, Romina Herz, 'JuWiLi Study 2022. Legal Part' (n 18) 15; the Austrian report for the project was drafted by *Romina Herz* and *Alice Perscha* and is available online at <https://ihr-notariat.at/fileadmin/user_upload/Notariatskammer/JuWiLi/Legal_Study_JuWiLi_.pdf> accessed 1 June 2025. The same was previously held by Deixler-Hübner, 'Art 3 EuErbVO' (n 820) para 46; and Motal, 'EU-Erbrechtsverordnung' (n 552) 68 (with regard to the measures mentioned in §§ 146–149 AußStrG 2005).

([834]) § 10(1) and (5) NO 1871.

([835]) § 6 GKG which states that §§ 19–25 JN apply to notaries carrying out court commissions.

incompatibility are further required to inform courts of such grounds. To further avoid incompatibilities, court commissioners, their substitutes, collaborators, members of staff, relatives and other vulnerable parties are moreover prohibited from entering into transactions with the estate and from acting as curators or representatives of the estate and the parties of the proceedings. ([836])

235 The second criterion seems to be generally met as well given that the right to be heard also has to be guaranteed in non-contentious (succession) proceedings. ([837]) Parties must thus generally be informed of the proceedings' subject matter, of the motions and submissions of other parties and the content of any official inquiries. ([838]) How and when the right to be heard is to be implemented is, however, not always precisely regulated, giving notaries a certain amount of discretion. ([839]) While there are a number of specific provisions expressly addressing the right, ([840]) there is also a general provision on the matter, § 15 AußStrG 2005. The rule can supplement potential shortcomings in practice. The explanatory report to the GKG expressly stated that the general provisions of the AußStrG 2005 would apply to court commissioners as well – thus including the provision on the right to be heard. ([841])

236 The last two requirements concern the fact that decisions of the non-judicial authorities a) can be made subject of an appeal to, or review by, a judicial authority; and b) have a similar force and effect as a judicial decision on the same matter.

([836]) § 6a(1) and (2) GKG.

([837]) See Stephan Verweijen, *Verlassenschaftsverfahren* (3rd edn, Linde 2021) 40; see Deixler-Hübner, 'Art 3 EuErbVO' (n 820) para 46. Motal, 'EU-Erbrechtsverordnung' (n 552) 68 raises some doubts as to whether the right is always fully implemented when adopting security measures, § 148(2) AußStrG 2005. See also § 169 AußStrG 2005.

([838]) See Verweijen, *Verlassenschaftsverfahren* (n 837) 40. Also §§ 152(2), 155(1), 183 AußStrG 2005.

([839]) Verweijen, *Verlassenschaftsverfahren* (n 837) 40.

([840]) Among them are §§ 152(2), 155(1), 157(1) (notaries have to request that potential heirs declare whether they intend to accept or waive the inheritance, potentially informing them of their rights in the proceedings), 160 AußStrG 2005. See also § 144(1) (parties can address any requests and submissions directly to the commissioner); § 176(1) (all non-heirs that can claim a part of the inheritance [eg, legatees and forced heirs] must have been informed of their potential claims in the estate); § 168(1) AußStrG 2005 (forced heirs are, for example, entitled to be present when the assets are appraised, and to provide comments; inventories have in any case to be sent to all parties).

([841]) § 9(5) GKG. ErlRV 225 BlgNR XXII GP 28. Insofar as notaries were entrusted with ascertaining relevant facts, the right to information and powers of inspection of probate courts (eg, to appear and to give evidence) were extended to them (see § 9(1) GKG; ErlRV 225 BlgNR XXII GP 28).

237 As for the appeal or review process, specific measures were introduced in 1970. Under § 7a GKG, parties that objected to certain measures or the conduct of court commissioners could refer the matter to the competent court. A judge was then entitled to address and resolve the potential issues (*Abhilfe schaffen*), provided that they had also heard the commissioner. (842) While the review system, that is still in place today, might thus not meet the standards of an appeal, it should satisfy the requirements of a review under Article 3(2)(a). (843)

238 Questionable is, however, whether the results or the activities of court commissioners can be considered to be 'decisions' for the purposes of the Succession Regulation. When talking about non-judicial authorities, Article 3(2) refers to 'their decisions'. (844) The Regulation defines the term as 'any decision [!] in a matter of succession given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court'. (845) Both the definition of 'court' and of 'decision' are thus closely connected. According to the opinion of Advocate General Bot in the *WB* case, however, the same is true for the concepts of 'decision' and 'judicial functions'. (846) If the concepts are indeed as closely linked as stated in the opinion, it would follow that court commissioners cannot take any decisions within the meaning of Article 3(1)(g) Succession Regulation, given that 'exercising judicial functions' implies having jurisdiction to hear and determine disputes in matters of succession – something that court commissioners cannot. (847)

---

(842) § 7a(2) GKG. The procedure was inspired by similar mechanisms in insolvency proceedings, see ErlRV 225 BlgNR XXII GP 27.

(843) Cf Deixler-Hübner, 'Art 3 EuErbVO' (n 820) para 46; Motal, 'EU-Erbrechtsverordnung' (n 552) 69–70. Doubted by Frodl, Kieweler, 'Historische Entwicklung und Anwendungsbereich' (n 824) 39–40, para 70.

(844) To be understood as defined under Article 3(1)(g) Succession Regulation ('any decision in a matter of succession given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court;'), see Anatol Dutta, 'Art. 3 EuErbVO' in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol XII (9th edn, CH Beck 2024) para 18.

(845) Article 3(1)(g) Succession Regulation.

(846) Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:166, Opinion of AG Bot para 60 which draws from Recital 22: '*When notaries exercise judicial functions* they are bound by the rules of jurisdiction, *and the decisions they give* should circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions' (emphasis added).

(847) Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444, para 56.

3. *Conclusion*

239 This seems to indicate that court commissioners cannot unequivocally be qualified as 'courts' for the purposes of the European Succession Regulation. ([848]) Whether or not Austrian notaries are bound by the Regulation's rules is, however, rather unproblematic given that the role of court commissioners is so closely intertwined with that of courts. ([849]) The former can, for the most part, not act independently from the latter; jurisdiction (within Austria) is furthermore still only established with regard to judicial authorities. For the limited number of cases in which tasks have to (can) be carried out before their appointment, court commissioners have to immediately inform the competent court. Instances in which court commissioners could still carry out tasks without Austrian courts having jurisdiction or Austrian law governing a succession case are moreover expressly limited. ([850]) As for the issuance of the European Certificate of Succession, the explanatory report of the 2015 succession law reform expressly stated that notaries are entrusted with the issuance, given that the certificate would only certify an already existing legal situation without being able to shape one. The issuance thus required an already pre-established determination of the legitimate heirs.

240 Thus, even if one were to arrive at the conclusion that court commissioners do not qualify as courts under Article 3(2) Succession Regulation, they would still be indirectly bound by the rules on jurisdiction of the Regulation, given that they operate under the supervision of courts and carry out their tasks once appointed (unless urgent measures need to be taken; in this case, however, notaries immediately have to inform competent courts). The quali-

---

([848]) Comparatively speaking, however, some of the requirements might not even be met by judicial authorities in other Member States (with regard to certain tasks at least).

([849]) See Brigitta Lurger, Karl Stöger, Romina Herz, 'JuWiLi Study 2022. Legal Part' (n 18) 15 come to the same conclusion. The Austrian country report drafted for the study by *Romina Herz* and *Alice Perscha* is available online at <https://ihr-notariat.at/fileadmin/user_upload/Notariatskammer/JuWiLi/Legal_Study_JuWiLi_.pdf> accessed 1 June 2025 and states: 'Austrian notaries acting as court commissioners in succession proceedings always act within the judicial framework and therefore – like the court – are bound by the rules of the SR on international jurisdiction'.

([850]) See § 147(4) AußStrG 2005 (security measures can still be adopted); § 150 AußStrG 2005 (subsidiary competence under Article 10(2) Succession Regulation); § 160a AußStrG 2005 (judicial determination of heirs in the case of conflicting declarations of acceptance), § 181b AußStrG 2005 (ECS), § 182(4) AußStrG 2005 (updating land registers if heirs fail to request that the changes are registered). See Ena-Marlis Bajons, 'Das Zusammenspiel von IZVR und IPR im Erbrecht' in Florian Heindler (ed), *Festschrift 40 Jahre IPRG* (Jan Sramek Verlag 2020) 299ff on how Austria considered the close connection of procedural and substantive rules in its implementation of the Succession Regulation.

fication has a limited relevance when it comes to the circulation of the 'output' of their activity. Only the release of assets from the estate might potentially be qualified as a 'decision' and thus potentially circulate under Article 39ff. In practice, this does however not seem to have much relevance.

IV. The law of natural persons

A. *Name changes*

1. *Introductory remarks*

241 The change of a person's name is only in part governed by the ABGB. Most relevant rules are contained in separate acts dedicated to civil status matters (*Personenstandsgesetz* [PStG 2013] ([851])) or specifically to the change of names (*Namensänderungsgesetz* [NÄG]). ([852])

242 Competence when a person's name is first established generally lies with municipalities that function as civil status authorities (*Personenstandsbehörde*) throughout Austria. ([853]) Only exceptionally can names be determined by State governors (*Landeshauptmänner/-frauen*). ([854]) Civil status events concerning a person's name and public documents relating thereto are consequently, in most cases, registered or issued by municipalities. ([855]) Registrars, as public officials within these administrative bodies, register every event taking place in Austria as well as changes, additions, or corrections to/of a person's civil status. ([856]) Events occurring abroad are only registered in a limited number of cases. ([857])

243 When it comes to changes in a person's name (and surname), however, other authorities might have to be involved as well. While civil status authorities

---

([851]) BGBl 2013/16.

([852]) Bundesgesetz vom 22. März 1988 über die Änderung von Familiennamen und Vornamen (Namensänderungsgesetz - NÄG), BGBl 1988/195. See also Verordnung des Bundesministers für Inneres zur Durchführung des Namensänderungsgesetzes (Namensänderungsverordnung 1997 – NÄV), BGBl II 1997/387.

([853]) See, eg, § 1(1), § 2(2)(1), § 20(1)(4), § 27(2), § 38, § 41(3) PStG 2013 as well as § 93c ABGB.

([854]) See § 66 PStG 2013. The provision concerns cases in which a person's origins cannot be determined. Rarely applied in practice.

([855]) See § 3 PStG 2013. The terminology varies for larger cities (*Statutarstädte* (chartered urban districts): Eisenstadt, Graz, Innsbruck, Klagefurt am Wörthersee, Krems, Linz, Rust, Salzburg, St. Pölten, Steyr, Villach, Waidhofen an der Ybbs, Wels, Vienna, Wiener Neustadt). In them, competence lies with the magistrate (*Magistrat*), in Vienna with the so-called *Magistratisches Bezirksamt*, municipal district offices).

([856]) See §§ 35, 41, 42 PStG 2013.

([857]) See § 35(2) PStG 2013. For more details see *infra* n 881 and 882.

remain competent for certain 'changes' (*Namensbestimmung*), [858] most requests have to be previously authorised by another administrative authority – the *Bezirksverwaltungsbehörde* (*(behördliche) Namensänderung*). [859] Applications have to be filed with the administrative authorities of the applicant's district of residence. [860] Administrative acts issued by them under the NÄG can consequently be challenged before administrative courts (*Landesverwaltungsgerichte*). [861]

244 Declarations of intent in matters of name can be challenged under the general rules of contract law. [862]

2. *Non-judicial procedures*

245 Names and surnames can, under the administrative procedure of the NÄG, only be changed in specific cases and, in principle, only by Austrian citizens, stateless persons and refugees. [863] Applicants have to further be capable of making informed decisions. [864] The application can otherwise also be filed by the interested parties' legal representative. [865]

246 Grounds based on which a change can be granted vary depending on the change concerning the first [866] or last [867] name of the applicant. The

---

[858] See § 93c ABGB. Examples are § 93a(1) ABGB: If the surname of a spouse changes, the common marital name can be redetermined; § 93a(1) ABGB: If the marriage is dissolved, both spouses can return to their former name. In both cases, the change can only be made once (§ 93b ABGB); § 157(2) ABGB: If the surname of the parents or one of the parents' changes or if the parents marry each other, the child's surname can be determined ('changed') again. The same applies to changes in the person of one of the parents, for example in the event of adoption or if parenthood is established (acknowledged) or changed.

[859] § 7(1) NÄG.

[860] If there is no (habitual) residence in Austria, applications have to be filed with the authority at the applicant's last place of residence. The last resort is the magistrate of Vienna. Outside of the chartered urban districts, the *Bezirksverwaltungsbehörden* are represented by the *Bezirkshauptmannschaften*.

[861] § 7(2) NÄG.

[862] Helga Jesser-Huß, '§ 93 ABGB' in Attila Fenyves, Ferdinand Kerschner, Andreas Vonkilch (eds), *Großkommentar zum ABGB - Klang Kommentar. §§ 44–136 ABGB. EheG und EPG* (3rd edn, Verlag Österreich 2021) paras 8, 19.

[863] § 1(1) NÄG.

[864] § 1(2) NÄG. They are presumed to possess capacity if they are over 14 years of age.

[865] § 1(3) NÄG. The same goes for vulnerable adults. For the latter, the application has to be brought by their legal representative and authorised if the change is in the adult's best interests; if they show that they do not agree with the change, the authorisation has to be refused unless the adult's well-being would otherwise be gravely endangered.

[866] See § 2(1) NÄG. The grounds are: 1) the previous surname seems ridiculous or offensive; 2) the previous surname is difficult to pronounce or write; 3) the applicant has

change cannot be authorised by the administration in certain statutorily identified cases. (868) Certain exceptions were nevertheless introduced. (869)

---

foreign origins and wishes to be given a surname that facilitates their integration process in Austria and the application is submitted within two years of acquiring Austrian citizenship; 4) the applicant wishes to obtain the surname that they previously used in good faith; 5) the applicant wishes to retain a surname that they previously rightfully used; 6) the name and surname and the date of birth of the applicant match those of another person in such a way that the persons could be confused (see also § 5 NÄG); 7) the applicant wishes to receive a surname under §§ 93–93c ABGB (name changes connected to marriage) after their surname had already been changed (§ 93b ABGB); 8) the applicant wishes to be given a surname under § 155 ABGB (children's surnames) after having already been given a name; 9) the applicant wishes to receive a surname corresponding to that under § 155 ABGB but of the person who exercises parental responsibility for them or in whose care they and the care relationship is not only intended for a short period of time; 9a) an applicant, who holds both the Austrian and another citizenship, wishes to obtain a surname which they already legally bear under the law of their (second) nationality and the aim of the change is to bear that same name under Austrian law as well; 10) the applicant can credibly demonstrate that the change of surname is necessary in order to avoid unreasonable economic disadvantages or in their social relationships and that these disadvantages cannot be averted in any other way; 10a) the applicant credibly demonstrates that they are a victim within the meaning of § 65 StPO, and that a change of surname can prevent criminal offences within the meaning of that same provision; 11) the applicant wishes to have a different surname for other reasons.

(867) See § 2(2) NÄG: Names can be changed for the following reasons mentioned in n 865 under 1)–6), 9a), 10), 10a) and 11). Furthermore, the following grounds justify a change of name: 1) the minor adoptee is to receive first names other than those given at birth and the application is submitted within two years of the authorisation of the adoption or the acquisition of Austrian citizenship; 2) the applicant, after changing their religious affiliation, wishes to have a first name with a special relationship to their current religious community or wishes to give up a first name with a special relationship to their former religious community and the application is submitted within two years of the change of their religious affiliation; 3) the name does not correspond to the gender of the applicant.

(868) § 3(1) NÄG. The respective grounds are: 1) the change of surname would enable the circumvention of legal provisions; 2) the requested surname is ridiculous, offensive or not commonly used to identify persons in Austria; 3) the surname applied for is lawfully used by another person who has a legitimate interest in excluding the applicant from using the same surname (see also § 5 NÄG); this does not apply in the cases mentioned in n 865 under 5, 7)–9); 4) the requested surname is composed of several names; 5) the requested change of surname for the grounds mentioned under 1)–3), 6, 10, 11 in n 865 or the requested change of name for all of the grounds mentioned in n 866 (potentially in connection with the aforementioned grounds in 1)–3), 6, 10, 11) would likely cause confusion with another person (within the meaning of the above-mentioned ground 6)); 6) the requested change of surname or name is detrimental to the welfare of a minor or of a person unable to make informed decisions; 7) the requested name is not commonly used or does not correspond to the applicant's gender; 8) the applicant applies to change a surname or first name that they received as a result of a name change based on an application submitted by themselves within the last ten years (exception: applications under the grounds mentioned in n 865 under 5)–9a) or 10a)).

247 Before granting the application, the district authority has to involve several people. Should the petition have been filed by/for a minor capable of making informed decisions, for example, their legal representative has to be heard before any further steps can be taken. (870) Where appropriate, the administration can also proceed to hear children over the age of ten on whose behalf an application was filed. (871) They are heard either orally or in writing. (872)

248 During their inquiries, authorities are entitled to send requests to authorities competent in matters of social security (*Sozialversicherungsträger*) to identify persons with the same or similar (that might cause confusion) surnames, names and dates of birth. The latter have an obligation to cooperate.

3. *Qualifications under private international law*

249 Name changes are, under § 13 IPRG, generally governed by a person's *lex patriae*. (873) This, however, only applies to changes under private law provisions. (874) Public law changes such as those governed by the NÄG are not directly covered by § 13. (875) The latter are rather governed by rules on personal status. (876) Given that the provisions use the same connecting factors, the result remains the same. (877) Potential conflicts are further avoided by the NÄG itself. Changes under its provisions can – at least in principle – only be carried out if they concern Austrian citizens. (878) Foreign citizens can only file a respective application if they are stateless, if their nationality is unknown (but their habitual residence is in Austria) or if they

---

(869) Cf § 3(2) NÄG: should ground 4) under n 867 prevent an authorisation, if a change of surname would be based on one of the grounds mentioned in n 865 under 5), 7)–9a); should ground 5) of § 3(1) prevent an authorisation, if the applicant gave particularly important reasons for their wish for a change in surname.

(870) § 4(1) NÄG.

(871) § 4(2) NÄG.

(872) § 4(3) NÄG.

(873) §§ 13 IPRG. See Bea Verschraegen, '§ 13 IPRG' in Peter Rummel, Meinhard Lukas, Andreas Geroldinger (eds), *Kommentar zum ABGB. IPR*, vol I (4th edn, Manz 2023) paras 1, 15; Florian Heindler, '§ 13 IPRG' in Simon Laimer (ed), *IPR Praxiskommentar* (Lexis Nexis 2024) para 2. Also Bea Verschraegen, '§ 9 IPRG' in Peter Rummel, Meinhard Lukas, Andreas Geroldinger (eds), *Kommentar zum ABGB. IPR*, vol I (4th edn, Manz 2023) para 5.

(874) Eg, in cases of adoption, the acknowledgement of paternity, marriage or divorce, registered partnerships or their dissolution. Cf Heindler, '§ 13 IPRG' (n 873) para 1.

(875) Heindler, '§ 13 IPRG' (n 873) para 1; Verschraegen, '§ 13 IPRG' (n 873) para 10.

(876) § 9 IPRG.

(877) See Heindler, '§ 13 IPRG' (n 873) para 1; Verschraegen, '§ 13 IPRG' (n 873) para 10.

(878) § 1(1) NÄG.

are refugees within the meaning of the 1951 Geneva Convention and the respective Protocol relating to the Status of Refugees, again, with a (habitual) residence in Austria. (879) Further obligations are derived from Union law. (880)

B. *Gender recognition*

1. *Introductory remarks*

250 Information on the civil status of a person is generally registered in the ZPR (*Zentrales Personenstandsregister*), a centralised digital public register in civil status matters. This includes data on a person's gender. (881) The competent public offices take note of all gender-related civil status events occurring in Austria, irrespective of the nationality of applicants. (882) Events taking place abroad are only registered in certain cases. (883)

251 Austria generally allows for changes in gender-markers and expressly recognised the existence of a 'third' (ie unspecified) gender in 2018. Applicants have to follow an administrative procedure. The respective requirements and the documentation that needs to be produced, however, vary slightly. Different rules are consequently applicable to the trans and the intersex community.

252 The competence for the registration of these events lies with civil status authorities (*Personenstandsbehörden*), ie municipalities. They exercise discretion when considering applications. Express rules in these cases are absent in

---

(879) Ibid.

(880) Cf Case C–148/02 *Carlos Garcia Avello v État belge* [2003] ECLI:EU:C:2003:539; Case C–353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECLI:EU:C:2008:559; Case C–208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECLI-:EU:C:2010:806.

(881) § 2(2)(3) PStG 2013. The gender-marker is generally communicated by doctors or midwifes assisting the birth (§ 9 PStG 2013, § 2 PStG-DV 2013), for example, included in the birth certificate (*Geburtsurkunde*, § 54(1)(2) PStG 2013), the marriage certificate (*Heiratsurkunde*, § 55(1)(1) PStG 2013), the partnership certificate (*Partnerschaftsurkunde*, § 56(1) PStG 2013), the death certificate (*Todesurkunde*, § 57(1)(2) PStG 2013), the certificate on stillbirths (§ 57(2)(2) PStG 2013) and miscarriages (§ 57a(2) PStG 2013)

(882) This principle of territoriality is enshrined in § 35(1) PStG 2013 (also with regard to changes, additions, corrections, etc).

(883) Eg, if they concern an Austrian citizen; a stateless person with a habitual residence in Austria; a refugee (within the meaning of the 1951 Convention relating to the Status of Refugees and the respective Protocol relating to the Status of Refugees) with a (habitual) residence in Austria (§ 35(2) PStG 2013). If occurring abroad (eg concerning changes in a person's gender-marker), the parties concerned have to inform the competent civil status authority (§ 35(3) PStG 2013).

the PStG 2013, the statutory act governing matters related to civil status. The authorities rather rely on ministerial guidelines based on case-law developed by the Supreme Administrative and Constitutional Court.

253 Any administrative acts (*Bescheide*) issued by the competent officials, registrars, in matters concerning gender recognition (eg refusing to register an event, change or correct an entry) can be challenged before administrative courts (*Landesverwaltungsgerichte*). (884) Mere changes (ie entries no longer reflecting the *status quo*) or corrections (ie entries that were *ab initio* untrue) of entries do not require the involvement of a judicial authority. (885) While the issue has not been widely discussed and, due to the lack of explicit rules, declarations of intent concerning the change of gender should further be reviewable under the general provisions of contract law, especially as to vitiating factors. (886)

254 Gender-specific names can generally only be chosen after the change of the gender-marker. (887) With the change, the civil status authority issues a new birth certificate that constitutes the basis for any other documents potentially requested by the applicant. (888)

2. *Non-judicial procedures*

255 Procedural requirements for the changes of gender-markers are different for the trans and intersex community. The competence lies with civil status authorities (*Personenstandsbehörden*). (889) Judicial authorities are not involved.

a) *Transgender*

256 The requirements for a change of a person's gender-marker have been modified over the years. Currently, gender reassignment surgery or divorce

---

(884) See §§ 41, 42 PStG 2013.

(885) § 4 PStG 2013. See also Bundesgesetz über das Verfahren der Verwaltungsgerichte (Verwaltungsgerichtsverfahrensgesetz – VwGVG), BGBl I 2013/33.

(886) §§ 869ff ABGB. § 876 ABGB extends the general rules to all declarations of intent which become complete on receipt by the other party alike (as would be the case for declarations before the civil status registrar). Some go even further and extend the rules to declarations that become complete without reception, see above n 5.

(887) See § 2(2)(3) NÄG. During the transition (or generally before a change in the gender-marker), changes can be based on § 1(1)10 NÄG (current name brings unreasonable disadvantages in social relations, etc). Cf also Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 30 August 2022, rdb.at) § 2 NÄG, para 34.

(888) Eg, documents certifying the applicant's residence (*Meldebestätigungen*) or citizenship (*Staatsbürgerschaftsnachweis*); passports; driver's licences, etc.

(889) These generally correspond to the municipalities (*Gemeinden*), see § 3(2) PStG 2013.

no longer constitute a requirement for the change of an applicant's gender-marker. (890) Authorities do, however, require proof of an irreversible feeling of belonging to another gender, and an outward appearance that clearly matches said feeling. (891) Both aspects can, in principle, only be sufficiently proven by an expert opinion. (892) Recommendations on medical treatments were elaborated by the Ministry of Social Affairs and follow international standards. (893)

The requirements were not introduced by statutory but rather by case- **257**
law, (894) which was then implemented by ministerial guidelines (due to a presumed limited practical relevance). (895) The latter are only binding on civil status authorities, not on courts. (896) Within the limits set by both case-law and guidelines, the competent authorities have discretion when

---

(890) VwGH 2008/17/0054; VfGH B 1973/08.

(891) BMI 11.5.2010, VA 1300/0139-III/2/2010 based on VwGH 2008/17/0054 and VwGH 2008/06/0032. The requirements were in a slightly different form already included in two ministerial guidelines of 1983 (BMI 18.7.1983, 10.582/24-IV/4/83) and 1996 (BMI 27.11.1996, 36.250/66-IV/4/96).

(892) See VwGH 2008/17/0054 and the practical guidelines for civil status officers (*Durchführungsanleitung für die standesamtliche Arbeit* (DA)), printed in Norbert Kutscher, Thomas Wildpert, *Personenstandsrecht* (2nd edn, 30 August 2022, rdb.at) I. Abschnitt: Personenstandsgesetz 2013 – ZPR DA 1.1.2.1.a.3.

(893) See Bundesministerium für Soziales, Gesundheit, Pflege und Konsumentenschutz, 'Transsexualismus/Geschlechtsdysphorie' <https://www.sozialministerium.at/Themen/Gesundheit/Nicht-uebertragbare-Krankheiten/Psychische-Gesundheit/Transsexualismus-Geschlechtsdysphorie.html> accessed 1 June 2025.

(894) Cf VwGH 95/01/0061; VwGH 2008/17/0054 and VwGH 2008/06/0032. Also, VfGH B 1973/08.

(895) Decrees issued by the Federal Ministry of the Interior: BMI 10.12.1981, 10 582/10-IV/4/81 (issues in the registration of changes in a person's gender were first brought up); BMI 18.7.1983, 10.582/24-IV/4/83 ('*Transsexuellen Erlass 1983*': registration only in cases of gender reassignment surgeries; the outward appearance had to match the opposite gender; the change was registered by adding a marginal note to the respective entry; need for an expert opinion; *ex nunc* dissolution of a marriage); BMI 12.4.1985, 10.852/11-IV/4/85 (reproduces the previous guidelines); BMI 27.11.1996, 36.250/66-IV/4/96 ('*Transsexuellen Erlass 1996*': registration only in cases of gender reassignment surgeries; no registration for married applicants; the outward appearance had to match the opposite gender; registration via a marginal note; need for an expert opinion before registration); BMI 12.1.2007, VA 1300/0013-III/2/2007 (change irrespective of the existence of a marriage; change is in any case registered via a marginal note; still: need for an expert opinion and gender reassignment surgery; no *ex officio* need for a separate expert opinion on behalf of the authority in every case); BMI 6.2.2009, VA 1300/0063-III/2/2009 (competence of the civil status authority of birth of the applicant; still: need for some gender reassignment surgeries); BMI 11.5.2010, VA 1300/0139-III/2/2010 (registration even without gender reassignment surgery).

(896) See LVwG 18.2.2020, 750727/5/MZ.

considering applications. (897) The specific documents that have to be produced might consequently vary from authority to authority. (898)

b) *Unspecified gender-marker*

258 People that cannot be allocated under the conventional gender categories (male, female) are generally qualified as non-binary or potentially intersex. (899) The existence of a third (*rectius*: unspecified (900)) gender and the right of (at least) the intersex community to have varying gender-markers registered in the ZPR (*Zentrales Personenstandsregister*) were first recognised by the Constitutional Court in 2018. (901) The decision was again imple-

(897) Cf also Bea Verschraegen, 'Civil Status and Trans Persons in Austria' in Isabel C. Jaramillo, Laura Carlson (eds), *Trans Rights and Wrongs. A Comparative Study of Legal Reform Concerning Trans Persons* (Springer 2021) 183 and 193f.

(898) The competent Viennese authority – *Magistratsabteilung Gewerberecht, Datenschutz und Personenstand (MA 63)*, eg, requires an opinion/report from a specialist in psychiatry or a psychotherapist or a clinical psychologist containing 1) a statement that there is a sense of belonging to the opposite gender; 2) a statement that that feeling is likely to be (largely) irreversible; and 3) a confirmation that the outward appearance of the applicant clearly expresses a sense of belonging to the opposite gender. See Stadt Wien (Wiener Antidiskriminierungsstelle für LGBTIQ-Angelegenheiten), 'Rechtliche Anerkennung im eigenen Geschlecht' <https://www.wien.gv.at/menschen/queer/transgender/geschlechtswechsel/rechtlich/personenstand.html> accessed 1 June 2025. Some other larger cities have dedicated specific websites to the matter as well: Innsbruck (Referat Standesamt und Staatsbürgerschaft – Geburt), 'Änderung der Geschlechtszugehörigkeit' <https://www.innsbruck.gv.at/leben/servicecenter/standesamt-pass/aenderung-der-geschlechtszugehoerigkeit> accessed 1 January 2025; Linz (Bürger*innen-Angelegenheiten Abteilung Standesamt), 'Änderung des Geschlechtseintrages' <https://www.linz.at/serviceguide/viewchapter.php?chapter_id=123357> accessed 1 June 2025.

(899) The term 'intersex' refers to people that can, from a medical point of view, not clearly be identified as either male or female; the Austrian Constitutional Court thus considered atypical developments of the biological (chromosomal, anatomical and/or hormonal) gender. Extensively on legal issues connected to intersexuality: Marija Petričević, *Rechtsfragen zur Intergeschlechtlichkeit* (Verlag Österreich 2017).

(900) See Matthias Neumayr, 'Verfassungsgerichtshof: „unbestimmtes", nicht „drittes Geschlecht"' (2018) 9 ÖZPR 126, 128.

(901) VfGH G 77/2018. The judgements solution was already anticipated by Christian Kopetzki, 'Das dritte Geschlecht' (2017) 24 RdM 261, 261. On the decision, see Angela Dengg, Jennifer Schranz, 'Das dritte Geschlecht. Verfassungsrechtliche Überlegungen zu VfGH 15. 6. 2018, G 77/2018' (2018) 25 RdM 272–280; Marija Petričević, 'Inter, divers oder keine Geschlechtsangabe. Zum Beschluss des VwGH zum nicht-binären Geschlecht im Personenstandsrecht' (2019) 30 juridikum 165–170; Barbara Simma, 'Intersex und Familienbegriff: Neues von VfGH und EuGH' (2018) 13 EF-Z 218f; Ulrike Aichhorn, 'Intersexualität und der Eintrag ins Personenstandsregister. Das „3. Geschlecht" in Österreichs binärer Rechtsordnung' (2018) 13 EF-Z 161–163.

mented through ministerial guidelines for civil status authorities that set specific requirements. (902) Statutory rules were not enacted. (903)

The rules vary depending on the time of registration. Registrations of the new gender-markers ('inter (*inter*)', 'divers (*divers*)', 'open (*offen*)', 'N/A') at birth or shortly after can generally be carried out without the need for an expert opinion. (904) Changes requested at a later stage, however, in principle require such an opinion, at least if the marker is changed from or to 'male'/'female'. (905) In principle, the opinion has to state that the applicant can – due to their chromosomal, anatomical and/or hormonal development – not be clearly identified as either male or female. **259**

(902) See BMI 20.12.2018, VA 1300/0528-III/4/b/2018 (a person's gender-marker in the ZPR and in other civil status documents could under § 41(1) PStG 2013 be changed to 'divers' (from male/female) and vice versa; the change requires a medical opinion from an expert group; different rules were envisaged for the registration of the gender-marker at birth: if a child cannot clearly be identified as male or female at birth, civil status offices can use the gender-marker 'open (*offen*)'; the respective entry then has to be changed as soon as possible, either to 'male', 'female' or 'divers' (always based on an expert opinion); the marker 'divers' can, however, not be used directly at birth, nor can an existing marker later be changed to 'open'); BMI VA 1300/0415/III/3/b/2019 (guidelines for civil status officials (*Dienstanweisung*)); BMI 9.9.2020, 2020-0.571.947 (currently in force; different solutions were found depending on the time of registration: 1) regarding the registration at birth: should it not be possible for a doctor or midwife to clearly identify a child as male or female at birth, the gender-marker notified to the civil status authority (binding) can be 'inter', 'divers', 'open' or 'N/A'; changes (not only to 'male' or 'female' but also to 'inter', divers', 'open' or N/A) made under § 41(1) PStG 2013 *shortly after birth* (as soon as the gender can clearly be identified) are based on the parties' or their legal representatives' declaration accompanied by a medical confirmation (not opinion); 2) changes taking place at a later stage: a) changes within the categories 'inter', 'divers', 'open', 'N/A' are possible without any specific motivation; b) changes from 'male'/'female' to 'inter', 'divers', 'open', 'N/A' require an expert opinion stating that the applicant can – due to their chromosomal, anatomical and/or hormonal development – not be clearly identified as male or female (exception: the interested party already submitted documents and an opinion that confirm the application beyond any doubt); c) changes from 'inter', 'divers', 'open', 'N/A' to 'male'/'female' require an expert opinion).

(903) Criticised by Ulrich Pesendorfer, 'Neuer Erlass zum Geschlechtseintrag. Sechs Varianten der Eintragung' (2020) 15 iFamZ 339, 341. See also Marija Petričević, 'Intergeschlechtlichkeit in den Rechtswissenschaften' in Astrid Biele Mefebue, Andrea Bührmann, Sabine Grenz, Handbuch Intersektionalitätsforschung (Springer 2020) 443, 451.

(904) The terms were used as 'colloquial' examples by the Constitutional Court. Their practical use and pre-existing relevance might, however, be questionable, see Adrian Eugen Hollaender, 'Replik zu A. Dengg/J. Schranz, Das dritte Geschlecht, RdM 2018/140, 272' (2019) 26 RdM 37, 37. Cf decree BMI 9.9.2020, 2020-0.571.947. For more details, see n 901 and Pesendorfer, 'Neuer Erlass zum Geschlechtseintrag' (n 903) 340; Petričević, 'Intergeschlechtlichkeit in den Rechtswissenschaften' (n 903) 443, 452.

(905) Ibid.

3. *Qualifications under private international law*

260 The Austrian civil status authorities are generally competent to register all civil status events occurring in Austria, irrespective of the applicant's nationality. (906) When confronted with applications of foreign citizens intending to change their gender-marker, questions as to the applicable law can arise. Gender-related matters are generally considered to be questions of personal status, (907) which, under § 9 IPRG, are governed by a person's law of nationality. For applicants that neither possess Austrian citizenship nor an asylum status, it is thus generally the law of their nationality (*lex patriae*) that applies to changes in their civil status, including their gender-marker. Should the applicable foreign law prohibit such changes, Austrian authorities might, however, rely on the public policy exception. (908)

261 Given the lack of explicit rules, other solutions might, nevertheless, also be viable. To fill gaps in the conflict rules of the IPRG, its § 1, for example, refers to the legal system to which a case has the closest connection. Whether this would be the law of nationality, habitual residence or of registration remains to be seen. (909)

262 With regard to the intersex community, the ministerial guidelines briefly referenced cross-border cases. (910) Should foreign citizens apply for the issuance of Austrian public documents or extracts from registry entries in the ZPR and should their passports indicate the gender-marker 'x', Austrian civil status authorities have to register or issue documents in accordance with Austrian law. The application of the *lex libri* means that the foreign gender-marker can only be registered as 'inter', 'divers', 'open', or 'N/A'. (911) The guidelines apparently refer to cases in which a change in the applicant's

---

(906) See § 35(1) PStG 2013 and above n 881.

(907) See Verschraegen, '§ 9 IPRG' (n 873) para 88. Interestingly also mentioned on an official government website, see <https://www.oesterreich.gv.at/themen/persoenliche_dokumente_und_bestaetigungen/aenderung-der-geschlechtszugehoerigkeit.html> accessed 1 June 2025.

(908) § 6 IPRG. The issue has not been discussed much (or at all) in Austrian legal writings. Whether or not the issue can be considered part of Austria's fundamental values might be questionable.

(909) A convincing proposal for Germany was recently developed by Alix Schulz, *Geschlechtliche Selbstbestimmung im Internationalen Privatrecht* (Mohr Siebeck 2024) 258–273. She refers to the law of the interested parties' habitual residence but introduces the option of a choice of law in favour of the *lex patriae* or the *lex libri*. Also Alix Schulz, 'Geschlechtliche Selbstbestimmung im IPR - Auf dem Weg zu einem neuen Art. 7a EGBGB' (2024) 44 IPRax, 28, 31–32.

(910) See BMI 9.9.2020, 2020-0.571.947 (page 3) which references § 36(3) PStG 2013. The decree is, however, only binding on civil status authorities and does not establish new rights for applicants (nor is it binding on courts).

(911) Verschraegen, '§ 9 IPRG' (n 873) para 99.

gender-marker already occurred abroad and thus concerns the registration of (originally) foreign civil status events. (912)

C. *Protection of adults*

1. *Introductory remarks*

263 Various authorities are involved in matters concerning the protection of vulnerable adults. The field no longer constitutes a prerogative of the judiciary but is rather concerned with providing vulnerable adults with the assistance they require, intervening as little as possible with their affairs and highlighting the involved parties' self-determination. (913) While judicial measures are still an important part of the Austrian adult protection regime, they are generally adopted only as a last resort. Bearing in mind the obligations under the 2009 UN Convention on Persons with Disabilities (CRPD), a 2017 reform further shifted the legislators' focus to measures initiated or adopted by the adults themselves. (914)

264 The new ABGB regime consequently introduced a new hierarchy of protective measures: unilateral 'mandates' in the case of incapacity (*Vorsorgevollmacht*), powers of representation in the case of an already reduced decision-making capacity (*gewählte Erwachsenenvertretung*), *ex lege* powers of representation (*gesetzliche Erwachsenenvertretung*), and, lastly, judicial measures (*gerichtliche Erwachsenenvertretung*).

265 Courts in any case play a supervisory role, while representatives have reporting duties towards the judiciary. (915) This applies both to representatives designated under an agreement, by law or under a court appoint-

(912) § 35 IPRG.

(913) §§ 239–242 ABGB.

(914) Bundesgesetz, mit dem das Erwachsenenvertretungsrecht und das Kuratorenrecht im Allgemeinen bürgerlichen Gesetzbuch geregelt werden und das Ehegesetz, das Eingetragene Partnerschaft-Gesetz, das Namensänderungsgesetz, das Bundesgesetz über Krankenanstalten und Kuranstalten, das Außerstreitgesetz, die Zivilprozessordnung, die Jurisdiktionsnorm, das Rechtspflegergesetz, das Vereinssachwalter-, Patientenanwalts- und Bewohnervertretergesetz, das Unterbringungsgesetz, das Heimaufenthaltsgesetz, die Notariatsordnung, die Rechtsanwaltsordnung, das Gerichtsgebührengesetz und das Gerichtliche Einbringungsgesetz geändert werden (2. Erwachsenenschutz-Gesetz – 2. ErwSchG), BGBl I 2017/59. See also, § 240 ABGB.

(915) In particular, § 259(1) and (2) ABGB as well as §§ 130, 134–135 AußStrG 2005. This particularly applies to financial matters.

ment. (916) Only with regard to unilaterally granted powers of representation is the court involvement (particularly in economic matters) limited. Judges can, however, always intervene *ex officio* and adopt all measures necessary to safeguard the adult's welfare. (917) Certain activities always require a prior court authorisation. (918)

266 In addition to courts, a number of non-judicial actors can be involved in the protection of adults. This includes notaries, lawyers, and certain certified organisations with specific competences in matters of adult protection (*Erwachsenenschutzvereine*). Especially the latter function as an intermediary between the vulnerable adult, their relatives and public authorities, and play an important role in counselling. (919) Furthermore, they have been entrusted with carrying out certain (non-legal (920)) assessments (921) concerning both the adult and the potential measure on behalf of courts. (922) The associations are not entitled to refuse the commission and cannot act *ex officio*. (923) In practice, the assessments often contain recommendations for courts; they are,

---

(916) Stefan Damböck, Robert Müller, 'Einkommens- und Vermögensverwaltung' in Peter Barth, Michael Ganner (eds), *Handbuch des Erwachsenenschutzrechts* (3rd edn, Linde 2019) 565.

(917) § 246(3)(1) ABGB.

(918) Eg, § 250(3) (for important personal matters, not however, in cases of powers of attorney under § 260ff ABGB), § 254 (adult refuses certain medical treatment), § 255 (sterilisation), § 256 (certain forms of medical research), § 257 (permanent change of residence), § 258(4) (extraordinary economic transactions, not however, in cases of powers of attorney under § 260ff ABGB).

(919) § 4 ErwSchVG.

(920) ErlRV 1461 BlgNR XXV GP 85. There are no medical assessments either.

(921) § 117a(1) AußStrG 2005. The assessments concern: 1) which activities would have to be covered by the measure; 2) the adult's ability to manage their own affairs (including documentation on their physical, mental health); 3) whether the adult is otherwise assisted in managing their affairs (by close relatives, social services and other organisations listed in § 239(2) ABGB); 4) the personal and social surroundings of the adult; 5) potential alternatives to the measure; 6) whether the requirements for an *ex lege* representation (*gesetzliche Erwachsenenvertretung*) or a representation by choice (*gewählte Erwachsenenvertretung*) are met; 7) whether there are grounds for closing or continuing the proceedings concerning the initial designation or renewal of the tasks of a court-appointed representative; 8) the suitability of close relatives as potential representatives; 9) the need to include provisions stating that the adult has to get the authorisation of their representative for certain activities (or even the court for others) (*Genehmigungsvorbehalt*). The list is not exhaustive.

(922) §§ 4a, 4b ErwSchVG.

(923) Cf Martin Schauer, '§ 117a' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz*, vol I (2nd edn, Manz 2019) para 11; Thomas Traar, Ulrich Pesendorfer, Stefanie Lagger-Zach, Romana Fritz, Peter Barth, *Erwachsenenschutzrecht* (2nd edn, Manz 2023) § 4a ErwSchVG, para 2.

however, not binding. (924) The associations do not exercise coercive powers when gathering relevant information on a case and are supervised by the Federal Ministry of Justice. (925)

267 The organisations are furthermore involved if the court- or self-appointed representative decides on a permanent change of residence for the adult, a change to which the representee does not (seem to) consent. (926) In these cases, they have to assess why the adult dissents, whether the change is necessary, and if so, whether there are any suitable alternatives. (927)

268 Procedurally, matters of adult protection are subject to the AußStrG 2005. (928)

2. *Non-judicial measures*

a) *Unilateral acts*

269 Adults can, by a unilateral (929) act, grant powers of representation that are to be exercised when they are no longer in a position to protect their interests (*Vorsorgevollmacht*). (930) This presupposes that they can still make informed decisions. The act is an ultimate expression of the adult's right to self-determination; it takes precedence over any other form of representation. (931) Content-wise, the act can be structured at the discretion of the adult but has to indicate the matters (or at least type of matters) for which the powers are granted. (932) The general rules on powers of attorney apply on a subsidiary basis. (933)

270 Due to the legal implications of such an act, formal requirements have been introduced. Acts have to be drawn up personally and in writing before a

---

(924) Traar, Pesendorfer, Lagger-Zach, Fritz, Barth, *Erwachsenenschutzrecht* (n 923) § 4a ErwSchVG, para 3.

(925) § 5 ErwSchVG.

(926) § 4b ErwSchVG; § 131 AuStrG 2005.

(927) ErlRV 1461 BlgNR XXV. GP. 87; Traar, Pesendorfer, Lagger-Zach, Fritz, Barth, *Erwachsenenschutzrecht* (n 923) § 4b ErwSchVG, para 2.

(928) In particular, §§ 116a–139 AußStrG 2005.

(929) Eg, Martin Schauer, '§ 260' in Andreas Kletečka, Martin Schauer, *ABGB-ON*$^{1.03}$ (1 August 2019, rdb.at) para 10.

(930) §§ 260–263 ABGB.

(931) § 240(2) ABGB.

(932) § 261 ABGB. Eg medical treatment (§§ 252ff ABGB) (not to be mistaken for advance directives which do not confer powers of representation [*Patientenverfügungen*]), the management of the adult's property or personal care.

(933) Traar, Pesendorfer, Lagger-Zach, Fritz, Barth, *Erwachsenenschutzrecht* (n 923) § 260 ABGB, paras 38ff.

notary, lawyer, or an organisation with competences in matters of adult protection (*Erwachsenenschutzverein*), which has certain informational obligations. (934)

271 The powers, however, do not immediately take effect once they are drawn up. Both the conferral and the fact that the adult lost the ability to protect their interests in the matters indicated in the act have to be included in a nation-wide central register (*Österreichisches Zentrales Vertretungsverzeichnis*). (935) The registration of both steps is again carried out by the notaries, lawyers, or organisations that were involved in the drafting process; the powers only come into effect once both events were registered. (936) The same is true for any potential changes to the powers. (937) Registration does not take place in any case. Should the actor proceeding to registration have reasonable doubts as to the adult's decision-making capacity, as to the fact that they lost that capacity, or as to the suitability of the chosen representative, (938) they have to refuse either drawing up or registering the respective act. (939) Courts have to become involved if they fear that the adult's wellbeing might be at risk. (940)

272 Powers of representation can be revoked at the discretion of the adult, even after they became unable to protect their interests in the matters indicated in the initial act. (941) They further cease to exist with the death of the adult or their representative or by means of a judicial decision. (942) Courts can terminate the powers of representation should the representative not have exercised their powers, or in violation of their duties or should the welfare of the adult so require. (943)

---

(934) § 262 ABGB. In particular, the legal consequences; the option to prohibit the transfer of general powers or in certain matters or to provide for joint representation by two or more people; and the possibility of revoking the powers at any point, even after the adult is no longer in a position to protect their interests on their own.

(935) § 263(1) ABGB.

(936) § 245(1) ABGB.

(937) § 246(2) ABGB.

(938) The suitability is assessed under § 243 ABGB.

(939) § 263(2) ABGB. § 4c ErwSchVG lists other grounds based on which the organisations have to refuse to draw up the powers of representation.

(940) § 263(2) ABGB.

(941) § 246(1)(3) ABGB. For the powers to end, the revocation/cancellation has to be included in the register; the same goes for the event that the adult becomes once again capable of managing their affairs in the indicated matter (even in this case, the event has to be registered, as the powers otherwise continue to exist (§ 245(4) ABGB)).

(942) § 246(1)(1) and (2) ABGB.

(943) § 246(3)(1) ABGB.

b) *Agreements*

273 Sometimes, people only become of aware of impairments or insufficiencies that affect their personal faculties or ability to protect their own interests when precautionary measures such as powers of representation can no longer be taken. Adults who can no longer confer such powers due to mental illnesses or comparable impairments can, however, still designate a representative provided that they possess a reduced decision-making capacity that allows them to assess the basic meaning and consequences of conferring powers of representation (*gewählte Erwachsenenvertretung*). (944)

274 For this purpose, adults and their representatives can personally enter into a written agreement in which they determine the scope of the respective mandate. (945) Competence in this regard lies with notaries, lawyers, and specifically authorised organisations (*Erwachsenenschutzvereine*). (946) Before the agreement is concluded, all parties have to be instructed about the nature and consequences of this form of representation, the fact that they can revoke their consent at any time, and of the rights and obligations of the designated representative. (947)

275 Due to the contractual nature of the agreement, the general rules of the law of obligations apply – at least insofar as they are not modified by the specific rules in adult protection matters. (948)

276 The mandate is then registered. (949) Similar thresholds apply as for unilateral acts. Should the actors involved in drafting the agreement consequently have reasonable doubts as to the existence of the statutory requirements or the suitability of the chosen representative, (950) they cannot proceed with the registration. (951) Potential threats to the adult's welfare have to be passed on to the competent court.

277 The representation takes effect once registered, (952) and only ceases in the

---

(944) §§ 264-267 ABGB.

(945) § 266(1) ABGB. Defined as such (a mandate, ie, *Bevollmächtigungsvertrag*) under § 265(1) ABGB which refers to § 1002 ABGB (governing mandates). For the scope, see § 265 ABGB.

(946) § 266(1) ABGB.

(947) § 266(2) ABGB. The parties drawing up the agreement have to document that the respective instructions were given.

(948) See Traar, Pesendorfer, Lagger-Zach, Fritz, Barth, *Erwachsenenschutzrecht* (n 923) § 265 ABGB, para 2.

(949) § 267(1) ABGB.

(950) Criteria were included in § 243 ABGB.

(951) § 267(2) ABGB.

(952) § 245(2) and (4) ABGB. Even if the adult in question had in the meantime re-acquired their decision-making capacity.

event of certain occurrences, modelled on those for unilateral powers of representation.

c) *Ex lege powers of representation*

278 In the event that the vulnerable adult did not grant powers of representation by a unilateral act (fully capable) or under an agreement (reduced decision-making capacity), a statutory default regime is set in place (*gesetzliche Erwachsenenvertretung*), ([953]) under which, the adult's next of kin are – in certain matters ([954]) – entrusted with powers of representation. ([955]) The adult can, however, influence who will be chosen as their representative by drawing up a specific act designating the preferred candidate (*Erwachsenenvertreter-Verfügung*). ([956])

279 For the powers to take effect, they have to be entered into the national register. ([957]) Notaries, lawyers, and organisations certified in matters of adult protection have been entrusted with the respective task. Should they have reasonable doubts as to the existence of the requirements for an *ex lege* representation or regarding the representative's suitability, they cannot proceed to registration. ([958]) Before the powers are registered, the representative and the adult have in any case to be informed of the nature/consequences of this form of representation, the possibility to challenge it at any point, and of the rights and obligations of the representative. ([959])

280 As with powers of representation conferred by a unilateral act or under an agreement, the powers cease to exist with the death of the adult or repre-

---

([953]) §§ 268–270 ABGB.

([954]) § 269 ABGB: 1) Representation in administrative proceedings and proceedings before administrative courts; 2) representation in court proceedings; 3) management of income, assets and liabilities; 4) conclusion of legal transactions to cover care and support needs; 5) decisions on medical treatment and the conclusion of related contracts; 6) changes of the adult's place of residence and the conclusion of nursing home contracts; 7) representation in personal matters not mentioned under 5) and 6); 8) conclusion of legal transactions not mentioned under 4)–6).

([955]) Next of kin are (§ 268(2) ABGB): parents and grandparents, children and grandchildren (if of age), siblings, nieces and nephews of the adult, their spouse or registered partner and their *de facto* partner if they had lived in the same household for at least three years, as well as the person designated by the adult in a separate document (*Erwachsenenvertreter-Verfügung*).

([956]) See § 244 ABGB. The designation can be revoked at any time but has to be registered in the nation-wide register in the same way the document itself was. As for the formal requirements, see § 244(3) ABGB.

([957]) § 245(2) ABGB.

([958]) § 270(2) ABGB.

([959]) § 270(3) ABGB.

sentative by means of a judicial decision or if the adult objects to the chosen representative. (960) The powers cease in any case after three years, unless they are renewed. (961)

3. *Judicial measures*

281 If one of the aforementioned measures is sufficient to safeguard the vulnerable adult, there is generally no reason for courts to become involved. (962) Should an adult, however, not be in a position to protect their own interests, and not have, or not be able to designate, a representative, (963) courts can appoint a representative (*gerichtliche Erwachsenenvertretung*). (964) The procedure can be initiated by the adult themselves or *ex officio*. (965) Any measure adopted, however, has to be flexible and should be tailored to the individual case. Representatives can thus only be appointed for certain matters that are relevant at the time of adoption and expressly determined. (966) Once the assigned matters have been dealt with, the powers of representation are to be restricted or terminated. (967)

282 When selecting the representative, the needs and wishes of the adult as well as the suitability of the candidate and the matters the latter will have to deal with have to be taken into account. (968) The adult can, however, influence who will be chosen as their representative. Preference is to be given to persons indicated in documents containing powers of representation by a unilateral act or under an agreement or which were designated in a specific act as their preferred candidate (*Erwachsenenvertreter-Verfügung*). (969) Otherwise, a person close to the adult, or, should no suitable candidate be available, an organisation with competences in matters of adult protection, is to be chosen. (970) As a last resort, notaries, lawyers or their substitutes can be appointed. (971)

283 Court-ordered measures take effect once the respective decision (appoint-

---

(960) § 246(1)(5) ABGB. The objection has to be registered.
(961) § 246(1)(5) ABGB.
(962) Except for the general supervisory role of courts. Also, § 259 ABGB.
(963) And should the statutory default rules not be applicable.
(964) §§ 271–276 ABGB.
(965) § 271 ABGB; § 117(1) AußStrG 2005.
(966) § 272(1) ABGB.
(967) § 272(2) ABGB.
(968) Ibid.
(969) § 274(1) ABGB.
(970) § 274(2) and (3) ABGB.
(971) § 274(4) and (5) ABGB. Especially, when legal matters have to be dealt with.

ment) becomes final; a registration is only of a declaratory nature. (972) The same rules apply to changes made to protective measures, (973) which lose their effects with the death of the adult or representative, by means of a judicial decision or after three years from the first-instance decision (unless the measure is renewed). (974) Courts can further transfer the powers of representation should the previously appointed representative have died, not be unsuitable, be unreasonably burdened by the tasks or if the welfare of the adult otherwise requires it. (975) The measure has to be terminated altogether if all necessary matters were addressed or if the requirements for the appointment have ceased to apply. (976) Should this only apply to some of the matters covered by the measure, the scope has to be adapted accordingly.

4. *Qualifications under private international law*

284 The recognition of foreign decisions and measures in matters of the protection of vulnerable adults is governed by the AußStrG 2005. The respective provisions not only cover judicial decisions but rather intend to cover all forms of representation. (977) This is in line with the 2000 Hague Adult Protection Convention and the EU Commission Proposal for a Regulation on the International Protection of Adults. (978) Both have a wide understanding of 'authority' and thus cover both judicial and administrative authorities. (979) Whether other legal professionals are covered by the Conventions' understanding remains ambiguous. (980) The private international law issues

---

(972) § 245(3) ABGB. The registration is only declaratory, see Martin Schauer, '§ 245' in Andreas Kletečka, Martin Schauer, *ABGB-ON*[1.03] (1 August 2019, rdb.at) paras 12f.

(973) § 246(2) ABGB. Procedurally, see § 128 AußStrG 2005.

(974) § 246(1)(1), (2) and (6) ABGB. Procedurally, see also § 128 AußStrG 2005.

(975) § 246(3)(2) ABGB.

(976) § 246(3)(3) ABGB.

(977) Cf Verena Cap, '§ 131a' in Birgit Schneider, Stephan Verweijen (eds), *AußStrG. Kommentar* (Linde 2019) para 12.

(978) Convention of 13 January 2000 on the International Protection of Adults and Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults, COM/2023/280 final. With regard to the Proposal, see Article 3(6): "'authority' means any judicial or administrative authority of a Member State with competence to take measures directed to the protection of an adult's person or property".

(979) The same in Article 3(6) of the EU Proposal: "'authority' means any judicial or administrative authority of a Member State with competence to take measures directed to the protection of an adult's person or property".

(980) The question is not addressed in the explanatory report either, see Paul Lagarde, *Protection of Adults Convention. Explanatory Report* (2nd edn, The Hague Conference on Private International Law Permanent Bureau 2017) 45 para 12. The report only specifies that

arising for practitioners, especially notaries, were, however, addressed in the explanatory report. (981) The approach which the EU Regulation will follow remains to be seen.

285 As for the applicable law, Austria already follows the Hague Convention approach and introduced similar rules into the IPRG in 2022. Within its scope, the Convention takes precedence over the internal rules. (982) Outside its scope of application, rules were modelled on the Convention. Specific rules were introduced for *ex lege* representations and powers of representation conferred by adults with an already reduced decision-making capacity.

286 Requirements, effects, and the extinction of powers of representations conferred by law are (irrespective of whether these powers have to be registered or not) consequently governed by the law of the State in which the vulnerable adult had their habitual residence when the representation took effect. (983) Should a vulnerable adult, on the other hand, intend to determine a representative when their decision-making capacity is already slightly diminished (*gewählte Erwachsenenvertretung*), the applicable law is determined under Article 15 of the Adult Protection Convention. (984) The requirements, effects, and extinction of judicial or other authoritative measures are – outside the scope of the 2000 Hague Convention – governed by the law of the personal status of the adult. (985)

287 Other rules concern advance directives, ie dispositions that do not designate a representative or confer powers of representation, in the medical field. The requirements, existence, extent, effects, modification and extinction of such advance directives (*Patientenverfügungen*) are – with regard to treatments performed in Austria – governed by Austrian law. (986) The provision intends to limit the need for the time-consuming determination of the applicable law in the case of urgent measures. (987) Treatments taking place abroad, on the

---

medical practitioners are not authorities within the meaning of the Convention (ibid, 52 para 42).

(981) Cf Paul Lagarde (n 980) 41 para 3. The report only specifies that medical practitioners are not authorities within the meaning of the Convention (ibid, 52 para 42).

(982) § 15(1) IPRG.

(983) § 15(2) IPRG. See Florian Heindler, '§ 15 IPRG' in Simon Laimer (ed), *IPR Praxiskommentar* (Lexis Nexis 2024) paras 5–7.

(984) See ErlRV 1527 BlgNR XXVII GP 48; Heindler, '§ 15 IPRG' (n 983) para 8.

(985) § 15(3) IPRG.

(986) § 1(3) PatVG.

(987) See ErlRV 337 BlgNR XXVI GP 2.

other hand, have to be assessed under the law to which the case has the closest connection; there is no specific conflict rule. (988)

V. Conclusions

288 The administration of justice in Austria is, to a large extent, still carried out by judicial authorities, ie courts in institutional terms. Some areas, especially in the field of succession law, were, however, already historically outsourced to non-judicial bodies, such as notaries, who act as court commissioners in succession proceedings, under the supervision of the judiciary, and thus – when carrying out certain authoritative tasks – as courts in the functional sense of the word. They do, however, not have a general decision-making power and cannot establish the status of heir.

289 Many family law matters, on the other hand, are still court-administered. This is particularly the case under the current rules on divorce and the dissolution of registered partnerships. Only some minor areas of family law have been (partly) de-judicialised. The solutions adopted sometimes refer parties to other public authorities (parental responsibility), strengthen and rely on party autonomy (parenthood, division of relationship property), or are subject to two-tier proceedings involving both judicial and non-judicial actors (adoption). Even some status-related matters are no longer only court administered (eg, parenthood agreements, breakthrough acknowledgements).

290 This is further true with regard to civil status changes (name changes or changes in a person's gender-marker) which, for the most part, do not require the involvement of a court but rely on public and administrative authorities. Matters of adult protection tend to strengthen party autonomy as well, limiting the need for court-appointed representatives. A supervisory role of the judiciary remains.

291 This said, contentious matters and disputes generally and thus both in family and succession matters remain a prerogative of the courts.

(988) § 1 IPRG. Florian Heindler, '§ 15 IPRG, Anhang A. § 1 PatVG' in Simon Laimer (ed), *IPR Praxiskommentar* (Lexis Nexis 2024) para 9.

DENMARK

by *Frank H Pedersen and Lars Thøgersen*

I. Introduction and overall considerations

For more than 100 years, the competence in family law matters (1) in Denmark has been shared between the courts and various administrative authorities. (2) The competence of administrative authorities has been focused on situations where there is no dispute, either because there generally is only one party to the proceedings eg concerning names or interstate succession for a surviving spouse or the parties are in agreeance eg regarding a legal separation, divorce, paternity, adoption or transfer of custody. However, the competence to make decisions on certain disputes on family law matters has also been placed on administrative authorities eg regarding maintenance or visitation rights. **1**

Today, it can be argued that the basic principle underlying Danish family law is 'party autonomy', where the parties are free to make deals or arrangements among themselves that they think suit them best, as long as such deals or agreements are made in close proximity to the time when the real and practical effects of the deal or agreement will be realised. Therefore, when an agreement can be reached between the parties, the public authorities' involvement in family law cases will mostly be reduced to registration or granting of a formal approval, without any particular substantial review. Thus, the autonomy that individuals have in other areas of the law to freely make agreements has also gradually become the standard regarding most issues related to family law matters, although this development may not receive general recognition. **2**

Over the years, the competence of administrative authorities in family law matters has been expanded, focusing on assisting the parties in reaching an agreement through mediation or similar alternative dispute resolution mechanisms. **3**

---

(1) Here the term family law is applied in the broadest sense, ie as an umbrella term encompassing the entire field of family and succession law, etc, which are the subjects of this report.

(2) Viggo Bentzon states in *Familieretten II* (G.E.C. Gad 1926) 33, that requests for spousal maintenance during marriage were decided upon by 'Overøvrigheden', an administrative authority which is now the Agency of Family Law. In *Den Danske Familieret* (G.E.C. Gad 1926) Viggo Bentzon states that divorce decrees in Copenhagen were issued by 'Overpræsidenten' and in the rest of Denmark by 'Amtmanden' (245–246), both administrative authorities similar to 'Overøvrigheden'. On 267 and 326, Viggo Bentzon states that decisions on child maintenance were taken by 'Overøvrigheden'. Finally, on 397 and 400 Viggo Bentzon states that paternity and adoption could be established by a decree which indicated that the matter fell in the competence of an administrative authority.

4 In 2019, a new family law system was established ('family law' understood in the narrower sense concerning questions such as marital status and children's legal relationships, etc), placing the competence in family law cases on an administrative authority – the Family Law Agency (*Familieretshuset*). This step can be seen as a conjunction of the tradition for the handling of cases by administrative authorities, and the basic principle of party autonomy becoming more salient – or one could say that those two factors are inseparably intermingled. (3)

A. *Sources in family law matters*

5 The Danish legal system is a civil law system primarily relying on Parliamentary Acts. The field of family law is heavily regulated by legislation. Consequently, decisions from administrative authorities and the courts within these areas primarily contribute to the interpretation of the Parliamentary Acts. (4) An exemption is the division of property of unmarried couples, where court decisions are essentially the legal source.

6 The primary legal sources in the field of family and succession law are Parliamentary Acts, consolidated Acts (*lovbekendtgørelser*), legislative material (*lovforarbejder*), and regulations (*bekendtgørelser*).

7 Consolidated Acts encompass the original law along with all subsequent amendments. Regulations constitute binding administrative legal provisions, primarily outlining the proceedings. Additionally, guidelines (*vejledninger*), while not legally binding, are directed towards administrative authorities.

B. *The court system*

8 Under the Danish Constitution, all administrative decisions are subject to a review by the courts.

9 The court system in Denmark consists of the following courts:

- The Supreme Court (*Højesteret*)
- The high courts (*landsretterne*)
- The district courts (*byretterne*)

10 Each district court contains the following units:

- The family court (*familieretten*) – see para 30
- The bailiff's court (*fogedretten)*
- The probate court (*skifteretten*)

---

(3) See paras 18–22, 27–30 and 33.

(4) See eg, Hans Viggo Godsk Pedersen and Ingrid Lund-Andersen, *Family and Succession Law in Denmark* (3rd edn, Kluwer Law International 2021) 19.

The probate court handles, among others, cases on the division of matrimonial property and the acquisition of estates – see paras 116–121 and 123–143. However, the actual administration and division of an estate is not handled by the probate court, but by the heirs or an authorised manager, who is a private lawyer. **11**

Generally, judgments from the district courts may be appealed to the high courts, but high court judgments may only be appealed to the Supreme Court with permission from the Appeals Permission Board (*Procesbevillingsnævnet*). See para 40 for special rules on limitations on appeals of family court judgments. In appeal cases, the competent court may perform a full review (facts and law) of the judgment in question. **12**

C. *Denmark and EU-legislation on family law*

The competence of the European Union on family law matters is based on the Treaty on the Functioning of the European Union (TFEU), Sec 81 (3), which is placed in Title V of Part Three of the Treaty. **13**

According to Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the EU Treaties, Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union. Thus, Denmark is not bound by, or subject to, EU legislation on family law, commonly referred to as the Danish exemption or 'opt-out' clause. **14**

However, certain parts of Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations apply to relations between the EU Member States and Denmark (see Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.) (5) **15**

D. *Greenland and the Faroe Islands*

The Faroe Islands and Greenland are parts of the Kingdom of Denmark but are not parts of the European Union. Therefore, family law of the Faroe Islands and Greenland will not be examined within this report. **16**

However, it should be mentioned that in both the Faroe Islands and Greenland, the competence in family law is shared between the courts and administrative authorities, similar to the situation in Denmark before 2019. **17**

(5) OJ L 149, 12.6.2009, p 80.

E. *Family law cases – party autonomy*

18 The basic concept of Danish family law is party autonomy. This concept gives the parties themselves the right to conclude agreements on family law matters that suit them without the involvement of public authorities or with minimal involvement of public authorities.

19 Thus, public authorities are only involved in family law cases in situations where an agreement has to be registered or approved by a public authority in order to be valid or in situations where the parties disagree. (6)

20 Private agreements on the following issues are, under Danish family law, valid without any involvement of a public authority:

- Child maintenance
- Spousal maintenance
- Visitation rights
- The residence of the child
- The dividing of property by spouses or unmarried couples

21 Through a private agreement, the parties may change any decisions as regards these issues which the Agency of Family Law or the courts have previously made.

22 The following private agreements have to be registered by the Agency to be valid; however, in practice, the Agency does not carry out any actual test as to the content of the agreement:

- Placement of custody between the parents of the child – either joint custody or sole custody
- Shared residence of the child
- A shared request to have legal separation or divorce granted

23 Before entering into a private family law agreement, the parties may seek legal advice in general terms from the administrative authority responsible for the legislation in question. In cases regarding issues of visitation rights, the residence of the child and custody, the parents may also seek child welfare counselling and family mediation from the Agency (see paras 40 and 101).

24 The private agreements mentioned above are enforceable. However, agreements on visitation rights and the division of property are only enforceable if the agreement contains a clause making the agreement enforceable. The agreements are enforced by the same authority and under the same conditions as an administrative or court decision on the same matter.

25 If the validity of a private agreement is disputed, the question is considered in the same manner in which the validity of any other agreement would be

(6) No professional support is required.

considered. Thus, if a party asks for a private agreement to be changed, the authority dealing with the case must consider the agreement to be valid, unless, under the general rules on the validity of agreements, it is deemed to be invalid. However, under Danish family law, the possibility of having a private family law agreement changed is greater than under the general rules on changing agreements.

II. Family law

A. *The Family Law System*

1. *Introduction*

26 The present family law system in Denmark was established in 2019. The legal basis for the system is the Act on the Family Law Agency (*lov om Familieretshuset*). (7) According to the Act, the system consists of two authorities:

- The Agency of Family Law (*Familieretshuset*)
- The family courts (*familieretterne*)

27 The Agency of Family Law is an administrative authority under the Ministry of Social Affairs and Housing (*Social- og Boligministeriet*). According to this Act, the Agency, when making family law decisions, is independent of instructions from the Minister responsible for the Agency.

28 Under the family law system, the Agency deals with the following issues:

- Parenthood
- Parental responsibility, which includes custody, the child's place of residence and visitation rights
- Divorce and legal separation
- Permission to marry in certain situations
- Child maintenance
- Spousal maintenance
- Names

29 The Agency also deals with cases on adoption and the protection of adults, but these cases do not fall within the remit of the family law system. The Agency does not deal with cases on matrimonial property, succession and gender recognition.

30 The family courts are parts of the district courts (*byretterne*). They are, however, not separate units, but integrated into the district courts. Thus, a

(7) Consolidated Act No 766 of 07.08.2019. For more details and discussion in English, see Annette Kronborg and Christina Jeppesen de Boer, 'Co-operation: The Glue that Unites the Danish Family Justice System' in Mavis Maclean, Rachel Treloar and Bregje Dikjsterhuis (eds), *What is a Family Justice System For?* (Bloomsbury Publishing Plc 2022).

judge may preside over family law cases, other civil law cases and criminal cases.

31 Children are parties to cases and proceedings on family law, but they cannot exercise their rights on their own. Thus, during proceedings before the Agency or the courts concerning a child, the child is represented by the parent who has custody over the child. This also applies when making private agreements concerning the child.

2. *The function of the family law system*

32 Under the family law system, all family law applications must be submitted to the Agency. Thus, a party cannot make an application in a family law matter directly to the courts.

33 Initially, the Agency screens all applications and divides them into three categories:

- Green cases – simple cases
- Yellow cases – less simple cases
- Red cases – complicated cases on parental responsibility

34 *Green cases* (simple cases) are those where the parties, according to the application, are, or may be, in agreeance. In these cases, the task for the Agency is to ensure that the parties are in agreeance and then issue a document according to their agreement, provided that the requirements for issuing the document are met. In cases on civil status (divorce, custody, parenthood, etc), the Agency records the agreement in the Civil Registration System (*Det Centrale Personregister*). In green cases, the Agency never makes a decision. If a decision is required because of a disagreement between the parties, the case is changed into a yellow or red case.

35 *Yellow cases* (less simple cases) are those where the parties, according to the application, are not in agreeance, and where a decision may, therefore, be needed. These decisions are normally taken by the Agency. However, if the case raises complicated questions of law or facts, the Agency must submit the case to the family court in order to reach a decision. Whether a case should be submitted for such decision at a family court falls within the competence of the Agency and not the parties.

36 Thus, decisions on, for example, legal separation, divorce, child or spousal maintenance, parenthood and names are generally taken by the Agency, even if the parties disagree on such issues.

37 For the question of the competence as regards decision-making powers of the Agency and the family courts in cases on parental responsibility, see para 109.

38 Decisions made by the Agency may be enforced by the bailiff's court (*fogedretten*) under the same conditions as court judgments. However,

decisions on child or spousal maintenance are enforced by the taxation authorities, as is also the case with the enforcement of various forms of debts to public authorities.

Decisions taken by the Agency may, within four weeks, be appealed to the family court. A decision taken by the family court in appeal cases may only be appealed to the higher courts with permission from the Appeals Permission Board (*Procesbevillingsnævnet*). **39**

In all yellow cases, the task for the Agency is firstly to offer the parties mediation or similar alternative dispute resolution mechanisms if the Agency considers it possible for the parties to reach an agreement – or in cases on parental responsibility in an effort to reach some level of agreement between the parties. **40**

Secondly, if the parties are unable to reach an agreement, the task for the Agency is to collect the information needed in order to make a decision. This also applies to situations where the decision is to be taken by the family court. In such situations, the information collected by the Agency is forwarded to the court when the Agency submits the case to the court for decision-making. The purpose of this is to enable the court to hold a court hearing shortly after receiving the case. **41**

For the handling of yellow cases on parental responsibility, see para 109. **42**

Red cases are complicated cases on parental responsibility, including other family law cases raised in connection with a complicated case on parental responsibility, eg divorce or child maintenance. **43**

For the handling of red cases on parental responsibility, etc, see para 109. **44**

3. *Procedural rules for the Agency of Family Law*

The parties have full access to their case file, except, inter alia, when the information may jeopardise the safety of the child or other persons involved in the case. **45**

The case handling in the Agency is based on written procedures, giving all parties contradictory rights. Thus, the Agency can only make a decision after all parties have been given access to the file and have been invited to submit written statements. **46**

The parties are free to submit written observations and evidence, including witness statements and expert reports. (8) They may also ask for the possibility to present the case before the Agency at a meeting, and in some **47**

(8) In child maintenance cases, the parent liable to pay said maintenance must provide income information. In cases on spousal maintenance, both spouses must provide income information.

situations, the Agency is obliged by law to hold meetings with the parties. Generally, the purpose of a meeting with the Agency is to explore the possibility of reaching an amicable solution, to collect information and inform the parties of their legal position and the handling of the case. Thus, meetings with the Agency cannot be compared to court hearings.

48 During the procedures before the Agency, a party may be represented by a lawyer, but the party will have to bear any legal expenses themself. However, there is a limited possibility of receiving free legal aid in red cases.

49 The Agency is obliged to ensure that all necessary information is collected before a decision is made or the case is submitted to the family court for decision-making.

50 In cases on parental responsibility, the Agency must interview the child and collect relevant information on the child and its parents from other public authorities, including expert statements on the best interests of the child.

51 In cases where parenthood is disputed, the Agency must initiate DNA testing. The costs for this are paid by the Agency.

52 In all cases involving children, except cases on child maintenance, the child must be heard or information on its perspective must be collected.

4. *The family courts*

53 Basically, the family courts deal with family law cases as with other civil law cases. However, the family courts have, to some extent, an obligation to ensure that all relevant information is gathered before making a decision in a family law case.

54 The parties may submit written statements and evidence supplementing the evidence submitted to the court by the Agency.

55 When the parties have submitted their statements and evidence, the court holds a hearing and issues a judgment.

56 However, the court may decide that a case should be processed through a special written procedure. This applies to cases where the court finds it unproblematic to reach a decision without a court hearing. This possibility is primarily aimed at cases on maintenance, divorce, legal separation, parenthood, names and minor changes of visitation rights.

57 In cases on parental responsibility and parenthood, it is for the court to ensure that all necessary information is collected before any decision is made. In cases on parental responsibility, this includes interviewing the child and collecting statements on the best interests of the child and in cases on parenthood, identifying possible fathers to the child and having DNA tests performed. The costs for this are paid by the court.

58 All court hearings take place behind closed doors.

B. *Divorce and legal separation*

59 The rules on divorce and legal separation are found primarily in the Act on Marriage Formation and Dissolution (*lov om ægteskabs indgåelse og opløsning*), (9) in synergy with the Act of the Agency of Family Law (*lov om Familieretshuset*). (10)

60 Cases on divorce and legal separation are dealt with by the Agency of Family Law and the family courts as described in paras 32–58. Hence, all cases are initially dealt with by the Agency and the vast majority of cases are finalised by the Agency.

61 The question of a separation or divorce is, in principle, a separate legal question, which is decided independently from other questions such as maintenance or division of property or, for parties with children, decisions about parental responsibility. However, the Agency of Family Law can choose to handle the question of separation or divorce together with the parties' other legal questions pending at the Agency, such as a decision about parental responsibility, where this is considered to be beneficial. Likewise at the family courts. Yet, as the questions are not substantively interconnected, this option is a matter of considerate and efficient case management. (11) The division of property falls within the jurisdiction of the probate court, see para 119, and this is thus outside the realm of the Agency.

62 Spouses have an unconditional right to have a divorce or separation granted if they are in agreement. (12) If not in agreement, a spouse has an unreserved right to have a separation granted. (13) And after a period of six months of separation, the spouse is entitled to a divorce. (14) A granted separation will cease by either one or both of the spouses initiating a divorce, if one of the spouses dies, or if the spouses continue or resume living together. (15)

63 A spouse may also seek a divorce without prior separation if one of the following conditions is met: 1) the spouses have been living apart for the last

---

(9) *Ægteskabsloven*, Consolidated Act No 1080 of 14.08.2023.

(10) Consolidated Act No 766 of 07.08.2019.

(11) Guidelines on separation and divorce, *Vejledning* No 9397 of 26.06.2020, item 2.3.1.

(12) Act on Marriage Formation and Dissolution, Consolidated Act No 1080 of 14.08.2023, s 29.

(13) Act on Marriage Formation and Dissolution, Consolidated Act No 1080 of 14.08.2023., s 30(1).

(14) Ibid, s 30(2).

(15) Act on Marriage Formation and Dissolution, Consolidated Act No 1080 of 14.08.2023, s 31.

two years due to disagreements; [16] 2) the other spouse has committed adultery; [17] 3) the other spouse has committed acts of violence against the spouse or the spouse's children; [18] 4) the other spouse is married to someone else (bigamy); [19] or 5) the other spouse has abducted mutual children. [20]

64 Two matters must be settled in conjunction with the legal question of separation or divorce: whether one of the spouses shall pay spousal maintenance to the other and, for spouses who have been living in a rented home, who should have the right to continue the lease. If the spouses are in agreeance with the terms, their case will be categorised as a green case, ie a simple case, in the Family Law System, [21] see para 34. These cases will have the shortest processing time, ie the duration from when an application is submitted to when a separation or divorce decree is granted. [22] If the spouses do not agree on the terms, it will normally be the Agency of Family Law which makes a decision, and the case would then be categorised as a yellow case, ie a less simple case. However, if a case on legal separation or divorce is being processed together with a case on parental responsibility, which is categorised as a red case, ie a complicated case, the Agency must submit the case to the family court for a decision, [23] see para 43.

65 For maintenance, it is most common that neither of the (former) spouses will pay any contributions to the other. [24] If maintenance is going to be paid, it will typically be for a shorter period, one to five years. If the couple have been married for 20–25 years, the duration might be eight to ten years. Only in exceptional circumstances will maintenance continue for an unlimited time. [25]

---

[16] Ibid, s 32.

[17] Ibid, s 33(1).

[18] Ibid, s 34(1).

[19] Ibid, s 35.

[20] Ibid, s 36(1).

[21] Guidelines on separation and divorce, *Vejledning*, No 9397 of 26.06.2020, item 3.1.

[22] <https://www.borger.dk/familie-og-boern/Skilsmisse-og-familiebrud/Separation-og
-skilsmisse>.

[23] Guidelines on separation and divorce, *Vejledning*, No 9397 of 26.06.2020, item 3.2.

[24] Linda Nielsen and Ingrid Lund-Andersen, *Familieretten* (10th edn, Ex Tuto Publishing 2022) 77

[25] Linda Nielsen and Ingrid Lund-Andersen, *Familieretten* (10th edn, Ex Tuto Publishing 2022) 81–82.

66 Parties seeking legal separation or divorce must initiate the process by submitting an application to the Agency of Family Law. (26) An application for legal separation or divorce must be submitted through the Agency's digital self-service system. (27) In connection with the submission of the application, a fee in the amount of €100 must be paid. (28) A case concerning bigamy can be initiated by the Agency of Family Law. (29)

67 Upon receiving a request for separation or divorce, the Agency of Family Law must determine whether one party or both parties should be summoned to a meeting or if the matter should be addressed in writing. (30) Such a meeting is referred to as a 'negotiation of terms' (*vilkårsforhandling*). If the spouses agree to the terms of separation and divorce, the Agency typically does not summon them for negotiations of terms. (31) However, a spouse can request that the Agency summon them for a meeting, even when they are in agreeance on the terms. (32)

68 The Agency of Family Law examines the documentation provided by the parties. For instance, in cases involving infidelity, the spouse seeking a divorce must substantiate the allegation of the other spouse's infidelity if the accused spouse denies it. (33) If a party presents new information in the case, the Agency must not make a decision until the other party has been informed and has had the opportunity to provide a statement. (34)

69 As part of the review process, the Agency of Family Law must ensure that there is international jurisdiction to handle the case in Denmark. (35) In the absence of jurisdiction, the Agency or the family court dismisses the case. Furthermore, the Agency may, based on the *lis pendens* principle, reject the processing of the case if a case addressing the same issue is already pending in another jurisdiction at the time of receiving the request. (36) Cases of

---

(26) *Ægteskabsloven*, Consolidated Act No 1080 of 14.08.2023, s 37(2).

(27) Ibid, s 58 d(2)(4) and s 58 d(2)(8).

(28) The fee is 825 DKK in 2024. *Ægteskabsloven*, Consolidated Act No 1080 of 14.08.2023 s 39. See also Familieretshuset, 'Separation and divorce' (Familieretshuset) <https://familieretshuset.dk/en/your-life-situation/your-life-situation/separation-and-divorce> (accessed 6 November 2024).

(29) Ibid, section 23(3).

(30) *Familieretshusloven*, Consolidated Act No 766 of 07.08.2019, s 10.

(31) Guidelines on separation and divorce, Vejledning No 9397 of 26.07.2020, item 8.

(32) *Ægteskabsloven*, Consolidated Act No 1080 of 14.08.2023 s 38 (1).

(33) Guidelines on separation and divorce, Vejledning No 9397 of 26.06.2020, item 6.3.2.

(34) *Forvaltningsloven*, Consolidated Act No 433 of 22.04.2014, s 19(1).

(35) *Ægteskabsloven*, Consolidated Act No 1080 of 14.08.2023 s 43 a.

(36) Guidelines on international jurisdiction in cases of separation and divorce, Vejledning No 9277 of 20.03.2019, item 4.3.

separation and divorce which are being processed in Denmark are always determined according to Danish law. This applies regardless of whether the marriage was entered into in another country, or if the spouses had a stronger connection to another country during the marriage. (37)

70 A separation or divorce becomes effective as of the date of issuance. (38)

71 The parties have a period of four weeks to request that the Agency of Family Law submit an appeal against a decision on separation or divorce to the family court. (39) After the expiration of the four-week deadline, and if a request for the case to be tried at the family court has not been brought, the decision becomes final, constituting *res judicata*.

72 A separation or divorce decree is not subject to public disclosure in a registry. However, the Civil Registration System (*Det Centrale Personregister*) exists, and through this, insurance companies, pension funds, and financial institutions are entitled to obtain information regarding marital status, except for details about separation. (40) As Denmark has opted-out, see paras 13 ff, the Agency of Family Law does not issue certificates based on Article 36(1)(a) or Article 66(1)(a) of the Brussels IIb Regulation.

C. *Parenthood*

73 The rules on parenthood are found in the Act on the Child (*børneloven*), (41) which must be read in connection with the Act om the Agency of Family Law (*lov om Familieretshuset*) (42) and the Administration of Justice Act (*retsplejeloven*) (43).

74 Cases on parenthood are dealt with by the Agency of Family Law and the family courts as described in paras 32–58.

75 According to the Act on the Child, paternity is generally established in connection with the registration of the birth of the child by the local registrar (*personregisterføre*). The local registrars are public servants employed by the local church under the Danish National Church (*folkekirken*). However, in southern Jutland, the local registrars are public servants employed by the municipalities.

76 The local registrars record the woman having given birth to the child as the mother of the child.

---

(37) Guidelines on international jurisdiction in cases of separation and divorce, Vejledning No 9277 of 20.03.2019, item 8.

(38) Ibid, s 35(1).

(39) Ibid, s 41(1).

(40) *CPR-loven*, Consolidated Act No 1010 of 23.06.2023, s 38(3).

(41) Consolidated Act No 772 of 07.08.2019.

(42) Consolidated Act No 766 of 07.08.2019.

(43) Consolidated Act No 1160 of 05.11.2024.

If the mother is married to a man at the time of birth, that man (her husband) is automatically recorded as the father of the child, unless the spouses are legally separated, or the mother was married to somebody else in a ten-month period preceding the birth, or both spouses ask for the husband not to be recorded as the father of the child. **77**

If the mother is unmarried, a man is recorded as father to the child, if he and the mother submit a declaration to the local registrar, stating that they will jointly care for, and assume responsibility for, the child. It is not a condition for recording paternity based on such a declaration that the parents are living together or that the man in question is, or may be, the genetic father of the child. Thus, the parents have party autonomy as described in paras 18ff. **78**

Co-motherhood, which has the same legal effects as paternity, is recorded in the same way as paternity (under the Marriage Act, two persons of the same sex may marry, and their marriage has the same legal effects as a marriage between two persons of opposite sex). **79**

These rules on recording parenthood (paternity or co-motherhood) only apply when the child is born in Denmark. **80**

The recording of parenthood as mentioned has the same legal consequences as a court decision on parenthood. **81**

If paternity or co-motherhood is recorded, proceedings against the registration may be brought by the mother, father, co-mother or the child's guardian within six months of the child's birth. Furthermore, when parenthood is recorded in connection with the registration of the birth of the child, a man or a woman who think that they may be the father or co-mother of the child may, in specific situations and within six months after the birth, ask the Agency of Family Law to initiate a case on parenthood.

If parenthood (paternity or co-motherhood) is not recorded within four weeks after the birth, the Agency initiates a case on establishing parenthood. **82**

In a case on parenthood, a man or a woman may acknowledge parenthood. An acknowledgement of parenthood is only valid when submitted to the Agency using the authorised form, mainly through a digital system. In some situations, parenthood is acknowledged in the course of a meeting with the Agency. **83**

If parenthood is not acknowledged, the Agency will initiate DNA testing and when the testing is final and when the test results are clear, generally parenthood is acknowledged. Otherwise, for the few remaining cases, the Agency will make a decision on parenthood or, in very special situations, submit the case to the family court for a decision. See the description under paras 26ff on yellow cases under the Family Law System. **84**

When parenthood has been established, the parents may ask the Agency to **85**

re-open the parenthood case. Such cases are also yellow cases (see paras 35–42). (44)

86 When a case on parenthood is not initiated in connection with the birth of a child in Denmark, according to the Administration of Justice Act, the Agency and the family courts have international jurisdiction, when the child, the mother or another party to the case live in Denmark. The Act does not contain rules on *lis pendens*, but the principle of *lis pendens* may be applied – however, it appears that there is no case-law on this subject.

87 The Act on the Child permits a child to have only two legal parents. (45)

D. *Adoption*

88 The rules on adoption are found in the Adoption Act (*adoptionsloven*), (46) which must be read in conjunction with some of the procedural rules in the Act on the Family Law Agency (*lov om Familieretshuset*).

89 Decisions on adoption are taken by the Agency of Family Law.

90 International adoptions are carried out in accordance with the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

91 National adoptions include both anonymous adoptions and adoptions within the family of the child. The parents and a child from the age of 12 must give their consent to the adoption. However, the adoption of stepchildren may be carried out without the consent of the other parent, provided that said parent has not had any contact with the child for more than seven to eight years.

92 Cases on adoption fall outside the Family law System as described in para 29. However, generally, the cases are dealt with by the Agency of Family Law in the same way as cases within the Family Law System. The main differences being that decisions on adoption taken by the Agency may be appealed to the National Social Appeals Board (*Ankestyrelsen*) – and thus not to the family court. The Board is an administrative authority under the Ministry of Social Affairs and Housing. When making adoption decisions, the Board is independent of instructions from the Minister responsible for the Board.

93 Under the Danish Constitution, decisions on adoption made by the National

---

(44) Decisions on family law matters taken by the Agency have the same legal effects as court judgments. Thus, the Agency may re-open a judgment issued by the courts, provided that new relevant information emerges.

(45) For more details and a discussion, see Ingrid Lund-Andersen and Frank H Pedersen, 'New Family Forms in Denmark: Legal Adaptability and Rigidity' in Jacqueline Heaton and Aida Kemelmajer (eds), *Plurality and Diversity in Law: Family Forms and Family's Functions* (Intersentia 2023) 227–249.

(46) *Adoptionsloven*, Consolidated Act No 775 of 07.082019.

Social Appeals Board are, as other administrative decisions, subject to a review by the courts.

94 A special system is set up for carrying out adoptions without consent: The local municipality submits an application for adoption to the local child and youth council (*børne- og ungeudvalget*). The council consists of five members: a judge, two members of the municipality, and two experts on child psychology. If the council agrees to the adoption, the case is submitted to the National Social Appeals Board. When deciding on adoptions without consent, the Board consists of two senior officials, two non-professionals, and an expert on adoption. The parents may, within four weeks, ask for the decision to be reviewed by the courts. Thus, procedures for cases on adoption without consent are different than normal administrative procedures. Throughout the procedures, the parents have the right to free legal assistance and to present their case in person to the authorities. The basic condition for adoption without consent is that the parents are permanently unable to take care of their child, and that adoption is in the best interests of the child.

95 All Danish adoptions are full adoptions, removing all legal ties between the child and its family of origin. However, the parents and the members of the child's family of origin may, after adoption, seek permission to have contact with the child. ([47]) An adoption may be revoked when all relevant parties agree, the adopter has grossly mistreated the child or neglected (to a significant extent) the obligations originating from the adoption towards the child, or if revocation is otherwise deemed to be of significant importance for the child.

96 The main condition for adoption is that it is in the best interests of the child. Thus, any agreement on adoption between the legal parents and the adopting parents is not valid.

97 According to the Adoption Act, the Agency of Family Law has international jurisdiction in adoption cases if the adopting parents live in Denmark. The Act does not contain rules on *lis pendens*, but the principle of *lis pendens* may be applied. No case-law on the subject, however, seems to exist.

98 Decisions on adoption without consent are taken by the National Social Appeals Board, and these decisions may be appealed to the District Courts.

E. *Parental responsibility*

99 The rules on parental responsibility (ie custody, the child's place of residence and visitation rights) are found in the Act on Parental Responsibility

([47]) *Forældreansvarsloven*, Consolidated Act No 1768 of 30.11.2020, s 20 a.

(*forældreansvarsloven*), ([48]) which must be read in conjunction with the Guardianship Act (værgemålsloven), ([49]) the Act on the Family Law Agency (*lov om Familieretshuset*), ([50]) and the Administration of Justice Act (*retsplejeloven*) ([51]).

100 Cases on parental responsibility are dealt with by the Agency of Family Law and the family courts as described in paras 26ff.

101 According to the Act on Parental Responsibility, parents with joint custody have to agree on all major decisions regarding the child. However, when parents with joint custody do not live together, the parent with whom the child lives may, without consulting the other parent, make decisions on everyday matters concerning the child, including where in Denmark the child lives. If parents with joint custody disagree on major topics regarding the child, they cannot ask the authorities for a decision. They may ask the Agency of Family Law for child welfare counselling and family mediation. If they still cannot reach an agreement, ultimately one of them may seek sole custody.

102 Having sole or joint custody includes having sole or joint guardianship in relation to the financial situation of the child, including the administration of the property of the child. Under joint guardianship, the parents must agree on all dispositions in relation to the financial situation of the child. If they disagree, one of them may ask the Agency of Family Law for a decision.

103 A parent with sole custody may, without consulting the other parent, make all decisions regarding the child, both on personal and financial matters.

104 For *agreements on custody* between parents, reference is made to paras 18ff on party autonomy.

105 Through an agreement approved by the Agency of Family Law, custody may be attributed to any person(s) other than the parents, and a parent and their partner may, by means of such an agreement, have joint custody. Only two persons can have custody over a child.

106 If they have joint custody, both parents must agree to attributing custody to other persons. Before a custody agreement is approved, a declaration has to be obtained from the non-custodial parent and information on the opinion of the child must also be obtained, see paras 50 and 51.

107 For *agreements on visitation rights and the residence of the child*, reference is made to paras 18ff on party autonomy.

108 In *decisions on custody, the child's place of residence and visitation rights*, the best interests of the child and the child's right to wellbeing and protection

---

([48]) *Forældreansvarsloven*, Consolidated Act No 1768 of 30.11.2020.

([49]) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021. For guardianship in relation to children below the age of 18, see Chapter 1 of the Act.

([50]) *Familieretshusloven*, Consolidated Act No 766 of 07.08.2019.

([51]) *Retsplejeloven*, Consolidated Act No 250 of 04.03.2024, Chapter 42.

from harm shall be a primary consideration. The Agency of Family Law and the family court also focus on measures to ensure that all decisions contribute to safeguarding the wellbeing of the child and to protecting the child from acts of violence or other treatment that exposes the child to harm or danger, including witnessing violence.

109 In cases on custody, decisions regarding the child's place of residence and visitation rights, the sharing of competence between the Agency of Family Law and the family courts differs from other cases under the Family Law System (see paras 32–44):

- Decisions on custody and the child's place of residence: the family courts.
- Decisions on visitations rights if the decision will have severe consequences for the child, particular cases on terminating the contact with one of the parents: the family courts.
- Other decisions on visitations rights: the Agency.
- Interim decisions on custody, the child's place of residence and visitation rights: the Agency or the family courts, depending on which authority is dealing with the case at the time when the request for an interim decision is made.
- Agreements on custody, the child's place of residence and visitation rights: the Agency.

110 As for the procedure for handling requests for custody, the child's place of residence and visitation rights, including the obligation to interview the child and to collect other relevant information on the child and its parents, see paras 45–52. In cases involving domestic violence, misuse of alcohol or drugs, ill-treatment of the child, etc, the Agency may work closely with the social services departments of the relevant municipalities. Furthermore, the Agency may, without the consent of the parents, share relevant information on the parents and the child with the municipalities, police, hospitals and other health authorities.

111 A parent may at all times submit an application for a *review of a decision* on custody, the child's place of residence and visitation rights. However, the Agency of Family Law may reject such an application if the circumstances have not changed significantly since the decision in question was made, taking into consideration the best interests of the child.

112 Cases on the *placement of a child in foster care* are not dealt with in the Family Law System: according to the Act on the Child (*barnets lov*), ([52]) the local municipality submits an application to place a child in foster care to the local Child and Youth Council (*børne- og ungeudvalget*). The Council consist of

([52]) *Barnets lov*, Consolidated Act No 83 of 25.01.2024.

five members: a judge, two members of the municipality and two experts on child psychology.

113 The decisions by a Child and Youth Council on placement in foster care may be appealed to the National Social Appeals Board (*Ankestyrelsen*) within four weeks. ([53]) The decision on appeal cases is taken by the Board consisting of two senior officials and two non-professionals. The parties have a right to present their case to the Board before a decision is taken. This decision may be appealed to the district courts.

114 The *international jurisdiction* in both cases on parental responsibility and foster care is governed by the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children. The Convention applies to the Agency of Family Law, the family courts and the municipalities. The Convention also applies to questions on the attribution and exercise of parent responsibility in international situations. In accordance with Sec 40 of the Convention, the Family Law Agency may issue a certificate indicating the capacity in which a person who has custody is entitled to act and the powers conferred upon them.

115 Under the Administration of Justice Act, ([54]) all decisions, including interim decisions, on parental responsibility made by the Agency of Family Law and the family courts are *enforceable*. The enforcement is carried out by the family courts, taking into account the best interests of the child. Decisions on the placement in foster care may be enforced by the police. ([55])

F. *Matrimonial property regimes*

116 In Denmark, matrimonial property regimes are governed by the Act on the Economic Relations between Spouses (*lov om ægtefællers økonomiske forhold*), ([56]) which must be read together with the procedural rules in the Act on the Administration of Matrimonial Property (*ægtefælleskifteloven*). ([57])

117 Under the Act on the Economic Relations between Spouses, any property belonging to the spouses at the time of death, legal separation or divorce is, as a main rule, community property (*delingsformue*), which is divided equally between the spouses. However, this does not apply to certain pension rights

---

([53]) See ch II.3.
([54]) *Retsplejeloven*, Consolidated Act No 250 of 04.03.2024, Chapter 42 b.
([55]) *Barnets lov*, Consolidated Act No 83 of 25.01.2024, s 139.
([56]) Consolidated Act No 774 of 07.08.2019.
([57]) Consolidated Act No 1808 of 03.09.2021.

and property which have been exempted from the division by mutual agreement between the spouses (absolute separate property [*særeje*]) or by declaration from a gift giver or a testator.

118 In the case of divorce or legal separation, the spouses are free to divide their property as they wish without any involvement by a public authority, see paras 18–25. The spouses may also choose not to conclude a formal agreement on the division of their property.

119 If spouses cannot reach an agreement on the division of their property, they may request help from the probate court (*skifteretten*), which is a unit under the district court (*byretten*). The spouses may limit their request to certain assets or issues. The procedures for the probate court in relation to the division of spousal property is governed by the Act on the Administration of Matrimonial Property.

120 Initially, the probate court informs the spouses of the rules on the division of their property. If one spouse – or both spouses – asks for a decision, the probate court designates a lawyer appointed by the Minister of Justice as authorised manager (*bobehandler*).

121 The authorised manager prepares a proposal for the division of the assets in question and invites the spouses to comment on it. Afterwards, the authorised manager submits the proposal to the probate court, which makes a decision on the division. The decisions made by the probate court may be appealed to the high courts. The spouses must pay the costs for the work performed by the authorised manager.

122 Danish law contains no specific rules on the *division of property of unmarried couples* upon the cessation of a cohabitation. However, under the Act on the Administration of Matrimonial Property, the probate court may make a decision on the dissolution of assets jointly owned by an unmarried couple. Besides, case-law shows that the courts, when hearing a case regarding a long relationship similar to marriage, may award one of the parties a form of compensation, provided that the party contributed to increasing the value of the assets belonging to the other party during the relationship.

III. Succession law

123 The main Acts as regards Danish succession law are the Inheritance Act (*arveloven*) ([58]) and the Administration of Estates Act (*dødsboskifteloven*). ([59]) The Inheritance Act primarily regulates the division of the

([58]) *Arveloven*, Consolidated Act No 1347 of 15.06.2021.
([59]) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021.

estate among the heirs and legatees both regarding intestate succession, and testamentary succession. The Administration of Estates Act primarily regulates matters on the acquisition and administration of the estate. Of importance are also the Inheritance and Gift Duty Act (*boafgiftsloven*) (60) and well as the Estate Tax Act (*dødsboskatteloven*). (61)

124 Jurisdiction over the administration of a deceased's estate lies with the probate court (*skifteretten*). (62) The probate courts are units of the district courts. Another authority involved with the acquisition and administration of an estate is the Tax Agency (*Skattestyrelsen*).

125 The probate courts receive notification of the death from the funeral authorities, or other Danish authorities receiving the death report. (63) Upon receiving the notification of the death, the probate court promptly summons the individuals identified as the deceased's closest relatives to a meeting. The relatives are obligated to provide the information about inheritance relationships that they are aware of. (64) During this meeting, a decision shall be made regarding the approach to administering the estate. (65) For an estate which is solvent, the basic principle can likewise be said to be party autonomy: ie that the estate can be divided in accordance with an agreement between the heirs and with respect to any rights for legatees.

126 There are five different forms of estate administration in Denmark: 1) distribution of the estate without probate (*boudlæg*), (66) 2) distribution to the surviving spouse (*udlæg til ægtefælle*), (67) 3) the process of transferring assets to the spouse who outlives their partner without any actual distribution (*uskiftet bo*), (68) 4) private distribution of the estate (*privat skifte*) (ordinary and simplified private distribution), (69) and 5) distribution of the estate by an authorised manager (*bobestyrerboer*) (70).

127 These different forms of estate administration are elaborated on further below. Whether the heir(s) can become liable for debts of the estate depends

---

(60) *Boafgiftsloven*, Consolidated Act No 11 of 06.01.2023.
(61) *Dødsboskatteloven*, Consolidated Act No 426 of 28.03.2019.
(62) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 2.
(63) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, art 4(1).
(64) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, art 7(4).
(65) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, art 7(1).
(66) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 18(1).
(67) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 22(1).
(68) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 24(1).
(69) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 25(1) and 33(1).
(70) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 36.

on the kind of estate administration. Generally, with a sensible manoeuvring of state administration, they normally do not become liable, and avoiding that the heir(s) become liable is also the basic premise behind the system where an actual probate of the estates occurs. (71)

128 In sec 9 of the Inheritance Act, the main rule for intestate succession is defined. (72) The estate is divided equally, with 50% accrued by a surviving spouse and the other 50% to be shared among the deceased's children. If there no descendants, then the spouse will inherit the full estate, and if there is no spouse, the descendants will inherit in full. Inheritance among descendants follows the so-called 'per strips' rule, so if a child is dead, the inheritance to this child is divided equally among this child's living children. (73) As the main rule, one-quarter of the spouse's and/or descendants' rightful inheritance is an indefeasible share. (74) If the deceased has made dispositions in a will which would violate the descendants' rights, the descendants can choose to dispute those parts of the will which violate their rights. Hence, as the main rule, anyone who has forced heirs, can, as a testator, dispose of three-quarters of their estate, and anyone not leaving a forced heir can dispose freely of their estate as they choose. However, these rules for inheritance division are secondary to the rules on the administration of estates, and, in the case of smaller estates, heirs might possibly lose the right to any share of the estate.

129 Due to the so-called Danish exemption clause, Denmark does not participate in the EU cooperation concerning succession law. A European Certificate of Succession is thus not issued in Denmark. The central succession documents in Denmark are the Probate Court Certificate (*skifteretsattest*) – which serves as evidence for the heirs regarding who has the authority over the deceased's assets – and the Inventory of Estate (*boopgørelse*) – which, among other information, includes a statement of the estate's assets and liabilities. (75)

---

(71) See further, Anne Louise Bormann, Johan Hartmann Stænger and Ib Hounsgaard Trabjerg, *Dødsboskifte* (3rd edn, Karnov Group 2022) 225ff.

(72) *Arveloven*, Consolidated Act No 1347 of 15.06.2021.

(73) *Arveloven*, Consolidated Act No 1347 of 15.06.2021, section 1. For an elaboration in English see, eg Hans Viggo Godsk Pedersen and Ingrid Lund-Andersen, *Family and Succession Law in Denmark* (3rd edn, Kluwer Law International 2021) 139–140.

(74) *Arveloven*, Consolidated Act No 1347 of 15.06.2021, section 5 and 10. Children's inheritance can be further restricted. For an elaboration in English, see, eg Hans Viggo Godsk Pedersen and Ingrid Lund-Andersen, *Family and Succession Law in Denmark* (3rd edn, Kluwer Law International 2021) 158.

(75) Not fully comparable to a national certificate of succession.

130 As explained, five different forms of estate administration are possible in Denmark. The following provides information on their statistical distribution in practice: (76)

1. Distribution of an estate without probate (27% of total cases)
2. Distribution to the surviving spouse (0.7% of total cases)
3. Transfer of assets, without distribution occurring, to the possession of the spouse who outlives their partner (23.4% of total cases)
4. Private distribution of the estate (35.7% of total cases)
5. Distribution of the estate by an authorised manager (11.7% of total cases)

A. *Distribution of the estate without probate (*boudlæg*)*

131 Small estates can be terminated without uninsured debts being paid, and without a division of the estate. (77) The main criteria for defining an estate as small is that the remaining value of the estate after payment of funereal costs, etc is below a set threshold value of currently approximately € 7,000. (78) For such estates, the probate court can allocate the administration and assets to one or more individuals, who are considered the closest relatives or someone who will take charge of the funeral, etc. The individual, the institution or the municipality who has accepted these tasks is responsible for the cost of the funeral when they have ordered this but they are not liable for the deceased's debts. (79)

132 The probate court might issue a Probate Court Certificate to the individual or individuals to whom the assets have been allotted, which specifies the received assets. (80)

B. *Distribution to the surviving spouse (*ægtefælleudlæg*)*

133 Some smaller estates, where the deceased leaves a spouse, can be closed down without a division of the estate. (81) The decisive criteria is that the surviving spouse can withdraw assets up to approximately €110,000, including the value of property they already own. (82) Hence, for example, if the

---

(76) Other cases: 1.5% of total cases. Figures from 2022. The Courts of Denmark <https://domstol.dk/om-os/tal-og-fakta/civile-sager/>.

(77) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 18.

(78) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 18 and 21.

(79) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 19.

(80) See further, Anne Louise Bormann, Johan Hartmann Stænger and Ib Hounsgaard Trabjerg, *Dødsboskifte* (3rd edn, Karnov Group 2022) 185.

(81) See generally, Anne Louise Bormann, Johan Hartmann Stænger and Ib Hounsgaard Trabjerg, *Dødsboskifte* (3rd edn, Karnov Group 2022) 191 ff.

(82) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 22.

surviving spouse owned property to the value of approximately € 50,000, including the surviving spouse's statutory share of community property, then assets from the estate up to € 60,000 can be taken out. If the extracted assets equal the value of the estate and there is thus nothing left to distribute to other heirs, then there will be no actual formal division of the estate. The surviving spouse takes over the deceased's debt obligations. (83) However, should it transpire that the estate is insolvent, liability can be limited to the received assets. (84)

C. *Undivided possession of the estate of the deceased (*uskiftet bo*)*

134 A surviving spouse has the option to refrain from dividing the estate among joint children, and instead, maintain undivided possession of the deceased's estate. (85) For joint children of the spouses, any actual inheritance (devolution of property) from the first deceased will then first occur at a later point in time, when the undivided estate is settled. However, this right for a surviving spouse to delay the division does not include any assets owned by the deceased as absolute separate property. (86)

135 The surviving spouse cannot, as a main rule, be insolvent themself and must assume responsibility for the debts of the first deceased's creditors. (87) However, should it transpire that the estate is insolvent, the liability can be limited to the received assets. (88)

D. *Private distribution of the estate (*privat skifte*)*

136 The private distribution of the estate either as an ordinary or as a simplified private distribution is the most common form of distribution, where an actual probate occurs. Among the central requirements for private distribution is that all heirs request it, that the estate is solvent, and that at least one of the heirs is not represented by a guardian or administrator and is solvent. (89)

---

(83) For an elaboration in English, see eg Hans Viggo Godsk Pedersen and Ingrid Lund-Andersen, *Family and Succession Law in Denmark* (3rd edn, Kluwer Law International 2021) 172.

(84) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 23.

(85) *Arveloven*, Consolidated Act No 1347 of 15.06.2021, s 17.

(86) For an elaboration in English, see, eg Hans Viggo Godsk Pedersen and Ingrid Lund-Andersen, *Family and Succession Law in Denmark* (3rd edn, Kluwer Law International 2021) 142.

(87) *Arveloven*, Consolidated Act No 1347 of 15.06.2021, s 25(1).

(88) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 25.

(89) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 25.

137 Decisions as regards the estate are made by the heirs, (90) and, as a main rule, it is the heirs' responsibility to ensure that all creditors are paid. (91) However, should it transpire that the estate is insolvent, it is possible to request the probate court to make a decision about transferring the estate to be handled in accordance with the rules for distribution of an estate by an authorised manager. (92) A Probate Court Certificate serves as evidence for the heirs regarding who has the authority over the deceased's assets. No one is allowed to dispose of the deceased's belongings until a Probate Court Certificate has been issued. (93)

138 The Inventory of Estate includes an account of the estate's administration and inheritance matters, along with a statement of the estate's assets and liabilities, income and expenses, specifying the distribution among legatees and heirs. No later than 15 months after the deceased has passed away should the Inventory of Estate be sent to the probate court (94) for revision. (95)

E. *Distribution of the estate by an authorised manager (*bobestyrerboer*)* (96)

139 The distribution of the estate by an authorised manager – along with the distribution of small estates without probate (97) – can be understood as the default form of distribution. As a main rule, authorised managers are lawyers who are formally appointed by the Minister of Justice. (98) The estate must pay the costs for the work performed by the authorised manager. A Probate Court Certificate serves as evidence for the authorised manager's right to administer the estate. (99)

140 Both solvent and insolvent estates can be handled by an authorised manager. However, there are various processes, and with solvent estates, it is, as a main rule, the heirs who makes important decisions, whereas, in the case of

---

(90) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 26.

(91) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 26–30.

(92) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 29 and 39.

(93) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 113.

(94) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 31 and 32. For simplified private distribution, these requirements are modified.

(95) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 79–80.

(96) Dødsboskifteloven, Consolidated Act No 1807 of 03.09.2021, s 36.

(97) See further Anne Louise Bormann, Johan Hartmann Stænger and Ib Hounsgaard Trabjerg, *Dødsboskifte* (3rd edition, Karnov Group 2022) 161.

(98) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, section 11. For an elaboration in English see, eg Hans Viggo Godsk Pedersen and Ingrid Lund-Andersen, *Family and Succession Law in Denmark* (3rd edn, Kluwer Law International 2021) 174f.

(99) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 42.

insolvent estates, it is the creditors. However, the authorised manager has the right to overrule decisions if they are manifestly unsuitable or violate the rights of others, including issues of relevance for taxation. Disagreements about the authorised manager's decisions can be brought before the probate court. (100)

In the case of solvent estates, the authorised manager must, as a main rule, complete an Inventory of Estate and present it to the heirs within a period of two years and two months after the deceased has passed away. (101) After the heirs' approval, the Inventory of Estate is sent to the Danish Tax Agency and the probate court for revision. (102) **141**

F. *Judicial and non-judicial handling*

Decisions from the probate court are predominantly judicial in nature. (103) **142**
Decisions made solely by an authorised manager are not in this sense judicial and have to be brought before the probate court if a judicial decision is sought. (104)

The decisions made by the probate court may be appealed to the high courts. **143**

IV. Status of natural persons

A. *Name changes*

The rules on name changes are found in the Act on Names (*navneloven*). (105) **144**

The main rules on name changes are the following: **145**

- If a surname is used by more than 2,000 people living in Denmark, everybody is entitled to that name.
- A person is only entitled to a protected surname (a name used by less than 2,000 people living in Denmark) if the person has a special connection to the name.
- A newly emerging name may be permitted, provided that it cannot be mistaken for a protected name, is not the name of an artist or a historical person and is not unsuitable to be used as a surname.

---

(100) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 53, 96 and 97.
(101) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 68 and 70.
(102) *Dødsboskifteloven*, Consolidated Act No 1807 of 03.09.2021, s 79–80.
(103) See further, Anne Louise Bormann, Johan Hartmann Stænger and Ib Hounsgaard Trabjerg, *Dødsboskifte* (3rd edn, Karnov Group 2022) 25f and 41f.
(104) See further, Anne Louise Bormann, Johan Hartmann Stænger and Ib Hounsgaard Trabjerg, *Dødsboskifte* (3rd edn, Karnov Group 2022) 347.
(105) *Navneloven*, Consolidated Act No 1074 of 09.08.2024.

146 According to the Act, a request for changing a name must be submitted to the local registrar (*personregisterførere*). Local registrars are public servants employed by the local church under the Danish National Church (*folkekirken*). However, in southern Jutland, the local registrars are public servants employed by the municipalities.

147 Decisions taken by the local registrars may be appealed to the Agency of Family Law and decisions taken by the Agency may be appealed to the family court. In these situations, the case falls within the Family Law System as described in paras 26ff.

148 Usually, there is no need to involve other parties in cases of name changes. However, parents with joint custody over a child must agree on a name change for their underaged children. If the parent requesting a name change for a child has sole custody, the other parent is invited to comment on the request before the decision is taken.

B. *Gender recognition*

149 If a person has had a sex change operation performed in Denmark or in another country, the new sex will be registered in the Civil Registration System (*Det Centrale Personregister*) by the municipality.

150 The Act on the Civil Registration System (*lov om Det Centrale Personregister*) ([106]) provides persons not having had a sex change operation with the possibility to be registered in the Civil Registration System as having another sex if they declare that they consider themselves as belonging to the other sex. The registration takes place when the person, after a six-month period of reflection, confirms the previous declaration. These registrations are performed by the Ministry of the Interior and Health (*Indenrigs- og Sundhedsministeriet*).

C. *Protection of adults*

151 Denmark primarily has two legal instruments, which in different ways are intended to protect the person and/or property of an incapacitated adult: 'continuing power of attorney' (*fremtidsfuldmagt*) ([107]) and guardianship (*værgemål*). The rules are found in the Act on Continuing Power of Attorney

---

([106]) Consolidated Act No 1010 of 23.06.2023.

([107]) See eg, Hans Viggo Godsk Pedersen and Ingrid Lund-Andersen, *Family and Succession Law in Denmark* (3rd edn, Kluwer Law International 2021) 31.

(*lov fremtidsfuldmagter*) [108] and the Guardianship Act (*værgemålsloven*). [109]

152 Guardianship is the traditional legal instrument, whereas the continuing power of attorney came into force in 2017. [110] The purpose of introducing a continuing power of attorney was to strengthen individual autonomy by ensuring that each individual, by concluding a contract on a continuing power of attorney, can influence who might represent themselves in the future, and by having appointed one, limiting the likelihood of the need for the more intrusive measure of a guardianship to be established. [111]

153 *Cases of guardianship* are handled by either the Agency of Family Law or the courts. In the case of guardianship, a distinction is made between whether an adult who is put under guardianship maintains their legal capacity (*værgemål*), [112]or the legal capacity is also taken away (*umyndiggørelse*). The Agency, as a main rule, makes a decision on guardianship when it does not involve the deprivation of legal capacity. [113] If the case involves the deprivation of legal capacity, a court will make a decision. [114] Also, if the person in question objects to be putting under guardianship, or if concerns arise at the administrative level, eg due to the need for a lawyer to represent the person in question, the court again makes the decision. [115] A decision about the person to be put under guardianship can also be made in a situation where the person objects.

154 If the Agency of Family Law has made a decision about guardianship (ie cases which do not involve deprivation of legal capacity), this decision can be brought before the courts. [116] Other decisions related to guardianship, taken by the Agency of Family Law, can be appealed to the Department of Civil Affairs (*Civilstyrelsen*). [117] Decisions taken by the Department of Civil Affairs can be brought before the courts.

155 An individual can be placed under guardianship if they are incapable of managing their interests due to mental illness, such as severe dementia or

---

[108] *Lov om fremtidsfuldmagter*, Act No 618 of 08.06.2016.

[109] *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021.

[110] Bkg No 1011 of 23.08.2017.

[111] Danish Ministry of Justice, 'Guidelines from The Danish Ministry of Justice on continuing power of attorney' (*Vejledning om Fremtidsfuldmagter*), item 1. <https://civilstyrelsen.dk/Media/7/9/justitsministeriets-vejledning-om-fremtidsfuldmagter--pdf-.pdf> (accessed 6 November 2024).

[112] *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 5.

[113] *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 6 (2).

[114] *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 13(3).

[115] *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 6 (2).

[116] *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 22.

[117] *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 22 a.

impaired mental development. (118) The guardianship may be restricted to financial matters. (119) A request for placing a person under guardianship can, among others, be initiated by the individual themselves, their spouse, children, parents, siblings, other close relatives, or municipalities. (120)

156 The Agency of Family Law or the court must investigate the facts of the case. (121) Obtaining a medical certificate can be mandatory to confirm that the individual in question is indeed in a condition covered by the Guardianship Act. (122) Before the Agency makes a decision, the affected party has the right to acquaint themselves with the facts of the intended decision, and to provide a written or oral statement on the matter. (123) Similarly, the affected party must present their views in a court hearing before the court makes the decision. (124) If a case pertains to the deprivation of legal capacity, and the court decides to deprive a person of their legal capacity, the decision is registered (*tinglyst*). (125)

157 In both situations, where the Agency of Family Law and the court make the decisions on guardianship, a guardian must be appointed. (126) Subsequently, the Agency of Family Law oversees the guardian. (127) If a guardian abuses their position, or proves unsuitable for the role, the appointment may be revoked. (128)

158 The scope of a guardianship can vary, and must be limited to what is necessary for the protection of the incapacitated person in question. (129) If their needs change, the scope of the guardianship should be enhanced or limited – or revoked if no longer needed. (130) A request for a change of the scope, or a revocation of the guardianship, can, among others, be submitted by the person in question, family members and the Agency of Family Law. (131)

159 *A continuing power of attorney* is distinct from guardianship by being based

---

(118) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 5(1).
(119) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 5(3).
(120) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 16, and *lov om social service* (Act on Social Services), Consolidated Act No 67 of 22.01.2024, s 82.
(121) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 18(1).
(122) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 18(2).
(123) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 19(1).
(124) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 19(2).
(125) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 6(3).
(126) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 11.
(127) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 28.
(128) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 12(1).
(129) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 8.
(130) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 9 and 10.
(131) *Værgemålsloven*, Consolidated Act No 1122 of 28.05.2021, s 16.

on a contract between the persons in question – the principal (*fuldmagtsgiveren*) – and an agent (*fremtidsfuldmægtig*) – or several agents – appointed by the principal. The contract defines the scope of the agent's or agents' authority. (132) However, it is notable that for the contract to be valid, it must comply with the regulation provided for in the Act on Continuing Power of Attorney.

160 A person can conclude a contract on a continuing power of attorney if they are capable of acting rationally and have reached the age of 18. (133) The continuing power of attorney is only considered valid if documented in writing, is registered in the Power of Attorney for the Future Register (*Fremtidsfuldmagtsregisteret*) and is acknowledged by a notary. (134)

161 A request to activate a power of attorney for the future must be submitted to the Agency of Family Law by the principal or by the agent – by all agents if more than one is appointed. (135) A medical certificate confirming that the principal fulfils the conditions for activation of the power of attorney for the future must, as a main rule, be attached. (136) A continuing power of attorney cannot be put into effect if the person in question is capable of understanding what the case is about, and objects. (137)

162 The Agency of Family Law oversees the agents. (138) However, the oversight is in an inactive state, awaiting possible relevant external information, in contrast to the ongoing active supervision of guardians under the Guardianship Act. (139) Consequently, the Agency can initiate an investigation if it becomes aware of circumstances through external communication that conflict with the principal's interests. (140)

163 Decisions about continuing powers of attorney which the Agency of Family Law has made can be appealed to the Department of Civil Affairs by the principal, a spouse or a cohabiting partner, or by the agent. (141) Decisions from the Department of Civil Affairs can be brought before the courts.

164 In addition to the legal instruments of guardianship and continued power of attorney, the Act on the Economic Relations between Spouses (*lov om ægtefællers økonomiske forhold*) gives a spouse the power to act on behalf of

---

(132) *Lov om fremtidsfuldmagter*, Act No 618 of 08.06.2016, s 2.
(133) *Lov om fremtidsfuldmagter*, Act No 618 of 08.06.2016, s 1.
(134) *Lov om fremtidsfuldmagter*, Act No 618 of 08.06.2016, s 3(1).
(135) *Lov om fremtidsfuldmagter*, Act No 618 of 08.06.2016, s 4(1).
(136) *Lov om fremtidsfuldmagter*, Act No 618 of 08.06.2016, s 5.
(137) *Lov om fremtidsfuldmagter*, Act No 618 of 08.06.2016, s 4 (2).
(138) *Lov om fremtidsfuldmagter*, Act No 618 of 08.06.2016, s 21(1).
(139) Proposed Act L135 2015/16 with notes, item 4.5, p 25.
(140) *Lov om fremtidsfuldmagter*, Act No 618 of 08.06.2016, s 21(2).
(141) *Lov om fremtidsfuldmagter*, Act No 618 of 08.06.2016, s 29.

the other spouse, when the latter is unable to manage their interests due to absence or illness. (142) The power is restricted to actions which are necessary for the family's support and cannot be postponed. Additionally, real estate cannot be disposed of or used as collateral without permission from the Agency of Family Law or a family court. (143)

V. Conclusions

165 Denmark has a more than 100-year-old tradition of having family law matters settled by administrative authorities and over the years, the competence attributed to administrative authorities has been expanded. From the analyses above, it can be concluded that today, Danish procedural law in family law and succession matters is primarily based on non-judicial decision-making concerning any first decision.

166 One could certainly argue that all decisions concerning family law, succession law and the status of natural persons are by nature important for the persons involved. Yet, from a legal point of view, some decisions are considered to have a more severe impact on the parties than others.

167 From the analyses above, it can be concluded that only decisions in cases which would have the most severe impact on the parties involved, including the child, are taken by the courts. Administrative authorities, for the most part, assist parties in reaching amicable solutions through mediation or similar alternative dispute resolution mechanisms, approving agreements made by the parties (if approval is needed) and making decisions which have a lesser impact on the parties, including the child.

168 Two examples illustrate this:

- In cases on parental responsibility, decisions are primarily taken by the courts, and the Agency of Family Law only takes decisions on visitation rights where the decision will not have severe consequences for the child, and interim decisions.
- In relation to the protection of adults, the Agency, as a main rule, decides on questions of guardianship when they do not involve the deprivation of legal capacity, and if the case involves the deprivation of legal capacity, a court makes the decision.

169 One area of family law, in the broad sense, does not fit into this scheme: The termination of family ties through adoption without consent is among the most significant decisions within family law, and yet decisions are taken administratively. The background for this is primarily historic. However, if

(142) *Ægtefælleloven*, Consolidated Act No 774 of 07.08.2019, s 1(3).
(143) *Ægtefælleloven*, Consolidated Act No 774 of 07.08.2019, s 1(3) and 60 a(2).

the parents want the courts to review the decision, they need only to ask for this – they do not have to go through the standard way of bringing a case to the courts themselves.

170 Decisions on legal separation and divorce are primarily taken by the Agency of Family Law, although such decisions may have a severe impact on the spouses. This must be seen against the background that the conditions for legal separation and divorce are fairly simple and that decisions on legal separation and divorce in Denmark do not include anything other than questions relating to legal separation and divorce, except for rare decisions on the obligation to pay spousal maintenance and the taking over of a rented home. Decisions on parenthood are also primarily taken by the Agency, although such decisions may have a severe impact on the parties, including the child. This must be seen against the background that, in general, DNA testing makes it clear who the genetic father is.

171 Furthermore, if a case on family law raises complicated questions of law or facts, the Agency must submit it to the family court for a decision and all administrative decisions are subject to a review by the courts.

172 The circumstance is different in matters of succession as administrative authorities play no role. However, judicial decision-making can still be said not to be dominating as, after the acquisition of an estate, the competence for the actual administration of estates will be held either by the heirs or by the heirs or creditors and a private authorised manager.

173 For both family and succession matters it applies, that the parties involved cannot choose whether a case is to be handled by an administrative authority or the courts, and a case cannot simultaneously be pending at both a non-judicial and judicial level. The legal consequences of a decision are the same regardless of whether it is taken by a court or an administrative authority.

174 Finally, but perhaps the most important aspect in understanding the contemporary Danish system: party autonomy can be understood as the basic principle underlying Danish family law and succession law. Whether any public authority is involved with authorisation or implementation varies. Some agreements require merely a registration by the authorities, eg transfer of custody from one parent to the other. (144) Other agreements require approval, although generally the starting point is that the agreement should be approved, eg an agreement on transfer of custody to a person who is not a parent of the child. (145) Agreements in need of registration or approval, in general, must be submitted to the competent authority, using an approved

(144) *Forældreansvarsloven*, Consolidated Act No 1768 of 30.11.2020, s 13(1).
(145) *Forældreansvarsloven*, Consolidated Act No 1768 of 30.11.2020, s 13(2).

form which contains information on the legal consequences of the agreement.

175 Other agreements do not require any involvement of a public authority to be valid. For instance, spouses, at the time of a legal separation or divorce, are free to conclude any agreement about the division of their property ([146]) without any public authority scrutiny. Yet, in addition to the ordinary rule in Danish law on unfair agreements that can be subsequently changed or terminated, ([147]) a particular provision allows for the possibility of overriding the agreement by a court ruling ([148]) should either of the parties later claim the agreement to be manifestly unfair. These examples thus highlight the great extent of party autonomy that enables the parties – to a great extent – to freely conclude agreements or arrangements on family law and succession law matters, combined with, albeit quite limited, options requesting that the agreement or arrangement be subsequently terminated or changed.

([146]) *Ægtefælleloven*, Consolidated Act No 774 of 07.08.2019, s 32.
([147]) *Aftaleloven*, Consolidated Act No 193 of 02.03.2016, s 36.
([148]) *Ægteskabsloven*, Consolidated Act No 1080 of 14.08.2023, s 58.

ESTONIA

by *Tiina Karm*

I. Introduction

A. *Estonian law system*

Estonian law is a civil law system which, in principle, adheres to the concept of the court. However, there are proceedings which, step by step, have been delegated to non-judicial authorities. For example, succession proceedings are conducted by notaries, marriage and, in certain cases, also divorce proceedings are conducted by the civil status offices ('Vital Statistics Office') or notaries, and proceedings concerning the right to have contact, maintenance of underage children and termination of joint custody are, in certain cases, conducted in family mediation services arranged by the Social Insurance Board. **1**

The independent democratic Republic of Estonia was established on 24 February 1918. Estonia's independence came to a de facto end during World War II when the country was illegally occupied and annexed by the Soviet Union in 1940, then by Nazi Germany in 1941, before it was returned to Soviet rule in 1944, when the Estonian Soviet Socialist Republic was declared. The independence of the Republic of Estonia was restored on 20 August 1991. Since regaining its independence, Estonia has had to rewrite its entire civil law. (1) A new Estonian civil law, based on a codified code with a pandect system, (2) was adopted step by step, gradually replacing the respective parts of the pre-existing Soviet era civil code by adopting new specific acts. (3) The first Family Law Act of the restored Republic of Estonia entered into force on 1 January 1995. Although the general concept of the **2**

---

(1) Irene Kull, 'Legal Integration and Reforms – Innovation and Traditions' (2000) 5 Juridica International 119, 119 <https://www.juridicainternational.eu/article_full.php?uri=2000_V%20_119_legal-integration-and-reforms-innovation-and-traditions> accessed 17 September 2023.

(2) Paul Varul, 'Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia' (2000) 5 Juridica International 104, 108 <https://www.juridicainternational.eu/article_full.php?uri=2000_V%20_104_legal-policy-decisions-and-choices-in-the-creation-of-new-private-law-in-estonia> accessed 17 September 2023.

(3) Martin Käerdi, 'Regulation of Limitation Periods in Estonian Private Law: Historical Overview and Prospects' (2001) 6 Juridica International 66, 68 <https://www.juridicainternational.eu/article_full.php?uri=2001_VI_66_regulation-of-limitation-periods-in-estonian-private-law-historical-overview-and-prospects> accessed 17 September 2023.

Family Law Act of 1995 in the broadest sense corresponded to the modern understanding of family relations, and rather surprisingly, several structural solutions dating back to the Soviet period had been fairly progressive in their overall regulative content, (4) it was – mainly due to its low degree of regulation (5) – replaced with a new Family Law Act (*perekonnaseadus*, hereinafter: PKS), (6) that entered into force on 1 July 2010. The first Law of Succession Act of the restored Republic entered into force on 1 January 1997, which was replaced with a new Law of Succession Act (*pärimisseadus*, hereinafter: PärS) (7) on 1 January 2009. The purpose of the new Law was to bring succession law into line with the development of the new civil law and to eliminate bottlenecks, but it also introduced some essential changes in succession law. For example, the system of renunciation of a succession was imposed. (8) Legislation to open registered partnerships to same-sex couples and opposite-sex couples took effect on 1 January 2016, when the Registered Partnership Act (*kooseluseadus*, hereinafter: KooS) (9) came into force, followed by the implementing acts on 1 January 2024. As of January 2024, also same-sex marriage is legal under Estonian law (§ 1(1) PKS). In the light of the rapid development of Estonian civil law during the last 30 years, Estonian legal literature and case law has remained somewhat in the background, especially in the field of family and succession law. In Estonian civil law, case law has only a weak binding effect. Although it does have a significant role in the interpretation of the law, it is not considered as a source of law. (10) Scholars' opinions are not considered as sources of law either, but

(4) Kai Kullerkupp, 'Statutory Marital Property Law de lege lata and de lege ferenda' (2001) 6 Juridica International 78, 78, <https://www.juridicainternational.eu/article_full.php?uri=2001_VI_78_statutory-marital-property-law-ide-lege-latai-and-ide-lege-ferendai> accessed 17 September 2023.

(5) Kai Kullerkupp, 'Statutory Marital Property Law de lege lata and de lege ferenda' (2001) 6 Juridica International 78, 79, <https://www.juridicainternational.eu/article_full.php?uri=2001_VI_78_statutory-marital-property-law-ide-lege-latai-and-ide-lege-ferendai> accessed 17 September 2023.

(6) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/515092023004/consolide> accessed 17 September 2023.

(7) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/522122023009/consolide> accessed 17 September 2023.

(8) Draft of the Law of Succession Act 56 SE, explanatory notes p 1.

(9) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/522122023011/consolide> accessed 17 September 2023.

(10) Paul Varul in *Commentaries to the General Part of the Civil Code* (Juura 2023) § 2 para 3.2.7.

have an indirect effect on the case law, assisting judges in the interpretation of the law and in forming and reasoning their opinions. (11)

3 After the restoration of independence, the Estonian legislator has continually stressed the importance of the doctrine of legal continuity, as also expressed in its utmost form in the preamble of the Constitution. The relevant guidelines of the Parliament of Estonia (*Riigikogu*) were included in the decision on the legal continuity of the Republic of Estonia, which unambiguously determined the effect of the historical argument on legislation, obliging the government to maintain legal continuity in that field. (12) In the field of private law, such assignment did not mean an automatic re-establishment of the acts applicable until 1940 but it has had a dramatic effect on the ideological foundation of the civil law reform. The main effect of such an approach has been the justified ties with the German legal family facilitated by the historical arguments of the post-reindependence legislator. (13) The German Civil Code, to a lesser extent also Austrian, Swiss and Dutch law, has been used as a role model in drafting both family and succession law Acts. The law of other countries is not to be considered a binding source for Estonian judges in the course of making a decision, (14) but, as explained by the Supreme Court, 'the analogous laws and practice of other countries may be taken into account, at least in the case of private-law provisions, as reference material in determining the meaning and purpose of an Estonian law [...] primarily in a situation wherein we do not have a practice implementing the provision, but elsewhere it has developed in the case of a similar provision. This applies, in particular, to countries with which we share a broadly similar legal system and practice in the application of the law, especially the other Member States of the European Union and, above all, countries belonging to the continental European legal family'. (15)

---

(11) Paul Varul in *Commentaries to the General Part of the Civil Code* (Juura 2023) § 2 para 3.2.11.

(12) The Riigikogu resolution on the legal continuity of the Republic of Estonia of 1 December 1992.

(13) Martin Käerdi, 'Regulation of Limitation Periods in Estonian Private Law: Historical Overview and Prospects' (2001) 6 Juridica International 66, 66 <https://www.juridicainternational.eu/article_full.php?uri=2001_VI_66_regulation-of-limitation-periods-in-estonian-private-law-historical-overview-and-prospects> accessed 17 September 2023.

(14) Age Värv, 'The Role of Foreign Law in the Courts' Application of Estonian Law' (2023) 23 Juridica International 42, 49, <https://www.juridicainternational.eu/article_full.php?uri=2023_32_the_role_of_foreign_law_in_the_courts_application_of_estonian_law_> accessed 18 September 2023.

(15) RKTKo 21.11.2004, 3-2-1-145-04, para 39; RKTKo 9.12.2008, 3-2-1-103-08, para 20; RKTKo 7.12.2011, 3-2-1-123-11, para 15.

B. *Estonian court system*

4 The structure of Estonia's court system is one of the simplest in Europe. The peculiarity of the system lies in the fact that the Supreme Court simultaneously performs the functions of the highest court of general jurisdiction, of the supreme administrative court as well as of the constitutional court. Estonia's court system consists of three instances: county and administrative courts are the first instance courts; circuit courts are the courts of second instance, and the Supreme Court is the third instance (16) (§ 9, § 18, § 22, § 25, § 26 of the Courts Act, *kohtute seadus*, hereinafter: KS (17)). Unlike Germany's court system, there are no specialised family and probate courts (*Familien- und Nachlassgerichte*). The Supreme Court is of the opinion that justice is to be administered solely by judges, not for example by law clerks (§ 125^1 KS, 146(1) § PS). (18) This approach, is, however, under constant discussion. For example, the resolution of disputes arising from employment relationships has been delegated to the Labour Dispute Committee (19) and dispute resolutions concerning rental agreements have been delegated to the Rent Committees. The decisions of these authorities are binding to the parties and enforceable, once they have entered into force, unless challenged in the court. Only recently, the creation of a similar dispute resolution body for disputes between a consumer and a trader has been under discussion. (20)

5 In the civil procedure, cases are divided into action-by-claim cases and action-by-petition cases. While action-by-claim cases are part of contentious civil proceedings, action-by-petition cases can be, by their nature, contentious as well as non-contentious. Both proceedings are separately regulated by the Code of Civil Procedure (*tsiviilkohtumenetluse seadustik*, hereinafter: TsMS). In action-by-petition cases, the court is not bound by the applications made or circumstances asserted by the parties and the principle of ex

---

(16) A short introduction in English can be found on the website of the Supreme Court of Estonia, 'Estonian Court System' <https://www.riigikohus.ee/en/estonian-court-system> accessed 17 September 2023.

(17) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/517032023014/consolide> accessed 17 September 2023.

(18) RKÜKo 4.02.2014, 3-4-1-29-13, para 44.6.

(19) A short overview of the Labour Dispute Committee in English can be found on the website of the Labour Inspectorate of the Republic of Estonia under <https://www.ti.ee/en/extrajudicial-proceeding-labor-disputes/how-submit-application/recourse-labour-dispute-committee> accessed 17 April 2024.

(20) Draft of the Law amending the Consumer Protection Act, State Fees Act and the Code of Enforcement Procedure, file No 24-0142/01 as of 14.2.2024 is available in the System of the Draft Acts online (in Estonian) at <https://eelnoud.valitsus.ee/main/mount/docList/3b5bdc5f-043e-49bb-81de-7d6f67f49a67#TBVqSzXs> accessed 17 April 2024.

officio examination is applied (§ 5(3), § 230(3) and (4), § 477(5) and (7) TsMS). (21) In these cases, and in some family law action-by-claim cases, the court itself ascertains the facts and arranges the taking of the evidence that is needed, unless otherwise prescribed by law. Court proceedings in action-by-claim cases end with a court decision (*otsus*), proceedings in action-by-petition cases end with a court order (*määrus*) (§ 434 and 478(1) TsMS). Many family law and succession law matters are action-by-petition cases, for some of which the TsMS also provides for a special regulation (§§ 475 TsMS). Action-by-claim cases are, for example, the granting of a divorce or termination of a registered partnership contract, the division of marital community property or of an estate, disputes regarding maintenance obligations and, as a rule, the judicial establishment or contestation of fatherhood. Action-by-petition cases are, for example, the appointment of a legal guardian to a minor and to an adult of limited active legal capacity, an administrator of an estate, as well as parental custody, arrangements regarding the right to contact with a child and adoption cases.

C. *Rights and obligations of a notary*

6 Notaries in Estonia are latin-type notaries. According to § 2(1) of the Notaries Act (*notariaadiseadus*, hereinafter NotS), (22) a notary is a holder of office in public law, an independent official to whom the State has delegated the duty of ensuring the security of legal relationships and prevention of legal disputes. A notary executes their office as a liberal profession in their own name and at their own responsibility. A notary shall not be an entrepreneur or a State official (§ 2(3) NotS). A notary cannot hold other paid offices besides the office of notary or perform any other paid work except teaching or research or creative activities (§ 12(1) NotS). A notary is to be impartial and reliable in their professional activities (§ 2(4) NotS). Notaries are fully qualified lawyers who have completed a notary candidate service and passed the evaluation of a notary candidate (§ 6 NotS).

7 The professional activities of a notary are divided into the performance of notarial acts and the provision of notarial services (§ 2(2) NotS). Whereas a notary may refuse to provide a notarial service – for example, conciliation services (§ 32(3)(3) NotS) – and they need not justify the refusal (§ 41(2) NotS), a refusal to perform a notarial act – for example, certification of a

(21) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/522122023001/consolide> accessed 23 December 2024.

(22) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/520122023005/consolide> accessed 23 December 2024.

divorce and conducting succession proceedings (§ 29(3)(2) and § 29(3)(7) NotS) – is only possible on the bases provided for by the law (§ 41(1) NotS). A person who was refused the performance of a notarial act by a notary may request a review of the application for the performance of the notarial act in proceedings on petition in a court (§ 41(5) NotS).

8 The utmost essential obligation of a notary is the notary's duty to give explanations. According to § 18 (1) of the Notarisation Act (*tõestamisseadus*, hereinafter: TõS), ([23]) a notary ascertains the intentions of parties and the facts which are essential for the performance of a legally correct transaction. A notary also explains to parties the meaning and legal consequences of the transaction and the different possibilities for entering into the transaction. The notary enters the declarations of intent of the parties in a notarial instrument clearly and unambiguously. At the same time, the notary ensures that errors and doubts are precluded and the rights of inexperienced or incompetent parties are not damaged. § 18(2) of the TõS states that if a notary has doubts concerning the compliance of a transaction with law or the actual intentions of the parties, they have to discuss this with the parties. If a notary doubts the validity of a transaction, and the parties nevertheless request authentication, the notary indicates their explanations and the justification provided for by the parties concerning the explanations in the notarial instrument. The Supreme Court is of the opinion that the obligation of a notary goes beyond the obligation to assess the validity of a transaction alone, but constitutes a verification obligation in the broader sense, including the obligation to identify the purpose of the transaction pursuant to § 4 TõS. ([24]) In addition, a notary represents the parties in connection with notarial acts in judicial and administrative agencies and prepares and forwards applications for the registration of notarially authenticated transactions and applications for the withdrawal of applications and prepares and forwards notarially certified applications for registration in a land registry department or registration department of a court and applications for the amendment or withdrawal of applications (§ 30(2) NotS). The notary is entitled to a fee for the performance of a notarial act and related legal or technical services, as provided for by the Notary Fees Act. A notary is liable for damage arising from any wrongful violation of their official duties (§ 14(1) NotS).

9 In Estonia, notaries have a number of tasks which reach beyond the traditional role of the notary. In addition to the marriage, divorce and

---

([23]) Semi-official English translation can be found online <https://www.riigiteataja.ee/en/eli/505122023002/consolide> accessed 23 December 2024.

([24]) RKTKm 10.12.2019, 2-17-11283, para 13.

succession proceedings mentioned above, notaries also deposit money, securities and documents (§ 29(3)(2) NotS), declare out-of-court agreements enforceable (§ 29(3)(5) NotS) and are entitled to act as a conciliator pursuant to the Conciliation Act (§ 32(3)(3) NotS). (25) It should be kept in mind that the notary is not a court, and, as also pointed out by the Supreme Court, is, therefore, neither obliged nor entitled to resolve disputes between parties nor hinder legal transactions without grounds provided for by the law. (26) On the other hand, the role of the notary is to prevent legal disputes. In practice, the authentication of an agreement is often preceded by negotiations. Thus, a notary inevitably deals with reconciliation of the parties, especially in family and succession law matters. (27) As the Estonian legislator explains, it may be said that notaries in Estonia fulfill the function of preventional legal care and welfare, such as ensuring legal security and legal peace and protection of persons who have little legal knowledge. (28) In Estonia, the delegation of tasks which potentially fall within the scope of administration of justice to the preceding notarial authentication phase was an informed choice – also the non-traditional tasks of the notary are justified by the idea of legal peace and as such, are compatible with the tasks of the notary, as explained by the legislator by giving notaries the authority to conduct conciliatiation proceedings. (29)

II. Family law

A. *General remarks*

1. *Sources of family law*

10 In the Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*, hereinafter: PS) (30) there are two main provisions dedicated to the matters of family law: § 26 stating the fundamental right to the inviolability of private and family life and § 27 stating the rights related to the family. Family law is considered as part of the civil law, thus the rules in the General Part of the Civil Code (*tsiviilseadustiku üldosa seadus*, hereinafter: TsÜS) apply unless

(25) Draft of the Conciliation Act 487 SE, explanatory notes p 11 (in Estonian).

(26) RKTKm 10.12.2019, 2-17-11283, para 13.

(27) Draft of the Law amending the Notaries Act and of other relevant Acts SE 411 explanatory notes, p 8–9 (in Estonian).

(28) Draft of the Conciliation Act 487 SE, explanatory notes p 11 (in Estonian).

(29) Draft of the Conciliation Act 487 SE, explanatory notes p 11 (in Estonian).

(30) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/530122020003/consolide> accessed 23 December 2024.

otherwise provided for by the acts of the specific area of law. ([31]) Substantive family law is regulated in the Family Law Act and Registered Partnership Act. The Child Protection Act (*lastekaitseseadus*, hereinafter: LasteKS) ([32]) provides for the obligations and functions of State and local government agencies and the officials thereof, legal persons in public and private law and natural persons to ensure the rights and well-being of children, the organisation of child protection, the prohibitions and restrictions established for persons working with children, the principles of treatment of children, the principles of treatment of children in need of assistance, children in danger and children separated from family, the State supervision of compliance with the Child Protection Act and the liability for any violation thereof (§ 1(1) LasteKS). The procedural aspects of family law proceedings in the civil court are regulated in the Code of Civil Procedure

11 Besides the abovementioned, information on matters related to family law, such as marital status, parents' right of custody, guardianship and data on the parents, spouse, registered partner and child of the person, as well as personal name in the meaning of the Names Act, are recorded in the population register, as regulated by the Population Register Act (*rahvastikuregistri seadus*, hereinafter: RRS). ([33]) The register is maintained and developed by the Ministry of the Interior (§ 3 RRS). Data entered in the population register is presumed to be correct (§ 6(1) RRS). Data subject to the registration shall be entered, in principle, immediately after the creation, amendment, entry into force of data or the issuance of documents (§ 30 RRS). Making entries concerning changes under family law and names law into the population register falls within the competence of civil status offices ('Vital Statistics Offices' ([34])), mainly rural municipality and city governments, as regulated in the Vital Statistics Act (*perekonnaseisutoimingute seadus*, hereinafter: PKTS ([35])) and notaries, as regulated in the Vital Statistics Act and Notaries Act. In cases provided by law, information on

---

([31]) Paul Varul in *Commentaries to the General Part of the Civil Code* (Juura 2023) before § 1 para 1 (in Estonian).

([32]) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/510042023004/consolide> accessed 23 December 2024.

([33]) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/523012024009/consolide> accessed 23 December 2024.

([34]) 'Vital statistics office' is a term used in the semi-official English translation of the Vital Statistics Act, which provides for the competence and functions of these offices, the procedure for performance of these procedures and the rights and obligations of persons upon performance of these procedures. For the international readers, the term 'civil status office' is used.

([35]) Semi-official English translation can be found online: <https://www.riigiteataja.ee/en/eli/524012024002/consolide> accessed 23 December 2024.

matrimonial property regimes and alterations to it are entered into the marital property register, regulated by the Marital Property Register Act (*abieluvararegistri seadus*, hereinafter: AVRS). (36) The controller of the marital property register is the Chamber of Notaries (§ 2(1^1) AVRS). Access to the data contained in the population register is granted to institutions, legal entities and natural persons for the performance of public duties and in the case of a legitimate interest (§ 44 RRS). The information entered on a registry card of the marital property register is accessible to everyone (§ 6(1) AVRS). All relevant registers are electronically accessible. (37)

2. *Division of competence in out-of-court proceedings*

12 As mentioned above, the Estonian notaries are trusted to conduct marriage and divorce proceedings (see paras 1ff above). The registration of births and deaths, data on the parents and guardian, certification of marriages and divorces and, as a rule, the assignment of a new personal name, as regulated in the Vital Statistics Act and Names Act, falls within the competence of civil status offices with different ranges of authority. (38) A civil status official is an official of a local government. They do not need to be a fully qualified lawyers, but knowledge of family law and the legal bases of the performance of civil status procedures and knowledge of the information technology systems used for the performance of the civil status procedures are required and are tested at the examination of a civil status official. Preliminary voluntary training is organised before the examination (§ 4(3) PKTS). A person who complies with the requirements provided for in the Civil Service Act and who has been granted the right to act as a civil status official by the minister in charge of the policy sector or by a person authorised by them after passing the examination of a civil status official may be appointed as a civil status official. The right to act as a civil status official is granted to an official for five years (PKTS § 4 (2)).

13 Recent developments in the area of family law show the preparedness of the Estonian legislator to increase the role of non-judicial authorities. The Act on

---

(36) Semi-official English translation can be found online: <https://www.riigiteataja.ee/en/eli/519122023007/consolide> accessed 23 December 2024.

(37) In order to help notaries with their everyday work, including making queries to different registers, an e-Notary system has been developed. More information can be found on the internet site of the Centre of Registers and Information Systems under <https://www.rik.ee/en/other-services/e-notary> accessed 25 February 2024.

(38) Whereas the city and rural municipality governments have the authority to register births and deaths, the local governments of the county centres have a wider range of authority, including certification of marriages and divorces (§ 3 (3) and (4) PKTS).

State-Funded Family Mediation Services (*riikliku perelepitusteenuse seadus*: hereinafter: RPLS) ([39]) was adopted on 22 November 2021 and came into force on 1 September 2022. ([40]) Aiming to provide support to parents who, having separated, seek to reach an agreement concerning arrangements related to their underage child, to facilitate cooperation between parents concerning the upbringing of their child and, by this, to ensure protection of the child's interests and the child's well-being, this Act governs the provision of State-funded family mediation services and establishes the principles for the organisation of family mediation proceedings (§ 1 RPLS). As explained in the explanatory notes to the Act in question, the sub-purposes of the legislator are as follows: (a) to increase the number of family mediation proceedings as an alternative to court proceedings; (b) to increase the number of extra-judicial agreements and decrease the number of court cases. ([41]) In its essence, family mediation is a voluntary service. ([42]) Unlike other options for conciliation services, family mediation is funded by the budget of the State (§ 15 RPLS) and is free of charge for the parents.

14 As a result of family mediation, the parties to mediation may conclude an agreement – referred to as a parenting plan – concerning the right to have contact, matters related to the maintenance of underage child and termination of joint legal custody or its variations (§ 4 RPLS). Family mediation services are arranged by the Social Insurance Board, ([43]) which is a mediation body for the purposes of the Conciliation Act (*lepitusseadus*, hereinafter: LepS) ([44]) (§ 5 RPLS). A parenting plan approved by the Social Insurance Board constitutes an enforceable title (§ 12(5) RPLS). Mediation proceedings are conducted by a family conciliator who has concluded a corresponding agreement with the Social Insurance Board (§ 3(1) RPLS). A family conciliator does not need to be a fully qualified lawyer. According to § 6(1)

([39]) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/501062022001/consolide> accessed 23 cDecember 2024.

([40]) Regulation regarding the joint legal custody entered into force on 1 July 2023.

([41]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 3 (in Estonian).

([42]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 11 (in Estonian).

([43]) The Social Insurance Board is a governmental authority that works to ensure the self-sufficiency and well-being of Estonian people under <https://sotsiaalkindlustusamet.ee/en> accessed 6 March 2024. The functions of the Social Insurance Board as regards the organisation of child protection are the implementation of State child protection policy, application of national strategies and coordination of cross-sectoral cooperation and prevention concerning child protection (LasteKS § 15(1)).

([44]) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/514072022002/consolide> accessed 23 December 2024.

RPLS, family conciliators must meet at least the following requirements: (a) they possess a higher education; (b) as a person, they are suited to conduct mediation proceedings; (c) they meet the requirements provided by § 20 of the Child Protection Act (a conciliator, however, is not a youth welfare officer in the meaning of the Child Protection Act ([45])); (d) they have completed a course of family conciliator training arranged by the Social Insurance Board. A family conciliator who deals with special situations, such as cases where there have been instances of domestic violence or one or both of the parents are suffering from a mental disorder or an intellectual disability, must, in addition, have completed a continuing education course on working with victims of domestic violence and with people with special mental health needs (§ 6(3) RPLS). Mediation proceedings provided for by the RPLS, proceedings before a mediation body, the duties of family conciliators and the approval, validity and enforceability of parenting plans are subject to the provisions of the Conciliation Act without prejudice to any special rules established by the RPLS (§ 2(1) RPLS). Into the scope of the Conciliation Act fall principles such as independence, impartiality and liability of the family conciliator, the obligations to confidentiality and to explain and the duty to document (§§ 3, 4, 6, 7, 8, 10 LePS). It is worth mentioning that there are high hopes that this systematic change will succeed, relying mainly on the arguments that professional family conciliators would have the dedication, time, knowledge and skills to guide parents and that they could support parents in focussing on the welfare of the child. This assistance is provided in a casual atmosphere which is designed not to resemble a court.

The youth welfare officers (*lastekaitsetöötaja*) are responsible for child and youth welfare. The functions of child protection workers are provided for primarily in the Child Protection Act. **15**

B. *Divorce*

1. *Divorce upon mutual agreement*

Under Estonian law, spouses may dissolve their marriage upon mutual agreement, a concept acknowledged already in the Law of Marriage Act of 1922. ([46]) Under the current law, it has been left, in principle, to the **16**

([45]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 9 (in Estonian).

([46]) Triin Göttig, Liis Hallik, Triin Uusen-Nacke, 'Abielulahutuse õiguslik regulatsioon Eestis' (2006) 4 Juridica 244, 245–246.

discretion of the spouses whether to file the application for a divorce to the competent civil status office (§ 64 PKS, § 44 (1) PKTS), a tradition recognised also under Soviet law (except in cases where the spouses had underage children), (47) or, as of July 2010, also to the notary (§ 64^1 and § $7(1^1)$ PKS, § 29 (3)(7) NotS). In case of mutual agreement, no rules for prior separation apply and the spouses can proceed directly to a divorce. The parties may agree to dissolve their marriage by the notary and resolve a dispute over the division of property in the court.

17 Divorce proceedings are considered as notarial acts in the meaning of the Notaries Act (§ 29 (3)(7) NotS). With respect to cross-border divorces, the competences of notaries are wider than those of the civil status offices. The civil status official might not possess the special legal knowledge necessary for handling cross-border cases. (48) A civil status office may grant a divorce if: (a) both spouses reside in Estonia and Estonian law applies to the divorce, or (b) the spouses have entered into, on the basis of Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ L343/10), an agreement on applicable law under which Estonian law applies to the divorce (§ 64 PKS). Thus, the civil status offices are competent only in cases where Estonian law applies. A notary, on the other hand, may grant a divorce if Estonia has jurisdiction in this divorce matter in accordance with Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (OJ L178/1). The spouses may enter into an agreement on the law applicable to their divorce corresponding to Council Regulation (EU) No 1259/2010 in person in a notarially authenticated form (§ 64^1(1) and (2) PKS). Before acceptance of an application for divorce, the notary ascertains the law to be applied. The notary explains to the applicants the possibility to conclude an agreement concerning the law applicable to their divorce and the content and consequences of the applicable law (§ $30(1^1)$ NotS). Thus, notaries are authorised to certify a divorce in domestic as well as in cross-border cases, including cases where a foreign law is applicable and the spouses do not reside in Estonia. Whereas the notary may also perform tasks related to the certification of marriages or divorces, the civil status offices' competences are limited to certification of

(47) ESSR Marriage and Family Code (ENSV abielu ja perekonna koodeks) entered into force in 1965 and was valid until 1995; Triin Göttig, Liis Hallik, Triin Uusen-Nacke, 'Abielulahutuse õiguslik regulatsioon Eestis' (2006) 4 Juridica 244, 246 and 248.

(48) Draft of the Law amending the Family Law Act and of other relevant Acts SE 112 explanatory notes, p 4 (in Estonian).

marriages or divorces. The legal and practical consequences of a divorce, such as division of the marital property or issues related to underage children, are subject to a separate agreement, for example by the notary or, in the case of disagreement, to be resolved in court.

18 A notary is not a civil status official ([49]), but performs the functions of a civil status office which are related to the divorce with the specifications provided for in the Notaries Act (see paras 98ff above) and the Family Law Act (§ 3(8) PKTS). The procedural rules concerning the divorce prescribed for civil status offices apply, with some exceptions, accordingly.

19 Irrespective of whether spouses have chosen the proceedings before a civil status office or a notary, the divorce can be granted on the basis of a personally submitted written joint application (§§ 64 and 64^1 PKS; § 44(1) PKTS). Submitting the application is the first step of the process. If the application for a divorce is submitted to a notary, one of the spouses can submit it by remote authentication (§ $1(3^1)$ TõS). ([50]) From 1 December 2024, spouses do not need to appear at a civil status office in order to submit an application for divorce if a digitally signed application is submitted in a secure online environment (§ $44(1^1)$ PKTS). The second step of the process is the actual certification of the divorce. To give the spouses time to consider, ([51]) a divorce is not granted earlier than one month and later than three months from the date of submission of an application for a divorce (§ 45(1) PKTS). No further investigation of legal prerequisites, such as arrangements concerning custody or maintenance obligations for underage children, is required. If on the determined date to divorce, the spouses' will to divorce remains unchanged, a civil status official or a notary grants a divorce, as a second step of the process, in the presence of both spouses under the conditions provided for in the Family Law Act (§ 46(1) PKTS). A divorce may be granted without the presence of one spouse if the spouse cannot appear at a civil status office or before a notary with good reason and the consent of the spouse to the divorce without the presence of the spouse which is authenticated by a notary or consular officer is submitted (§ 47 PKTS). Remote authentication by a notary is not allowed for the certification of the divorce, for which, as a rule, the presence of both spouses is necessary. A civil status official and the notary immediately register a divorce in the

([49]) Draft of the Law amending the Notaries Act and of other relevant Acts SE 411 explanatory notes, p 10 (in Estonian).

([50]) A short introduction to remote authentication in English can be found on the website of the Chamber of Notaries, Remote authentication and facial recognition, under <https://www.notar.ee/en/teabekeskus/kaugtoestus> accessed 6 March 2024.

([51]) Triin Göttig, Liis Hallik, Triin Uusen-Nacke, 'Abielulahutuse õiguslik regulatsioon Eestis' (2006) 4 Juridica 244, 251.

population register (§ 46(3) PKTS). The divorce is entered in the population register on the day of the divorce (§ 48(3) and § 3(8) PKTS). Both the notaries and civil status offices are entitled to issue a certificate pursuant to Article 66 of Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (OJ L178/1) on a divorce (§ 30(3)(8^3 NotS and § 15^3 PKTS). Thus, the notary may issue a certificate concerning a divorce granted by any notary or civil status office and vice versa. On the other hand, the right to make corrections to the certificate lies solely on the issuing authority. In addition, the local government of a county centre is entitled to issue a certificate on a divorce registered by a notary or civil status office. ([52])

20 The notary's duty to explain mentioned above applies to the procedures of divorce as well as to the certification of marriage. Upon receipt of an application for contracting a marriage or divorce, a notary explains to the applicants the legal consequences relating to, and arising from, marriage or divorce respectively, including the duties to provide maintenance in a family (§ 30(1) NotS). An obligation to give legal assistance concerning the divorce is not foreseen for the civil status officials (§§ 44 PKTS). The obligation to explain can be considered as the main argument for assigning the competence to certify marriages and divorces to notaries. As it reads from the explanatory notes, the notary, due to their qualification, can, for example, in the procedure of certification of a marriage, explain thoroughly what the options for arranging the legal relationship regarding the matrimonial property are. The legislator rates this obligation highly, stating that such legal advice is necessary and, as a result, can motivate the future spouses to choose to make alterations to the matrimonial property regime they regard as most suitable to meet their specific expectations. The convenience of entering into several agreements regulating the legal consequences of marriage or a divorce at once by the same notary is also listed as an argument for assigning the notary with the right to certify marriages and divorces. ([53])

21 The competences concerning cross-border divorces are, inter alia, assigned to notaries in order to give the spouses an opportunity to dissolve their marriage in a more cost-efficient way compared to proceedings before a

---

([52]) Draft of the Law amending the Code of Civil Procedure and other Acts SE 622 explanatory notes, p 11 (in Estonian); Draft of the Law amending the Vital Statistics Act, Population Register Act, Local Government Organisation Act and State Fees Act SE 464, explanatory notes p 28 (in Estonian).

([53]) Draft of the Law amending the Notaries Act and of other relevant Acts SE 411 explanatory notes, p 9 (in Estonian).

court. For example, if an Estonian couple has moved to Finland, they do not need to approach the court for the sole reason that they do not reside in Estonia anymore. In addition, the assignment of such competences to notaries helps to decrease the workload of the courts, leaving within the authority of the court only such cases where there is a dispute between the spouses concerning the divorce. (54) As mentioned above, Estonian law requires the agreement on the applicable law to be notarially authenticated. The rationale for this is that the obligation of the notary ensures that the spouses have a clear understanding of the content of such an agreement and its legal consequences, to protect the parties from hasty and ill-conceived transactions and, as a result of the impartiality obligation of the notary, to guarantee equal treatment of both spouses. In addition, the spouses are charged a fixed fee, which does not depend on the 'price list' of a particular professional but is provided for in the Notary Fees Act (*notari tasu seadus*, hereinafter: NotTS (55)). In certain cases provided for by the law, such as the authentication of the agreement on applicable law, the obligation of a notary to explain also includes the obligation to explain the contents of the law of a foreign State and the consequences of its application (§ 18(5) TõS). (56)

2. *Divorce proceedings in court*

22 A court grants a divorce only if the spouses disagree about the divorce or the circumstances relating to it or if a civil status office or a notary is not competent to grant a divorce (§ 65(2) PKS). A marriage may be dissolved by a court judgment on the basis of an action of one spouse against the other spouse (§ 65(1) PKS). Unlike divorce proceedings before a civil status office (57) and notary (§ 64 and 64^1 PKS), the court examines the breakdown of marriage. A divorce may be granted by court if conjugal relations have definitively terminated. Conjugal relations have terminated if the spouses do not have matrimonial cohabitation anymore and there is reason to believe that the spouses will not restore cohabitation (§ 67(1) PKS). However, termination of conjugal relations is presumed if the spouses have lived apart for at least two years (§ 67(2) PKS). A court takes measures for the

(54) Draft of the Law amending the Family Law Act and of other relevant Acts SE 112 explanatory notes, p 5 (in Estonian).

(55) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/520122023004/consolide> accessed 23 December 2024.

(56) Draft of the Law amending the Family Law Act and of other relevant Acts SE 112 explanatory notes, p 6 (in Estonian).

(57) Triin Göttig, Liis Hallik, Triin Uusen-Nacke, Abielulahutuse õiguslik regulatsioon Eestis, (2006) 4 Juridica 244, 248.

conciliation of the parties unless it is impossible or unreasonable due to the circumstances. In matrimonial and filiation cases, the county court requires the principal parties to appear in person and must hear them unless the party has a valid reason for non-appearance (§ 346(2) TsMS). The representative of a spouse or registered partner who does not possess active legal capacity for purposes of civil procedure may file a petition for divorce or the termination of a registered partnership contract only with the consent of the court (§ 222(2) TsMS). The court may appoint a representative to a person who does not possess active legal capacity for purposes of civil procedure if this is needed to protect the person's interests (§ 219(2) TsMS). An authorisation to be represented that is granted in a family case, including a divorce case, ([58]) must be given expressly for acting in that case (§ 222(3) TsMS).

23 A court may give the parties a term of up to six months for reconciliation (§ 67(3) PKS). In Estonia, the private autonomy of the spouses is highly rated and absent a joint will of the spouses to save the marriage, the spouse willing to end the marriage is entitled to do so. ([59]) It lies upon the discretion of the court to decide on the circumstances of an individual case, whether there is potential to restore the marriage, whereas the period of living apart does not constitute a determining factor. According to § 363(5) TsMS, the statement of claim seeking a divorce should also state the names and dates of birth of any underage children born from the marriage, the person who maintains and raises the children, the person with whom the children reside, as well as a proposal for future arrangements concerning parental rights and the raising of the children. The practical impact of this provision has been questioned in legal literature. Scholars argue that the fact that spouses have children should not constitute a reason for not granting a divorce. Should there be a dispute regarding legal custody, the spouses should raise such a claim. ([60]) A court may resolve a dispute concerning the legal custody also in the proceedings concerning the divorce (§ 137(1) PKS). It is worth mentioning that the concern about the workload of the courts and the necessity to reduce the government's deficit has led to a discussion of a further reduction of the tasks of the courts. Only recently the public was introduced with the idea that, in the future, courts may stop, among some other proceedings, processing divorces. The Minister of Justice and Digital Affairs explained that the

---

([58]) Inga Järvekülg, Villu Kõve in Commentaries to the Code of Civil Procedure II (Juura 2017) § 222 para 3.3 (in Estonian).

([59]) Inga Järvekülg, Villu Kõve in *Commentaries to the Code of Civil Procedure II* (Juura 2017) § 357 para 3.2 (in Estonian).

([60]) Inga Järvekülg, Villu Kõve in *Commentaries to the Code of Civil Procedure II* (Juura 2017) § 363 para 3.10 (in Estonian).

authority of the court is no longer justified because today the court actually has no other option than to grant the divorce. (61)

3. *Other*

24 According to § 66 of the Family Law Act, a marriage terminates: (a) upon the death of one spouse at the time of their death; (b) upon the granting of a divorce by a court on the date of entry into force of the court judgment; (c) upon the granting of a divorce by a civil status office and by a notary on the date of entry into force of the divorce entry (§ 7(1[1]) PKS, § 3(8) PKTS). An entry enters into force upon storage thereof in the population register. An entry made on paper enters into force upon signing thereof by a civil status official (§ 8(3) PKTS). An exception is foreseen for the registered partnership contract, which, in the case of mutual agreement, ends upon its signing at a notary (§ 20(4) KooS). If there is a dispute concerning the legal consequences of marriage, the spouses may approach the court and raise a respective claim.

25 The grounds for annulment of marriage and the persons entitled to file an action for annulment of marriage are exclusively regulated in the Family Law Act. An action for annulment of marriage may be filed only to the court (§ 9 and §§ 12 PKS). In addition, the marriage can be declared void (§ 10 PKS). These rules apply irrespective of whether the marriage has been certified by the civil status office, the notary or the competent ordained minister (§ 7(1[1]) PKS).

26 In summary, in Estonia, divorce proceedings are conducted in court if there is a lack of a unanimous will to divorce, there is no agreement on the consequences of divorce (eg division of joint property) or if the out-of court authorities (civil status office or notary) do not have jurisdiction/competence. Challenging a divorce is exclusively within the competence of the court.

C. *Parenthood*

1. *Concepts of parenthood*

27 In Estonia, legal parenthood is a normative concept. (62) The mutual rights and obligations of parents and children arise from the filiation of children, which can only be established in cases and under conditions listed exhaus-

(61) Madis Hindre, 'Minister: Divorces could be processed outside of courts in future' (Estonian National News Portal (ERR), (11 December 2024; in Estonian) <https://www.err.ee/1609547986/abielu-lahutamine-voib-kohtutest-kaduda> accessed 22 December 2024.

(62) Susann Liin, 'Põlvnemine kui normatiivne õigusmõiste' (2023) 10 Juridica 807, 807.

tively in the law (§ 82 PKS). Filiation is a legal family law relationship, absolute by its nature, (63) which usually, but not always, corresponds to genetic parenthood (64) and is neither created nor terminated by an entry in the population register. (65) The entry in the population register only has an evidentiary effect. (66) If the entry is incorrect, it can be corrected (67) by the decision of the civil status office, based on an application or ex officio. If the civil status office is not competent to make the decision, the person whose data is incorrect has a recourse right to a court (§ 13 PKTS). The establishment of a filiation relationship lies mainly in the competence of civil status offices, except for the judicial establishment and contestation of fatherhood and adoption.

28 Under Estonian law, co-motherhood and co-fatherhood is a relatively new phenomenon. Until the adoption of the Registered Partnership Act, which entered into force on 1 January 2016, when the option to adopt a same-sex registered partner's child was introduced, a child could only have a mother and a father. Only recently has a lively legal debate arisen as to whether a child can, in a legal meaning, have more than two parents. The Estonian legislator decided not, in principle, to change the traditional approach to legal parenthood based on the understanding that legal parenthood is established between the child and their biological parents and that the child has the right to know their origin, but widened the grounds for the establishment of parenthood. (68) According to the amendment of the Family Law Act, which entered into force on 1 January 2024, legal parenthood may be established through a female spouse giving their consent to the artificial insemination of their female spouse. (69) The latter option is only available in circumstances where there are two female spouses. (70) Surrogacy is illegal and parenthood established outside Estonia, is, in principle, recognisable. In addition, as of 1 January 2024, it is clearly stated in the Family Law Act that a child cannot have more than two parents (§ 82 PKS). This solution in its

---

(63) Susann Liin, 'Põlvnemine kui normatiivne õigusmõiste' (2023) 10 Juridica 807, 812.

(64) RKTKm 12.01.2022, 2-19-1719, para 13.

(65) RKTKm 12.01.2022, 2-19-1719, para 15.

(66) RKTKm 12.01.2022, 2-19-1719, para 14; RKTKm 15.06.2023, 2-22-7773, para 10.

(67) RKTKm 12.01.2022, 2-19-1719, para 15.

(68) Draft of the Law amending the Family Law Act and of other Acts related to it 207 SE, explanatory notes p 8, p 22 and pp 55–56 (in Estonian).

(69) Draft of the Law amending the Family Law Act and of other Acts related to it 207 SE, explanatory notes pp 22–24 and pp 55–56 (in Estonian).

(70) Draft of the Law amending the Family Law Act and of other Acts related to it 207 SE, explanatory notes p 55 (in Estonian).

essence complies with the court order (*määrus*) of the Supreme Court of Estonia of 19 May 2023. (71)

2. *Establishment of motherhood and fatherhood between parents of the opposite sex*

a) *Motherhood*

Under Estonian law, the mother of a child is the woman who gives birth to the child (§ 83 PKS). Accordingly, a child born as a result of artificial insemination through egg donation is deemed to descend from the woman who gave birth to the child (§ 23 and § 24 Artificial Insemination and Embryo Protection Act, *kunstliku viljastamise ja embrüokaitse seadus*, hereinafter: KVEKS (72); § 83 PKS). Pursuant to § 132 of the Penal Code, transfer of a foreign ovum, or an embryo or foetus created therefrom to a woman whose intention to give away the child after birth is punishable by a pecuniary fine. **29**

Motherhood is, as a rule, established without the involvement of the courts. The registration of births lies within the competence of civil status offices. The data of the mother of a child is entered in the population register upon application of the legal representative of the child (§ 23 PKTS) on the basis of a certificate of a health care provider or, in case of an adoption, a court order (§ 25(1) PKTS). The entry into the population register does not have a constitutive effect. (73) Changes in legal motherhood are possible through adoption. The judicial establishment of motherhood and contestation of motherhood are not regulated by law. The Supreme Court is of the opinion that whereas the judicial establishment of motherhood is possible, the judicial establishment of grandmotherhood is not. (74) Contestation of motherhood would be rather unlikely under Estonian law (§ 26 KVEKS). (75) **30**

b) *Fatherhood*

Under Estonian law, there are five possibilities to establish legal fatherhood: (a) presumption of the fatherhood of the mother's husband (§ 84 (1)(1) **31**

(71) RKTKm 19.05.2023, 2-21-7200/68, para 23.3, 24, 24.2.

(72) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/508012024002/consolide> accessed 19 November 2024.

(73) RKTKm 12.01.2022, 2-19-1719, para 14; draft of the Family Law Act 55 SE, explanatory notes p 29 (in Estonian).

(74) RKTKm 5.06.2012, 3-2-1-40-12, para 11.

(75) Susann Liin, 'Põlvnemine kui normatiivne õigusmõiste' (2023) 10 Juridica 807, 813; Liis Arrak in Commentaries to the Code of Civil Procedure III (Juura 2018) § 579 para 3.1.1.c (in Estonian).

PKS); (b) acknowledgement of fatherhood (§ 87 and § 84 (1)(2) and § 85 PKS); (c) establishment of fatherhood by a court (§ 84 (1)(3) and § 95 PKS) or contestation of fatherhood, followed by establishment of fatherhood [76] (§ 91 and § 95 PKS); (d) adoption (§§ 147 PKS, § 550(1)(3) and § 564 TsMS) and – in addition to the options regulated in the PKS – (e) consenting to the artificial insemination of a woman as a partner donation [77] (§ 84(2) PKS, § 3(2) and § 17^1 KVEKS).

32 Legal fatherhood is established, provided that the prerequisites of the substantial law are met. According to § 84 of the Family Law Act, the man by whom a child is conceived is the father of the child. It is deemed that a child is conceived by a man: (a) who is married to the mother of the child at the time of birth of the child; (b) who has acknowledged his fatherhood; or (c) whose fatherhood has been established by court. Fatherhood can be acknowledged and judicially established only if it has not yet been established (§ 87(1) and § 94(1) PKS), and as of 1 January 2024 only if a child does not already have two parents (§ 82 PKS). Fatherhood can be acknowledged only in person (§ 87(2) PKS). Conditional or temporary acknowledgement of fatherhood is void (§ 87(3) PKS). In the case of acknowledgement, the consent of the mother is required (§ 89 PKS). The mother's consent is granted in person, and it cannot be conditional or temporary (§ 89(3) PKS). Acknowledgement of fatherhood and the relevant consent are invalid only if the requirements for an application for acknowledgement provided for in the Family Law Act or in the Vital Statistics Registration Act have been violated (§ 90(1) PKS). Despite the abovementioned, if a person has been entered in the population register as the father of a child on the basis of an acknowledgement, this acknowledgement is valid even if the application for acknowledgement or the consent given therefor do not meet the requirements described above (§ 90(2) PKS).

33 In case of conflict of the aforementioned grounds of establishment of fatherhood – presumption and acknowledgement – the acknowledgement of fatherhood prevails. As a rule, the data of the man who is married to the mother of a child is not entered in the population register as the data of the

---

[76] RKTKm 12.01.2022, 2-19-1719, para 16; RKTKm 23.05.2012, para 18.

[77] A partner donation means the donation of gametes between a man and a woman, where the person of the donor is known to the recipient and the donor declares that the child is deemed to descend from the donor (§ 3^2 (1) KVEKS). Where the artificial insemination of a woman is performed with the gametes of an anonymous or non-partner donor or an embryo created from ovum of another woman, the child is not deemed to descend from that donor. An anonymous or non-partner donor may not demand establishment of fatherhood from them, and third persons may not demand establishment of fatherhood from them (§ 17^1(4) KVEKS).

father only in the cases specified in § 85 of the Family Law Act. According to the referred paragraph, a man who is married to the mother of a child is not considered to be the father of the child if the latter was not conceived by him and: (a) the spouses have submitted a respective joint application to the civil status office; or (b) another man has acknowledged fatherhood (§ 85 PKS). The latter, a simple out-of-court option which does not require any further investigation than that regarding the validity and existence of the respective applications, was added to the Family Law Act in 2014 with the purpose of ensuring the equal treatment of men and women. As a result, consent of the husband is not required prior to the acknowledgement nor is it necessary to contest the fatherhood of the husband in court. Thus, the fatherhood of the husband is not established, and the legal father of the child is the man who has acknowledged the fatherhood. (78) The right to contest the fatherhood remains (§ 91(1) PKS). The joint application of the spouses in the meaning of § 85 PKS may be submitted by appearing in person or in a notarially certified format (§ 25(3) PKTS). In the case of conflict of the grounds of establishment of fatherhood between the ex-husband and the current husband of the mother of the child, the current husband is deemed to be the father (§ 86 PKS).

34 Once the fatherhood has been established, new fatherhood cannot be established unless the previous fatherhood has been successfully contested. A court decides on the establishment or contestation of fatherhood on the basis of an action of a man filed against a child or on the basis of an action of a mother or a child filed against a man (§ 95 PKS), or on the basis of an action of a man against another man. (79) Fatherhood, in particular fatherhood which has been established on the basis of the marriage to the mother of the child or acknowledgement of fatherhood, may be contested under rather narrow circumstances. For the purpose of protection of the social family of the child and the maintenance of the legal status of the child, (80) fatherhood may only be contested within one year as of the date when the person entitled to contest fatherhood becomes aware of the circumstances which are the basis for contestation (§ 93(1) PKS). A man may contest another man's fatherhood which was established on the basis of marriage to the mother of a child or who acknowledged fatherhood within one year after the birth of a child. If more than one year has passed from the birth of a child, a man

(78) Draft of the Law amending the Family Law Act and of other Acts related to it 546 SE, explanatory notes pp 6–7 (in Estonian).

(79) RKTKm 23.05.2012, 3-2-1-48-12, para 19.

(80) Susann Liin, 'Põlvnemine kui normatiivne õigusmõiste' (2023) 10 Juridica 807, 814.

applying for the establishment of his fatherhood may contest the fatherhood of another man with the consent of the man who has been entered in the population register as the father, and the mother of the child or, in the absence of these consents, with a court's permission, which the court may only grant with good reason and considering the interests of the child (§ 91(1) PKS). If the legal representative of an underage child fails to contest fatherhood in due time, the child may contest filiation from their father in person as an adult (§ 93(3) PKS). In order to avoid 'hidden adoptions', ([81]) the minister in charge of the policy sector may, taking account of the significant interests of a child, contest fatherhood arising from an acknowledgement if there is reasonable doubt that the child does not descend from the man who acknowledged paternity (§ 91(2) PKS).

35 In all these cases of establishing fatherhood, a non-constitutive entry in the population register for evidentiary purposes is required. For a registration of birth, a respective application is required (§ 23 PKTS). An application for acknowledgement of paternity and the consent of the mother, required for the acknowledgement of fatherhood, is to be submitted to a civil status office by appearing in person, in a secure online environment in a digitally signed form in the case provided for in § 23(3) of PKTS, or in a notarially authenticated form (§ 26 (1) PKTS).

36 In summary, in the case of presumptions and acknowledgements of fatherhood, fatherhood is established, in essence, on the basis of the simplified procedure by agreement of the parties, ([82]) or, in the case of the judicial establishment of fatherhood, on the basis of a court judgment. ([83]) The courts are involved only in the case of a judicial establishment of fatherhood, contestation of fatherhood and adoption. These proceedings lie solely in the competence of the courts. The establishment of fatherhood by a court as well as the contestation of fatherhood against a person who is alive is an action-by-claim case (§ 95 PKS). Adoption and the establishment of fatherhood by a court as well as the contestation of fatherhood against a person who is dead, on the other hand, is an action-by-petition case (§§ 550(1)(3) and § 564 TsMS). A judgment that was rendered in a filiation case and which became effective during the lifetime of the principal parties and which

---

([81]) Draft of the Family Law Act 55 SE, explanatory notes p 29 (in Estonian).

([82]) Susann Liin, 'Põlvnemine kui normatiivne õigusmõiste' (2023) 10 Juridica 807, 819.

([83]) Susann Liin, 'Põlvnemine kui normatiivne õigusmõiste' (2023) 10 Juridica 807, 810 and 815.

concerns the existence, termination or absence of a legal relationship has *erga omnes* effect (§ 457(4) TsMS). (84)

3. *Establishment of motherhood and fatherhood between parents of the same sex*

37 In Estonia, co-motherhood or co-fatherhood can be established through adoption. A registered partner may only adopt a biological child of their registered partner or a child who was adopted by their registered partner before the parties entered into their registered partnership contract (§ 148 (3) PKS in conjunction with § 15 KooS). In rare cases, the law also provides registered partners with an option to adopt a child of a third person to prevent extreme unfairness (15(4) § KooS). As of 1 January 2024, same-sex married persons may adopt a child jointly (§ 148 (2) PKS). This means that they can adopt a child of a third person. (85) In both cases, the adoption is possible, provided the biological father, whose fatherhood has been legally established, has given their consent to the adoption (§ 82 and § 152 (1) PKS).

38 As of 1 January 2024, co-motherhood can also be established under the special rules of the Artificial Insemination and Embryo Protection Act when a female spouse gives her written consent to the artificial insemination of her female spouse with the gametes of an anonymous or non-partner donor or an embryo created from ovum of another woman (KVEKS 17^2 (1)). It should be noted that this is only possible when the biological father of the child has chosen not to establish legal fatherhood over the child (§ 17^2 (3) and § 26 (5) KVEKS and § 82 PKS). In this process, court proceedings are not required and data of the female spouse of the mother of the child as the other parent are entered in the population register on the basis of the consent granted to the artificial insemination (§ 25 (3^1) PKTS).

39 Acknowledgement of motherhood (as an equivalent to acknowledgement of fatherhood) or a presumption of motherhood of a female spouse (as an equivalent to presumption of fatherhood of a husband) is not recognised under Estonian law – the principle of two parents applies. (86)

40 In practice, it may occur that a child only has one legal parent. Where, upon the registration of birth, the application is submitted by the mother and there is no basis for the entry of the data of the father or the other parent of the child in the population register – the mother is not married or an application

(84) RKTKm 12.01.2022, 2-19-1719, para 18.

(85) Draft of the Law amending the Family Law Act and of other Acts related to it, 207 SE, explanatory notes p 26 (in Estonian).

(86) Draft of the Law amending the Family Law Act and of other Acts related to it 207 SE, explanatory notes p 24 (in Estonian).

of acknowledgement of parenthood has not been submitted (87) – the civil status official explains to the mother the legal effects and consequences of filiation and the possibility to ascertain filiation from the father or the other parent and enters the data of the father or the other parent in the population register. If the filiation of a child has not been established, the data of a parent is not entered in the register and the respective fields are left blank (§ 23(5), § 25(5) and § 7(5) PKTS).

41 It can be summarised that in cases occurring most often in practice, the establishment of parenthood is a simple and convenient procedure carried out by civil status offices. No further judicial review is required.

D. *Adoption*

42 Under Estonian law, only a court can decide on adoption (§ 159(1) PKS), and the consensus of parties involved is inevitable, ie the consent of the child (at least ten years of age or younger if the development level of the child so permits), the parent(s) or the legal guardian, the adoptive parent and the spouse of the adoptive parent (§§ 151 PKS, § 565 TsMS). The legal consequences of an adoption are extensive – a legal parent-child relationship between the adoptive parent and the child is established by a court order in the meaning of § 463 and § 568 TsMS (88) and the family relationship of the child and their descendants with the former relatives and the rights and obligations arising from the previous family relationship are terminated (§§ 147, 162, 163 PKS). Only minors may be adopted (§ 147(4) PKS).

43 Relevant provisions regarding adoption can be found in the Family Law Act, the Registered Partnership Act as well as in the Code of Civil Procedure (§§ 564). Adoption is an action-by-petition case (§ 475(1)(8) TsMS). The adoption procedure is initiated upon application by the adoptive parent to the Social Security Board (§ 158(1) PKS, § 564 TsMS). The Social Security Board is responsible for the preparation of the adoption procedure. If all requirements are fulfilled, it is the task of the court, on the basis of the petition of an adoptive parent (§ 159 PKS), to assess the justification for the adoption: adoption is permitted if it is necessary in the interests of the child and there is reason to believe that a parent-child relationship will be created

(87) Draft of the Law amending the Family Law Act and of other Acts related to it 207 SE, explanatory notes p 69 (in Estonian).

(88) Triin Uusen-Nacke, Triin Göttig in Commentaries to the Code of Civil Procedure III (Juura 2018) before § 564 para 1.a (in Estonian).

between the adoptive parent and the child (§ 147 (1) PKS). (89) A petition for adoption is unconditional, for an unspecified period of time and it has to be filed in person (§ 159(2) PKS). In order to protect the child and gather the information necessary for deciding on the adoption, an opinion of the Social Insurance Board is sought and presented to the court (§ 567 (1) TsMS). The Social Insurance Board presents to the court the information concerning the health, financial situation, and residence of the petitioner, and provides an opinion on whether the petitioner is able to raise, care for and maintain the child (§ 567(2) TsMS). The court hears a child who is capable of holding their own opinions (§ 552^1 TsMS). A child is adopted as of the entry into force of the court order on adoption (§ 159(3) PKS, § 568 TsMS). An adoption order enters into effect when it is served on the adoptive parent. The order cannot be appealed or amended (§ 568(2) TsMS).

44 A special regulation is foreseen for a declaration of invalidity of an adoption. Only a court may declare an adoption invalid (§§ 166 PKS, § 565 TsMS) and it may do so if the adoption took place without the petition of the adoptive parent or without the consent of one of the parents. Before a child becomes an adult, a court may, on its own initiative, declare the adoption invalid in the compelling interests of the child, including for the purpose of enabling a new adoption (§ 169 PKS). The Supreme Court has stressed the importance of maintaining stability in the child's life and explained that such declaration should be granted only in exceptional cases. (90)

45 An adoption case may be dealt with by Estonian courts if the adoptive parent, one of the spouses wishing to adopt or the child, is a citizen of the Republic of Estonia or has their residence in Estonia (§ 113 (1) TsMS). If the residence of the adoptive parent or the child is not in Estonia, a court cannot decide on adoption without the consent of the committee for international adoptions of the Social Insurance Board (§ 165 (1) PKS). There are no ongoing discussions regarding a transfer of the authority from the courts to non-judicial authorities.

E. *Parental responsibility*

46 Under Estonian law, parental responsibility includes parental custody, the right and obligation of a parent to have contact with their child, the obligation to guarantee the material well-being of a child, to secure a child's maintenance and other rights and obligations (for example, mutual support

(89) Triin Uusen-Nacke, Triin Göttig in *Commentaries to the Code of Civil Procedure III* (Juura 2018) before § 564 para 1.c (in Estonian).

(90) RKTKm 19.05.2023, 2-21-7200/68, para 19.

and the child's obligation to help their parents). (91) For each element of parental responsibility there is a special regulation provided by law and each right – legal custody, the right to have contact and to receive maintenance – is considered as an independent right. Thus, the obligation to provide maintenance is not affected by amendments of legal custody (§ 96(1) of PKS) and the right to have contact may be exercised irrespective of whether the parent has legal custody. (92)

47 Parental responsibility is constitutionally guaranteed – according to § 27(3) of the Constitution, the parents have the right and the duty to raise and care for their children. The Family Law Act states as one of the principles of parental custody that parents have equal rights and obligations with respect to their children unless otherwise provided by law (§ 116 PKS). On the other hand, the principle of the best interests of children is of the utmost importance. According to § 123 of the Family Law Act, upon hearing any matter concerning a child and regulated in Chapter 10 of PKS, including parental custody and the right to have contact, a court makes its decision primarily in the interests of the child, taking into account all the circumstances and the legitimate interests of the relevant persons. In addition, any risks threatening the well-being and development of the child must be prevented in order to ensure the rights and well-being of the child, as stated in § 6 of the Child Protection Act.

1. *Parental custody*

a) *Establishment of parental custody*

48 With respect to parental custody, as in many other aspects, Estonian law is influenced by German law, including the principle of joint parental custody. Parental custody is a legal family law relationship, which can be established only on the conditions provided for by law. (93) If the parents are married to each other, they have joint legal custody of their child (§ 117(1) PKS, § 29(1) PKTS). If the parents are not married to each other at the time of birth of the child, they have joint legal custody unless they have expressed their wish to grant legal custody to only one of the parents upon submitting declarations of intent concerning the acknowledgement of paternity (§ 117(2) PKS, §

(91) Andra Olm, 'Ühine hooldusõigus ja selle lõpetamine: vanema õigus versus lapse huvi' (2023) 10 Juridica 829, 830.

(92) RKTKm 9.11.2011, 3-2-1-83-11, para 21; Triin Uusen-Nacke, Triin Göttig in *Commentaries to the Code of Civil Procedure III* (Juura 2018) § 550 para 3.4.a (in Estonian).

(93) RKTKm 19.05.2023, 2-21-7200, para 23.2.

29(2) PKTS). In the latter case, a civil status official explains the rights and obligations arising from joint legal custody, the possibility to grant legal custody to only one of the parents and the legal consequences accompanying the registration of the birth of a child (§ 29(2) PKTS). As for registered partners, one registered partner is not granted custody of the other partner's child based on the registered partnership contract. The registered partner may submit an application for adoption (§ 15 KooS). If parenthood of another parent is not established, the child only has a mother, and she has sole custody (§ 25(5) PKTS). Establishment or termination of parental custody is not dependent on the entry to the population register – the entry does not have a constitutive effect. (94)

b) *Exercise of joint custody*

49 As a rule, parents exercise joint custody with respect to their child and perform the custodial obligation on their own responsibility and unanimously, considering the general well-being of the child (§ 118 (1) PKS). It is the responsibility of the parents to provide the children with everything necessary for their life and personal development. (95) Parents have the obligation and right to care for their underage child. The parents' legal custody includes the right to care for the person of the child and for the property of the child and to decide on matters related to the child. Upon caring for and raising a child, the parents take into account that the ability and need of the child to act independently and responsibly increases. If the development level of a child so allows, the parents discuss care and raising issues with them (§ 116 (2) and (3) PKS; § 27(3) PS). This means that in matters of parental custody, the court should seek a balance between contradicting interests of the parents and the best interests of the child, whereas the latter is a decisive factor. (96) A parent who has legal custody is the legal representative of a child. Parents who have joint legal custody have a joint right of representation (§ 120 (1) PKS).

50 If parents who have joint legal custody live permanently apart or no longer wish to exercise the right of joint legal custody for any other reason, each parent has the right to request from a court that the legal custody of the child be partially or fully transferred to them (§ 137(1) PKS). Such a proceeding

(94) RKTKm 19.05.2023, 2-21-7200, para 23.2.

(95) Draft of the Family Law Act 55 SE, explanatory notes p 32 (in Estonian).

(96) Andra Olm, 'Ühine hooldusõigus ja selle lõpetamine: vanema õigus versus lapse huvi' (2023) 10 Juridica 829, 840.

is an action-by-petition case (§ 550(1)(2) and §§ 558 TsMS), [97] with a special regulation for, inter alia, hearing the parents in person, [98] and other persons raising the child (§ 558 and § 559 TsMS), hearing the child in person (§ 552^1(1) TsMS) and cooperation with the local government (§ 552 TsMS). The grounds for dismissal of the petition as well as the criteria for the termination of the joint custody and the granting of legal custody to one parent are provided for by law. A petition shall be dismissed if: (a) a child who has attained at least 14 years of age objects to the transfer of legal custody; or (b) if there is reason to believe that the termination of joint legal custody and the granting of sole legal custody to the petitioner would not be in the best interests of the child (§ 137(2) PKS). In the case of termination of joint legal custody, a court decides on the granting of legal custody to one parent on the basis of the best interests of the child, taking into account, inter alia, the mental and financial capabilities of each parent to raise the child, their emotional relationship with the child and current commitment to caring for the child and the future living conditions of the child (§ 137(3) PKS).

c) *Out-of-court termination of and amendments to joint custody*

51 Until 1 July 2023, [99] the termination of joint legal custody, as well as the granting of any other type of legal custody, were exclusively within the authority of the courts. Until then, only parents who were not married to each other at the time of the birth of their child could agree on granting the right of custody to only one of the parents upon submitting the declarations concerning the acknowledgement of fatherhood. Parents who were married and who wished to arrange another type of parental custody had to approach the court, where the case was resolved either by judicial compromise (§ 430 TsMS) or a court order. [100]

52 The rules for the establishment of parental custody have not changed, but as of 1 July 2023, the termination of joint custody through family mediation coordinated by the Social Insurance Board is, in principle, possible, as

---

[97] The court may also hear a case concerning legal custody or access to the child in action-by-claim proceedings provided the corresponding claim is made in action-by-claim proceedings together with a claim for divorce or termination of a registered partnership contract or the award of maintenance (§ 550(2) CCP).

[98] RKTKm 11.04.2018, 2-17-507, para 13 and para 15.

[99] The Act on State-Funded Family Mediation Services entered into force on 1 September 2022, in order to guarantee the technical preparedness of the electronical population register, the regulation concerning parental custody entered into force on 1 July 2023.

[100] Andra Olm, 'Ühine hooldusõigus ja selle lõpetamine: vanema õigus versus lapse huvi' (2023) 10 Juridica 829, 834.

provided in the Act on State-Funded Family Mediation Services and amendments adopted to the Family Law Act, the Code of Civil Procedure and other related Acts. The purpose of family mediation is to conclude a working agreement based on the welfare of the child, which both parents respect and, therefore, adhere to. Family mediation is only possible if both parents agree to it (see paras 10ff above). (101)

53 Family mediation proceedings are carried out with the intermediation of a family conciliator, as a result of which, the parents may conclude an agreement – a parenting plan – which, after the approval of the Social Insurance Board, has the same legal effect as a court decision. Whereas in matters concerning the right to contact or maintenance the parents may apply for mediation directly, in matters concerning parental custody, the parents cannot apply for family mediation services instead of approaching the court. (102) According to the amendments made to the Family Law Act, if parents who have joint legal custody live permanently apart or who no longer wish to exercise the right of joint legal custody for any other reason, they may agree, through the mediation proceedings provided for in the Act on State-Funded Family Mediation Services, to partially or fully terminate joint legal custody and partially or fully transfer legal custody to one of the parents. However, such agreement can only be reached if the court has issued an order of reference for family mediation on the basis of § 560^1 of the Code of Civil Procedure (§ 4(2) RPLS, § 137^1 PKS). The court, on the other hand, may not direct the custody case to the mediation independently. (103) The court may direct the parents to undertake mediation concerning parental custody only if a petition has been submitted to the court that concerns the right to have contact with the child (§ 560^1(9) TsMS). Thus, the court may direct the custody case to mediation only together with the case that concerns the right to have contact. If, in addition, a child's claim for maintenance has been filed with the court, the court may direct the parents to undertake mediation regarding all three matters (§ 560^1(9) TsMS). The same applies to maintenance cases. (104) In other words, even if the termination of joint custody is initiated upon mutual agreement of the parents, the

(101) A short introduction in English can be found on the website of the Social Insurance Board, 'Family mediation' <https://sotsiaalkindlustusamet.ee/en/child-and-adult-need-help/child-protection-and-family-support/family-mediation> accessed 6 March 2024.

(102) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes pp 21–22 (in Estonian).

(103) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes pp 21–22 (in Estonian).

(104) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes pp 21–22 (in Estonian).

termination of joint custody through family mediation is only possible if at least one of the parents ([105]) also seeks to regulate the right to have contact with the child, approaches the court and the court finds that there is a fair chance that the parents reach an agreement during a family mediation. As a rule, the court is expected to refer the case to family mediation unless there is a valid reason to hear the case in court, including cases with elements of domestic violence. Upon application, the court decides on the referral, but it does not prescribe the conditions of the future agreement. As the regulation is relatively new, there is very little case law. In the legal literature, a slight criticism has been expressed as to the unsufficient explanation of the legal reasoning of the regulation. ([106])

54 If family mediation is successful and the parents reach an agreement, such an agreement is subject to the approval of the Social Insurance Board (§ 3 (2), § 12(1) and (2) RPLS). ([107]) If the Social Insurance Board finds the agreement to be in the best interests of the child, it becomes binding (§ 12 (4) and (5) RPLS). Data regarding the termination of custody are entered in the population register by the Social Insurance Board on the basis of the parenting plan (§ 22(1)(10) RRS, § 8(3) RPLS). ([108]) If family mediation turns out to be unsuccessful, the Social Insurance Board issues a certificate of unsuccessful mediation and transmits it to the court, where the proceedings will continue (§ 14 RPLS, § 560^1(8) TsMS).

The Estonian legislator justifies the transfer of authority concerning custody cases with the practical need to negotiate all relevant – and essentially related – questions, such as the right to have contact, legal custody and the payment of maintenance within one and the same proceeding and reach a comprehensive and enforceable agreement. ([109]) The mediation option gives parents more freedom to design their family relationships and offers professional help in reaching an agreement. ([110]) Family mediation is introduced to parents as a faster, cheaper, and more sustainable option of dispute resolu-

---

([105]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 18 (in Estonian).

([106]) Triin Uusen-Nacke, Kai Kullerkupp, 'Mis oma, see oma. Mida koolilaps võib teha taskurahaga?' (2023) 10 Juridica 854, 854.

([107]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 18 (in Estonian).

([108]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 18 (in Estonian).

([109]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 18 (in Estonian).

([110]) Andra Olm, 'Ühine hooldusõigus ja selle lõpetamine: vanema õigus versus lapse huvi' (2023) 10 Juridica 829, 834.

tion, which takes the well-being of the child into account; it is further argued that the parents' agreements concluded in family mediation are more effective. (111)

It is important to mention that the termination and transfer of joint custody fully or partially to one of the parents through the family mediation proceedings are only possible if parents have joint custody and, as a result of the mediation, they reach an agreement according to which the joint custody will be (a) terminated fully and one of the parents is granted sole custody or (b) terminated partially, ie limited to some matters such as domicile, health and/or education of the child by giving one of the parents the sole right to decide these questions. (112) Also, the transfer of 'one-time' decisions, such as the choice of school or family doctor (§ 119 PKS), is considered to fall into the competence of family mediation. (113) In all other cases where there is an intention to make changes to parental custody, family mediation is not possible. For example, where one of the parents is entitled to sole custody and the parents wish to restore joint custody (§ 123^1(3) PKS) or where a parent with no legal custody applies for the transfer of sole custody (§ 138(1) PKS). In such cases, the courts remain the exclusive authority. (114) The same applies in cases where a parent with sole legal custody has died or has been fully deprived of legal custody and legal custody is granted to the other parent (§ 138(2) PKS) and where a temporary (115) suspension of parental custody in the case of factual (116) impediment or its restoration is justified (§ 140 PKS). If the physical, mental or emotional well-being or the property of a child are endangered by abuse of the parent's legal custody, neglecting the child, inability of the parents to perform their obligations or the conduct of a third person and the parents do not wish, or are unable, to prevent danger, the court must intervene ex officio (§ 134 PKS) and apply measures to prevent the endangering of the well-being or property of the child, including removal of parental custody in full or in part (§ 135(2) and (3) PKS). The law

(111) Website of the Social Insurance Board, 'Family mediation' <https://sotsiaalkindlustusamet.ee/en/child-and-adult-need-help/child-protection-and-family-support/family-mediation> accessed 6 March 2024.

(112) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 18 (in Estonian).

(113) Information leaflet 'Riiklik perelepitusteenus', issued by the Social Insurance Board (in Estonian) p 5, <https://www.sotsiaalkindlustusamet.ee/sites/default/files/documents/2024-01/Perelepituse-ABC_08.01.2024.pdf> accessed 15 November 2024.

(114) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 18 (in Estonian).

(115) RKTKm 4.12.2013, 3-2-1-142-13, para 16.

(116) RKTKm 14.11.2022, 3-2-1-121-12, para 14.

provides a list of persons who are required to notify the rural municipality or city government and a court if they have information concerning the endangered child (§ 134(2) PKS). In addition, if the parents have to acquire prior consent for making in the name of the child certain transactions listed in § 187 and § 188 Family Law Act, such as for selling child's real-estate, they must approach the court. Finally, an appointment of a special guardian for the act which cannot be performed by the parents (§ 209 PKS) and an appointment of a guardian for underage child also falls within the authority of the court. If neither of the parents of an underage child have the right of representation or if it is not possible to ascertain the origin of a child, a guardian is appointed for the child (§ 171(1) PKS). A guardian has both the right to care for the person and for the property of the child (§ 172 PKS). Guardians are the legal representatives of persons under guardianship (§ 179(1) and 207(1) PKS). A court decides on the establishment of guardianship on its own initiative or on the basis of an application of a rural municipality or city government or an interested person (§ 173(1) PKS). The law provides a list of persons who are required to notify the rural municipality or city government and a court if they have information concerning a child in need of guardianship (§ 171(2) PKS). Courts supervise the activities of guardians (§ 193 PKS) and may require a guardian to submit information concerning the performance of their duties at any time (§ 194 PKS). A court may release a guardian in the cases provided by law (§ 197 PKS).

d) *Amendments to previous arrangements concerning parental custody*

56 In civil procedure, disputes concerning parental custody are considered as action-by-petition cases (see paras 4f above). Although a court order issued in an action-by-petition procedure that has entered into effect is binding and applies with regard to all persons (§ 478 (5) ([117]), § 463 (2) TsMS), a court can amend a decision made earlier if this is required due to significant circumstances which permanently affect the well-being of a child (§ 123(2) PKS, § 480(1) TsMS; § 138(1) PKS). The Supreme Court has explained that amendments to previous judgments concerning parental custody are possible if the circumstances or situation brought before the court did not exist when the previous decision was made, or the court could not have taken them into account. The circumstances justifying an amendment concerning the change in the living arrangements of a child, must, in order to maintain stability in

([117]) Inga Järvekülg, Villu Kõve in *Commentaries to the Code of Civil Procedure II* (Juura 2017) § 457 para 3.5.2 (in Estonian).

the child's living arrangement, be particularly compelling. (118) In principle, the same applies for the parenting plan concerning the custody agreements. If the circumstances underlying a previous judicial disposition which has entered into effect or a previous agreement approved by the Social Insurance Board have not changed significantly, the Social Insurance Board refuses to offer family mediation services (§ 9(5) RPLS). Where the circumstances have changed significantly, new proceedings are conducted under the same rules described above. (119)

57 Legislation concerning the termination of joint custody in family mediation under the Act on State-Funded Family Mediation Services took effect on 1 July 2023. During the short period of this option in practice, there have been only few custody cases which have undergone family mediation. Since there are no specific regulations for custody cases, apart from the aspects mentioned above, a more thorough overview of the family mediation proceedings is given in the next chapter concerning the right to contact, an issue which brings parents to family mediation most frequently.

e) *Power of attorney for custody*

58 Notwithstanding the above, parents who have joint legal custody also have a joint right of representation. Parents may agree on the arrangement of exercising the joint right of representation (§ 120(1) PKS). According to the Supreme Court, this means that the parents can agree that the child is represented by one of the parents and in this case, a parent can grant the authority to represent the child to another parent (§ 119(2) TsÜS). (120) The Supreme Court is of the opinion that other issues related to joint custody may be arranged in a similar way. (121) In legal literature, it has been recognised that although parental custody as a personal, subjective and absolute right may be neither waived nor transferred by a transaction, it is possible to transfer the exercise of it. (122) However, since the conditions for termination of joint custody are exhaustively listed in the law, a power of attorney can only regulate the arrangement regarding the exercise of joint custody, but not terminate it. The power of attorney for custody is not (yet) widely accepted in Estonia.

---

(118) RKTKm 12.11.2017, 2-16-5794, para 21.1 and para 21.2.

(119) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 22 (in Estonian).

(120) RKTKm 17.11.2015, 3-2-1-127-15, p 23.

(121) RKTKm 12.11.2017, 2-16-5794, para 16.

(122) Triin Uusen-Nacke, Kai Kullerkupp, 'Mis oma, see oma. Mida koolilaps võib teha taskurahaga?' (2023) 10 Juridica 854, 854.

59 For the purposes of this report, it can be concluded that custody cases still lie mainly in the authority of the courts. The only exception being that in case the parents are willing and prepared to resolve a custody case and a dispute concerning the right to have contact in out-of-court proceedings, the termination of joint custody fully or partially and transferring that to one of the parents, as well as amendments to a limited extent are possible upon mutual agreement of the parents in family mediation. However, also in this case, with respect to parental custody, the initiation of family mediation proceedings still lies within the authority of the court. The court refers the case to mediation unless there are valid reasons against it.

2. *Right to have contact*

a) *Concept and agreement concerning the communication arrangement*

60 The right to have contact is constitutionally guaranteed, as stated in § 27(3) of the Constitution. ([123]) The Family Law Act states that whereas a child has the right to maintain personal contact with both parents, both parents have the obligation and right to maintain personal contact with their child (§ 143(1) PKS). The right of contact is a subjective and personal right of the child. ([124]) In the case of the legal separation of parents, the parents agree on the right of the separated parent to have contact with the child (§ 143(2^1) PKS). According to the Family Law Act § 143(2), a parent shall refrain from any action which is harmful to the relationship between the child and the other parent, or which obstructs the raising of the child. A violation can lead to the ex officio intervention of the court (§ 134 PKS) and result in a limitation of parental custody if the well-being of the child is endangered. ([125]) In other words, the parents have an obligation to avoid, as much as possible, endangering the best interests of the child and to find a reasonable solution for maintenance of the personal relationship between the child and the separated parent. ([126]) The parties to a registered partnership contract can agree on a form of communication between the child(ren) of one party and the other registered partner. A registered partner who is not

---

([123]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 6 (in Estonian).

([124]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 6 (in Estonian).

([125]) RKTKm 14.03.2012, 3-2-1-6-12, paras 22–24.

([126]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 6 (in Estonian).

the parent of the other registered partner's child has the right to have contact with the other registered partner's child (§ 15 KooS; § 143(4) PKS). Thus, the registered partner of the parent of the child who is not the parent of the child is entitled to request the arrangement of a communication regulation. (127)

61 Since there is no specific domestic regulation (apart from the general principles regulated in § 143 PKS and the principle of the best interests of the child) on how to reach an agreement concerning the right to have contact, the agreement is subject to general rules of law, is mutually binding and form-free.

b) *Communication agreement in out-of-court proceedings*

62 As a rule, an extra-judicial agreement concerning the right to have contact, except for the parenting plan agreed on in family mediation, is non-enforceable. It may become enforceable if it is reached between the parties as a result of conciliation proceedings conducted in accordance with the rules prescribed by the Conciliation Act by (a) a person to whom the parties have entrusted the task of carrying out the conciliation proceedings, (b) a notary, (c) an attorney-of-law, and the enforceability is declared by the court in accordance with the rules prescribed in § 627^1 and § 627^2 (§ 475(1)TsMS) of TsMS or, in case the conciliation proceedings are conducted by a notary or an attorney-of-law, is authenticated by the notary, together with the debtor's obligation to consent to immediate enforcement (§ 14, § 2 LepS). Upon receipt of an enforcement declaration, the notary conducts an authentication procedure, in accordance with the Notarisation Act, including ascertaining, once more, the essential facts underlying the agreement. (128) In addition, the notary is obliged to verify whether the agreement was concluded as a result of conciliation proceedings (§ 14(4) LepS). These options are, however, rarely used in practice, especially after the Act on State-Funded Family Mediation Services entered into force on 1 September 2022. Since then, parents have been encouraged to undertake family mediation before approaching the court (the option remains).

63 As of 1 September 2022, parents may conclude an agreement concerning the right to have contact with the child in the family mediation provided for by the Act on State-Funded Family Mediation Services (see paras 10ff and 51ff above). The Estonian legislator explains that the purpose of the new regu-

(127) Draft of the Law amending the Family Law Act and of other Acts related to it 207 SE, explanatory notes p 80 (in Estonian).

(128) Draft of the Conciliation Act 487 SE, explanatory notes p 15 (in Estonian).

lation is to offer parents a more flexible, out-of-court option to agree on a communication order between the child and the separated parent, during the early stages of ongoing court proceedings as well as in the phase of implementation of the communication order. (129)

64 Unlike the termination of joint custody, parents may apply for an arrangement of communication regulation through the family mediation proceedings directly and irrespective of whether the parents have filed an application to regulate other related issues. Even if the parents turn to the court, the court most likely directs the parents to the family mediation. If the parents opt for family mediation, the proceedings will be carried out with the intermediation of a family conciliator (§ 4(1) RPLS), as a result of which the parties to the mediation conclude a parenting plan (§ 3(2) and RPLS). In the proceedings, special rules are foreseen for hearing the child. To ascertain the interests of a child concerned by a dispute, they must be given an opportunity during mediation proceedings to express their views. A child must be heard using a method that corresponds to their age and their level of development (§ 10(1) RPLS). The hearing of a child concerned by a dispute may be dispensed with if, within six months preceding the commencement of mediation proceedings, they have been heard – concerning the facts that constitute the subject matter of mediation proceedings – by a child protection worker or another person working with the child, or if, having regard to the child's age or level of development, it is not possible to conduct such a hearing (§ 10(1) RPLS). To avoid a repeated hearing of a child, a family conciliator coordinates with a child protection worker or with other persons working with the child (§ 10(2) RPLS). The Social Insurance Board has a right to check, through the Register of Social Services and Benefits Information, whether the child concerned by the dispute has been heard – within six months preceding the commencement of mediation proceedings and in child protection proceedings – with respect to the facts that constitute the subject matter of the mediation proceedings (§ 10(3) RPLS). Where a child has been heard in the course of child protection proceedings, the Social Insurance Board has a right to acquaint itself with the facts of the matter (§ 10(4) RPLS). The Social Insurance Board transmits, to the family conciliator, relevant particulars concerning the hearing of a child concerned by the dispute (§ 10(5) RPLS).

65 If parents reach an agreement and the parenting plan is signed, it is subject to the approval of the Social Insurance Board (§ 12(1) and (2) RPLS). The Social Insurance Board does not approve a parenting plan when it is manifest

(129) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 5 and 6 (in Estonian).

that what the parties to the mediation have agreed on is not compatible with the best interests of the child, or if the plan or a part of the plan cannot be realised (§ 12(3) RPLS). In such case, the Social Insurance Board invites the parties to continue the mediation sessions and to amend the plan so that it is compatible with the best interests of the child and can be realised (§ 12(3) RPLS). A parenting plan becomes binding upon its approval by the Social Insurance Board (§ 12 (4) and (5) RPLS) and constitutes an enforceable title within the meaning of clause 25 of subsec 1 of § 2 of the Code of Enforcement Procedure (*täitemenetluse seadustik*, hereinafter: TMS ([130])) (§ 12(5) RPLS). No further judicial approval is necessary. ([131]) Where the court has issued an order directing the parties to undertake family mediation, and mediation proceedings have ended, the Social Insurance Board is obliged, within ten business days following the termination of the proceedings, to transmit to the court the particulars concerning approval of a parenting plan or – where mediation has been unsuccessful – a certificate of unsuccessful mediation (RPLS § 14). If mediation has been successful, the court terminates the proceedings without passing judgment (§ 560^1(8), § 428(1)(4^1) TsMS). If mediation has been unsuccessful, the parents have the option to approach the court or, if the circumstances have changed significantly, file a new application with the Social Insurance Board. Where the case was already directed to family mediation by the court, the proceedings will continue in the court (§ 560^1(8) TsMS).

The choice of the body of dispute resolution has, in principle, been left to the **66**
discretion of parents. The Social Insurance Board may refuse to conduct the mediation services on the grounds provided for by the Act on State-Funded Family Mediation Services, including cases where the nature of the case makes it unsuitable for mediation proceedings (for example, cases where the mediation is most likely to fail due to the high level of conflict between the parents or due to the fact that one of the parties to the mediation is in a dominant position ([132])), where litigation is pending on the claim that is to be the subject matter of mediation or where the facts underlying the previous communication arrangement have not changed significantly (§ 9 RPLS; § 560^1(10) TsMS). It should be emphasised that family mediation services are not considered as a mandatory pre-litigation procedure. In matters concern-

([130]) A semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/510042024005/consolide> accessed 19 November 2024.

([131]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 8 (in Estonian).

([132]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 12 (in Estonian).

ing the maintenance of an underage child and communication arrangement, the parents are entitled to choose to resolve their differences in family mediation before approaching the court. If they approach the court, the court accepts the petition for a communication order irrespective of whether the parents have attended family mediation sessions. Mediation sessions are not required to be undertaken as a prerequisite for approaching the court for assistance where one parent has been violent towards the child or the other parent, (133) or where another valid reason is present (§ 560^1(2) TsMS). With respect to the assessment of valid reasons against mediation, the court has full discretion. As an example, a valid reason can exist when the problems of the parents are known to the court from earlier proceedings and the court therefore considers a successful outcome of mediation to be extremely unlikely and it lies within the best interests of the child to ensure a rapid settlement of the dispute by the court. (134) In other cases, the parties are expected to present a certificate of unsuccessful mediation to the court (§ 560^1(2) TsMS), but if there is no such certificate, this does not lead to a termination of the court proceedings. Where the petition was not accompanied by a certificate of unsuccessful mediation or conciliation and no reference was made to the circumstances which indicate the use of violence or other valid reason, the court requests information from the Social Insurance Board on whether mediation or conciliation proceedings have taken place (§ 560^1(3) TsMS). Where, according to information received from the Social Insurance Board, the parents have not undertaken mediation or conciliation proceedings before approaching the court for assistance, and where the circumstances against family mediation are not present, the court accepts the petition and directs the parents to attend family mediation sessions. The court explains to the parents the rules that govern recourse to the Social Insurance Board and sets a time limit for such recourse. The court transmits the order of reference for family mediation to the Social Insurance Board and serves it to the parties (§ 560^1(4) TsMS). If the court directs the case to mediation, the court suspends court proceedings on the petition until the end of the mediation procedure. The court may, at any time, obtain information from the Social Insurance Board concerning the progress of the mediation procedure (§ 560^1(5) and (6) TsMS). The court may, based on the

(133) As a party to, and in accordance with Article 48 of, the Istanbul Convention, Estonia has undertaken an obligation to prohibit mandatory alternative dispute resolution processes with respect to victims of domestic violence.

(134) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 20 (in Estonian).

petition or of its own motion, impose measures of interim relief as interim protection measures. (135)

c) *Communication arrangements in court*

67 In case family mediation is not possible and there is a dispute between the parents, the communication arrangement regulating the right to have contact are determined at the request of a parent by the court (§ 143(2[1]) PKS; 560[1] TsMS). Court proceedings concerning the right to have contact are conducted in accordance with the rules for action-by-petition cases, which end with an enforceable court order (*määrus*), which is, unless the court decides for a later date, valid and enforceable without delay – regardless of whether it has entered into effect – as of the day on which it is notified to the persons concerned (§ 562[1](3) TsMS). In designing the communication arrangement, the court must first and foremost align it with the best interests of the child, taking into account all the circumstances and the legitimate interests of the relevant persons (§ 123(1) PKS). A court may restrict the right to have contact or the implementation of previous decisions made concerning the right to have contact or terminate the exercise of the right to have contact or the implementation of previous decisions made concerning the right to have contact (§ 143(3) PKS), order that a parent has contact with a child in the presence of a suitable third person (§ 143(3[1]) PKS) and allow, prohibit or restrict the contact of a third person to a child in the interests of the child (for example, brothers and sisters, grandparents, foster parents or other person raising the child daily (136)), impose an obligation on a person involved to refrain from any action which is harmful to the relationship between the child and their parents or which obstructs the raising of the child (§ 143(4) PKS). In addition, the court is entitled to appoint a special guardian (§ 209(1) PKS) whose duties may include decisions concerning when and where the child and separated parent meet. (137) The court may also apply these measures ex officio (§ 143(5) and § 134 PKS). The Supreme Court has explained that the purpose of the communication order is to establish and maintain a natural personal relationship between the child and the separated

(135) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 21 (in Estonian).

(136) Triin Uusen-Nacke, Triin Göttig in Commentaries to the Code of Civil Procedure III (Juura 2018) § 558 para 7.6.c (in Estonian).

(137) RKTKm 14.03.2012, 3-2-1-6-12, para 23.

parent ([138]) and grant the child an opportunity to know their parent better and to have a close relationship with them. ([139])

d) *Amendment and enforcement of communication arrangements*

68 In civil procedure, disputes concerning the right to contact are considered as action-by-petition cases (see paras 4f above). Although a court order issued in an action-by-petition procedure that has entered into effect is binding (§ 478 (5) ([140]), § 463 (2) TsMS), a court can amend a decision made earlier if this is required due to significant circumstances which permanently affect the well-being of a child (§ 123(2) PKS, § 480(1) TsMS; § 138(1) PKS). In principle, the same applies to a previous parenting plan approved by the Social Insurance Board. Thus, an agreement or judicial disposition concerning the communication arrangement can be reviewed and amended only if the circumstances have changed significantly. ([141]) If the circumstances underlying a previous judicial disposition which has entered into effect or a previous agreement approved by the Social Insurance Board have not changed significantly, the Social Insurance Board refuses to allocate family mediation services (§ 9(5) RPLS). Where the circumstances have changed significantly, new proceedings are conducted under the same rules described above. ([142]) A parenting plan that has been approved by the Social Insurance Board replaces a previous judicial disposition or an agreement rendered in respect of the child (§ 12(4) RPLS).

69 If a parent violates terms of the the parenting plan during the enforcement proceedings, it is possible to approach the court and file an application for a fine to be imposed on the obligated party, as prescribed in § 179(2) and (2^1) of the Code of Enforcement Procedure: a bailiff files an application with the court on an application of the party seeking enforcement. Instead of imposing a fine on the obligated party for the second time, the party may be given a short-term custodial sentence (§ 179(3) and (3^1) TMS). Coercion can be

---

([138]) RKTKm 14.03.2012, 3-2-1-6-12, para 23.

([139]) RKTKm 5.11.2014, 3-2-1-113-14, para 26.

([140]) Inga Järvekülg, Villu Kõve in *Commentaries to the Code of Civil Procedure II* (Juura 2017) § 457 para 3.5.2 (in Estonian).

([141]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 12 (in Estonian).

([142]) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 22 (in Estonian).

ordered exclusively by the court and only in respect of the party obligated to observe the terms determined in the court order (§ 562^1(2) TsMS). (143)

70 There is no special regulation provided for by law to challenge the parenting plan. The approval of the Social Insurance Board should, in principle, prevent the necessity to challenge it. The mediation proceedings and the validity of parenting plans are subject to the provisions of the Conciliation Act without prejudice to any special rules established by the Act on State-Funded Family Mediation Services (§ 2 RPLS). According to § 29 Conciliation Act, challenging such agreements is limited to any breach of procedural rules which have affected, or might have affected, the content of the agreement. This will occur only in rare cases. (144) According to the explanatory note of the RPLS, a party to unsuccessful family mediation can approach the court under § 29 (2) of Conciliation Act. (145)

71 As mentioned above, the parenting plan approved by the Social Insurance Board constitutes an enforceable title. It should be considered as an 'agreement' in the meaning of Article 2(3) of the Brussels IIb Regulation. For that purpose, during the drafting process of the Act on State-Funded Family Mediation Services, much attention was given to the right of the child to be heard. (146) At the time of writing this report, a respective notification to the European Commission in accordance with Article 103 of the abovementioned Regulation is under preparation.

72 In summary, the court is the competent authority to resolve a dispute regarding the right to have contact where the parents have failed to reach an agreement through mediation services, where such an agreement was not approved by the Social Insurance Board or where other valid reasons against mediation are present. (147) In all other cases, the disagreement will be solved in out-of-court proceedings, either by the own initiative of the parties or by the referral of the court.

F. *Matrimonial Property Regimes*

73 Under Estonian law, spouses or registered partners may select a property regime from those provided in the Family Law Act (§§ 25–48, § 16 Koos).

---

(143) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 24 (in Estonian).

(144) Draft of the Conciliation Act 487 SE, explanatory notes p 17 (in Estonian).

(145) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 17 (in Estonian).

(146) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes pp 9, 10 and 13 (in Estonian).

(147) Draft of the Act on State-Funded Family Mediation Services 438 SE, explanatory notes p 20 (in Estonian).

There is no special law regulating the financial relationship between non-marital and not-registered partners. De facto partners may avail themselves of the options and remedies provided for in contract law or property law. In some – according to court practice, limited (148) – cases, the liquidation provisions of a partnership contract regulated in the Law of Obligations Act (*võlaõigusseadus*, hereinafter: VÕS) can be applied via analogy (§§ 580 VÕS).

74 The legal consequences of marriage, such as mutual obligations to respect, support and provide maintenance to the family, rights and obligations regarding expenses of the family and arising from transactions to satisfy the needs of the family, as well as the scope of the duty of care and transfer of the right to use shared housing in the case of legal separation apply irrespective of the chosen matrimonial property regime (§§ 15–23 PKS; see also § 68 and § 69 PKS). The same applies, with exceptions, to registered partners (§§ 7–14 and § 22 KooS).

75 Spouses or registered partners can choose between three property regimes: (a) community of property (§§ 25 PKS); (b) community of accrued gains (§§ 40 PKS) and (c) separation of property (§§ 57 PKS). The concept of the regimes resembles German models, with some exceptions. Somewhat surprisingly, the most common property regime in Estonia is the community of property (chosen by more than 60% of couples). (149) Prospective spouses may, by agreement, select a property regime before the contraction of marriage by an application for marriage pursuant to the procedure prescribed in the Vital Statistics Registration Act. If partners do not choose a property regime, the provisions of the community of property regime applies (§ 24 PKS). Although civil status officials and notaries have an obligation to explain the legal consequences of the choice of a matrimonial property regime, the scope of such obligation of notaries can be considered wider in its essence (§ 30(1) NotS, § 37(4) PKTS).

76 In addition to the choice of the regime, alterations to each regime – in cases prescribed by law – are possible upon mutual agreement and these must be expressed in the form of a marital property contract (§§ 59 PKS). The spouses may, for example, where they have opted for a community of property, declare single objects or certain types of objects to be joint property or separate property in a marital property contract (§ 27(4) PKS). A marital property contract is also necessary when spouses mutually agree to

---

(148) RKTKo 3.12.2014, 3-2-1-109-14, para 19; RKTKo 24.09.2019, 2-16-12328, para 19.

(149) Draft of the Law amending the Marital Property Register Act and other related Acts 258 SE, explanatory notes p 3 (in Estonian).

terminate the chosen property regime and to establish another (§ 59(1) and (2) PKS). A marital property contract can only have an ex nunc effect. (150) The content of a marital property contract is prescribed by law, leaving, for example, maintenance obligations out of its scope (§ 59 PKS). The marital property contract is entered into by the spouses in person and in notarially authenticated form (§ 60 PKS). A marital property contract is subject to the provisions of the General Part of the Civil Code and other related Acts. Judicial proceedings take place insofar as there is a dispute regarding the validity of the contract. For example, if one of the spouses claims the contract to be void for the reason of contradicting good morals (§ 86 TsÜS).

77 Any changes in a proprietary relationship made on the basis of a marital property contract are entered in the marital property register (§ 61(1) PKS). If spouses alter the chosen property regime or terminate it, the changes have legal effect with regard to a third person only if the changes have been entered in the marital property register as a marital property contract or the third person was aware of the existence of the marital property contract (§ 61(2) PKS). As a rule, entries in the marital property register are made by notaries or civil status officials. Entries are made together with the official procedure of the notary or civil status official no later than on the working day following the date of performing the procedure which serves as a basis for the entry (§ 19(1) AVRS). A notary makes an entry either on the basis of a marital property contract, the registered partnership contract or the property agreement related to a registered partnership contract (§ 19 (1^1) AVRS).

78 The courts are involved if there is a dispute regarding the division of the joint property or concerning the accrued gains. The division of joint property is not possible during the community of property (§ 26(1) PKS). The community of property ends if: (a) one of the spouses dies; (b) a marital property contract is entered into which establishes another marital property relationship prescribed by law; (c) the spouses divorce, or (d) the property relationship is terminated pursuant to § 36 of PKS at the request of one spouse on the basis of a court judgment (§ 35 PKS). Since the community of property regime is often chosen by spouses or registered partners to govern their marital property matters or is applied as a default property regime to a considerable extent, disputes regarding the division of joint marital property and the acknowledgement of a right as separate property are very common in Estonia. In case the partners agree on a classification of assets into joint and separate property and on the division of joint property, a division of the

(150) RKTKo 11.04.2013, 3-2-1-36-13, para 12.

property in out-of-court proceedings is possible. The agreement on the division of joint property is a transaction in the meaning of § 67 of the General Part of the Civil Code, and, thus, subject to general rules of contract law and the General Part of the Civil Code. (151) As long as there is real estate among the assets to be divided, such contract requires a notarially authenticated form and an entry in the land register. The entry in the land register has a constitutive effect (§§ 64^1, 119(1) and 120(1) of the Law of Property Act (asjaõigusseadus, hereinafter: AÕS). If the spouses or registered partners have divided joint property based on a valid contract, the court may no longer divide the property at the request of one of them, unless there is a dispute regarding the validity of the contract. (152)

79 In summary, the courts are involved insofar as there is a dispute (see also chapter 'Division of the estate' below).

G. *Conclusion to Family Law*

80 Under Estonian law, a marriage can be certified upon mutual consent before a civil status official, a notary and the competent ordained minister. A marriage can be dissolved upon mutual consent and upon joint application before a civil status official, a notary and in case of dispute, in contentious proceedings in the court.

81 Motherhood is established ipso iure (a woman who gave birth) or upon the consent of a female spouse to artificial insemination of her female spouse with the gametes of a man who has chosen not to acknowledge legal fatherhood of the child. The court is not involved. The acknowledgement of motherhood and the presumption of motherhood of the female spouse is not acknowledged. The establishment of motherhood is possible in the court, contestation rather not.

82 Fatherhood is established by the presumption of fatherhood of the husband of the mother (ipso iure), by acknowledgement of fatherhood (with the consent of the mother) before the civil status official, establishment of the fatherhood by court or contestation of fatherhood, followed by establishment of fatherhood (action-by-claim proceedings, as a rule), adoption and consenting to the artificial insemination of a woman as partner donation. In the latter case, the court is not involved.

83 Changes in legal motherhood and fatherhood are possible through adoption. The adoption of adults is not possible. The adoption of minors is only

(151) RKTKo 20.06.2001, 3-2-1-88-01; AÕS-Komm I/Varul, § 77, 3.4.2.2.

(152) RKTKo 5.11.2008, 3-2-1-82-08, paras 14, 15, 16; AÕS-Komm I/Varul, § 77, 3.4.2.2.

possible by application to the Social Insurance Board and only a court decides on it in accordance with the rules for action-by-petition cases, whereas the consent of all parties involved is inevitable (the child, the parents/legal guardian, adoptive parent(s)). An adoption can be declared invalid only in the compelling interests of the child by the court, including ex officio, and in exceptional cases only. Partners in a registered partnership, not-married couples, can adopt a child of third persons only in exceptional cases.

84 Joint legal custody is established ipso iure when the parents are married. If the parents are not married, joint legal custody is established, unless they have expressed their wish that only one of them has legal custody (a declaration of both parents before the civil status official is necessary). In other cases, a court must be involved, for example when one parent has sole custody and the other parent applies for the transfer of the custody fully or partially or where the parents have joint custody and one of them applies for transfer of the custody fully or partially, or where the court interferes ex officio because the welfare of the child is in danger (action-by-petition case). Changes in custody arrangements are only possible through the court, except for cases where the parents agree on the termination of joint custody, fully or partially or in one particular question, they have applied to the court and the court has ordered a referral to family mediation together with the dispute concerning the right to contact with the child (and maintenance). In such case, the agreement is subject to the approval of the Social Insurance Board. If the Board finds the agreement in line with the best interests of the child, the agreement becomes binding, but can be changed if the circumstances change significantly.

85 In the case of legal separation of parents, the parents agree on the right of the parents to have contact with the child. The registered partner has the right to have contact with the child of the other registered partner. Requests for the arrangement of the communication order can be filed to the court or to the family mediation services coordinated by the Social Insurance Board (or to the private mediator); however, in most cases, the request filed to the court will be directed to family mediation coordinated by the Social Insurance Board as a voluntary and free of charge alternative authority to the court. The parents' agreement on a communication order becomes binding upon approval by the Social insurance Board and constitutes an enforceable title with no further judicial review or approval. The communication order can be reviewed if circumstances change significantly.

86 In Estonia, there are three marital property regimes: separation of property, community of accrued gains and community of property, the last being the default statutory property regime. The choice of regime is made either on the

application for marriage or expressed in a form of notarially authenticated marital property contract. Alterations to the chosen regime or change of the regime are expressed in the form of a notarially authenticated marital property contract. The courts are involed insofar as a dispute arises between the spouses concerning the validity of the contract, division of the estate or accrued gains (possible only after termination of the regime).

III. Succession law

A. *Sources of succession law and division of competence*

87 In § 32(4) of the Constitution of Republic of Estonia, it is stated that the right to inherit is guaranteed. The right to inherit is connected to the right to property (PS § 32), granting the protection of the property after a persons's death and guaranteeing the transfer of the rights and obligations of the bequeather by way of succession. The constitutionally guaranteed right to inherit includes the right to testamentary freedom, as well as the right of the heirs to become an owner of the bequeather's property. (153)

88 In Estonia, succession law is considered as part of civil law, thus the General Part of the Civil Code rules apply unless otherwise provided for by the acts of succession law. (154) Substantive succession law is regulated in the Law of Succession Act (*pärimisseadus*, hereinafter: PärS). (155) As mentioned above, succession proceedings lie in the competence of the notaries. Despite the long historical experience, such task is not considered as a typical obligation of the notary. Special rules for conducting succession proceedings are largely regulated in the Law of Succession Act. There are no explicit references in the law which would allow the application of the rules of administrative or civil procedure. As the Estonian legislator has explained, notaries conduct succession proceedings as the first instance authority instead of the court (156)

---

(153) Maivi Ots, Aleksei Kelli, Peeter Roosma in Commentaries to the Constitution of Republic of Estonia (in Estonian) § 32 para 29 <https://pohiseadus.ee/sisu/3503> accessed 23 December 2023.

(154) Paul Varul in Commentaries to the General Part of the Civil Code (Juura 2023) before § 1 para 1.

(155) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/522122023009/consolide> accessed 23 December 2024.

(156) Draft of the Law amending the Code of Civil Procedure, the Vital Statistics Act and other Acts 731 SE explanatory notes, pp 1, 9, 13 and 18; Draft of the Law concerning the denunciation of the treaty between the Republic of Estonia and the Russian Federation on legal aid and legal relations in civil, family and criminal matters 362 SE, explanatory notes, p 18 (in Estonian).

and have the same rights and possibilities to gather evidence. (157) Thus, the general regulation for the performance of notarial acts apply, taking into account the nature and purpose of the succession proceedings (see paras 6ff above). Additional specific procedural rules for the performance of notarial acts pursuant to the Law of Succession Act, including the notarial authentication of the succession certificate, can be found in the regulation of the Minister of Justice (*pärimisseadusest tulenevate notari ametitoimingute tegemise kord*, hereinafter: PärSKord). (158) Aspects of succession law relevant in the civil court are regulated in the Code of Civil Procedure. For example, the administration of the estate lies in the competence of the court, for which there is relatively extensive regulation.

Although succession proceedings are conducted by notaries, the making of **89**
the inventory of the estate is delegated to bailiffs. Special rules for drawing up an inventory are regulated in the Code of Enforcement Procedure (*täitemenetluse seadustik*, hereinafter: TMS (159) and in the regulation of the Minister of Justice (*kohtutäituri määrustik*, hereinafter: KMS (160)). Under Estonian law, the bailiff holds a public-law office as a liberal profession in their own name and at their own responsibility, as regulated in § 2 (1) of the Law of Bailiffs Act (*kohtutäituri seadus*, hereinafter: KTS). (161) In other words, the bailiff is, similarly to a notary, self-employed, which means that a bailiff is neither an entrepreneur nor a civil servant (162), but rather an independent holder of office in public law to whom the State has delegated some aspects of the exercise of State power pursuant to the norms of public law (§ 2 (2), § 5 and §§ 6 KTS). (163) The bailiff must be impartial in the performance of their official work and appear trustworthy to any person for whose benefit or in whose respect they perform their functions (§ 2 (3) KTS) and has a duty to maintain confidentiality (§ 11 KTS). Currently, a person

---

(157) Draft of the Law concerning the denunciation of the treaty between the Republic of Estonia and the Russian Federation on legal aid and legal relations in civil, family and criminal matters 362 SE, explanatory notes, p 18 (in Estonian).

(158) No English translation is available. The Act in Estonian can be found at <https://www.riigiteataja.ee/akt/13347627?leiaKehtiv> accessed 8 December 2023.

(159) A semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/510042024005/consolide> accessed 19 November 2024.

(160) No English translation is available. The Act in Estonian can be found under <https://www.riigiteataja.ee/akt/130112018018?leiaKehtiv> accessed 8 December 2023.

(161) A semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/515122023009/consolide> accessed 8 December 2023.

(162) A short introduction to the the rights and obligations of a baliliff in English can be found on the website of the Estonian Chamber of Bailiffs and trustees in bankruptcy, Enforcement Agents, under <https://kpkoda.ee/en/bailiffsinfo/> accessed 30 March 2024.

(163) RKHKp 11.12.2009, 3-3-1-76-09, para 24.

may be appointed a bailiff if they hold the citizenship of a Member State of the European Union, are proficient in oral and written Estonian, are honest and of high moral character, have been awarded an officially recognised Bachelor's degree in law, and have: (1) served as an assistant enforcement agent, attorney-at-law, judge, notary or trustee in bankruptcy for at least one year; or (2) before applying for appointment to the office of enforcement agent, worked in a position requiring an academic or professional higher education in law for at least five years, and have passed the enforcement agent's examination (§ 17 and § 104 KTS). Bankruptcy proceedings regarding the estate are largely regulated by the Bankruptcy Act (*pankrotiseadus*, hereinafter: PankrS). (164)

90 Information concerning wills, succession contracts, estate administration measures, succession proceedings, succession certificates, European Certificates of Succession, disposal of a share of the community of an estate and persons performing procedural acts, heirs and bequeathers, including other information concerning the conduct and transfer of succession proceedings and suspension, continuation and termination of succession proceedings conducted on the basis of Regulation (EU) No 650/2012 of the European Parliament and of the Council is entered in the electronic succession register (§ 176^1(2) PärS). Relevant norms can be found in the Law of Succession Act and in the regulation of the Ministry of Justice (*pärimisregistri pidamise, pärimisregistrisse kannete tegemise ja pärimisregistrist teabe väljastamise kord* (165)). Information entered in the succession register is informative (§ 176^1(1) PärS). Everyone can access the information in the succession register after the death of the bequeather is certified (§ 179(1) PärS). In order to access the information entered in the succession register, knowledge of the given name and surname and personal identification code of the bequeather is sufficient (§ 179(2) PärS). Information entered in the succession register can be accessed at notaries' offices or on the relevant website (§ 179 (2^1) PärS). The succession register is maintained by the Estonian Chamber of Notaries (§ 176(2) PärS).

91 The role of the notary in succession proceedings raises several theoretical and dogmatic questions, which, unfortunately, have been reflected only modestly in the Estonian legal literature. The rights and obligations of a notary in succession proceedings are in no way to be considered as classical and typical for the office. Despite the long legal tradition, the set of norms regulating

(164) Semi-official English translation can be found under <https://www.riigiteataja.ee/en/eli/519122023002/consolide> accessed 23 December 2024.

(165) No English translation is available. For the Estonian version see <https://www.riigiteataja.ee/akt/108032024002> accessed 23 December 2024.

succession proceedings and the rights and obligations of all authorities involved – notaries, courts, bailiffs – and the parties to the proceedings have proven to be insufficient in some aspects. However, even though this may cause uncertainty in procedural rules and lead to inconsistent practice, the paucity of court cases in that respect confirm that there is neither a need nor an intention to shift the competence back to the courts. Until new comprehensive legislation is adopted, the current regulation should be interpreted in accordance with the role of the notary and the purpose of the succession proceedings and to avoid further disputes.

B. *Succession proceedings*

1. *Delegation of competence to the notary*

92 Prior to the Soviet occupation, succession proceedings were conducted by the court and that was also the intention of the Estonian legislator in drafting the Civil Code before the occupation. (166) The competence for such proceedings was delegated to notaries under Soviet law. The first Law of Succession Act of the restored Republic, which entered into force on 1 January 1997, aimed to return the competence to the court but such a shift never took place. The Estonian legislator explained that there is a long tradition of notarial involvement in succession proceedings, the benefit of notarial duty to explain to the heirs who, as a rule, are not familiar with the succession law and therefore need legal protection and refraining from the attempt to change the system helps to save resources of the public sector and decrease the burden of taxpayers who are not involved in succession proceedings. In addition, such a system does not burden judges with additional tasks, which deviate from the main function of the courts and which are successfully performed by notaries. (167)

2. *Acceptance and renunciation of succession and opening of the succession proceedings*

93 In Estonia, a principle of universal succession applies (§§ 1, 2 and 130 PärS). The inheritable rights and obligations of the bequeather transfer to the heir under operation of the law and automatically (§ 4(1) PärS). The heir is entitled to renounce a succession pursuant to the procedure provided for in the Law of Succession Act (§ 4(2) PärS). It is worth mentioning that the

(166) Erki Silvet, 'Pärimisseaduse eelnõu põhijoontest' (1995) 7 Juridica 282, 282–288.

(167) Draft of the Law amending the Law of Succession Act SE 131 explanatory notes, p 2.

system of renunciation is relatively new in Estonia. Until the new Law of Inheritance Act came into force on 1 January 2009, the system of acceptance of succession was applied.

94 In order to submit an application of renunciation or acceptance of the succession, an opening of the succession proceedings by a notary is necessary (see para 97 below). However, the loss of the right to renounce the succession does not depend on it. In Estonia, succession proceedings are opened only upon an application. Registration of death, as regulated by the Vital Statistics Act (§§ 31 PKTS), will be conducted automatically, but the registration of death does not lead to an opening of the succession proceedings. The list of persons eligible to submit an application for opening the succession proceedings is relatively wide. A corresponding notarially authenticated application to a notary may be submitted by an heir, a creditor of the bequeather, a legatee or any other person who has rights in respect of the estate (§ 166(1) PärS). The persons entitled to submit an application for opening succession proceedings may choose any notary to conduct the proceedings at their own discretion. Once the proceedings have been opened, a succession case is handled by the notary by whom the proceedings were opened (§ 166(5) PärS). An application to renounce the succession may also be submitted to another notary who will send the authenticated application to the notary responsible for that case (§ 165(5) PärS). There is no specific time limit foreseen for the opening of succession proceedings.

95 For the acceptance of a succession, no application is required. If an heir does not renounce the succession within the term provided for, the heir is deemed to have accepted the succession (§ 118(1) PärS). However, if the heir wishes, they may submit, before the expiry of the deadline, an application for acceptance of the succession to a notary and the notary authenticates it (§ 118(2) PärS). In order to renounce a succession, an application of renunciation is submitted to the notary and the notary authenticates the application (§ 118(3) PärS). General rules on declarations of intention apply, including rules concerning limited active legal capacity (§§ 8 TsÜS). Thus, a legal representative of an heir with limited active legal capacity is required to present the notary with a prior consent of the court for renouncing the succession (§ 188(1)(2) PKS). Consent of the court is not required if a child's right to an estate has arisen as a result of renunciation of succession by their parent who has the right of representation with respect to the child (§ 131(2) PKS). However, succession cannot be accepted or renounced conditionally or partially (§ 122 PärS). The application is irreversible – a succession can no longer be renounced after acceptance unless otherwise provided by law; a succession can no longer be accepted after renunciation (§ 116(2) PärS). If a person entitled to inherit renounces a succession, the person who would

have inherited if the renouncer had died before the opening of the succession is entitled to inherit (§ 124(1) PärS). In this case, the notary is obliged to inform the person entitled to inherit (§ 13(5) PärSKord). The application of renunciation or acceptance of the succession may be void only on the grounds set out by the Law of Succession Act and only if declared invalid by the court (§ 123 PärS). A court may declare the acceptance or renunciation of a succession invalid on the bases provided for in §§ 92, 94 and 96 of the Act on the General Part of the Civil Code. However, according to the special regulation in the Law of Succession Act, an heir may apply for the acceptance or renunciation of a succession to be declared invalid due to an error (§ 92 TsÜS) only when they accept or renounce a succession due to an error regarding whether the successor succeeds by intestate or testate succession or by succession contract (§ 123(2) PärS). The Supreme Court has explained that the fact that a person was not aware of the content of the estate, including not knowing that an obligation belongs to the estate, does not justify the invalidity of the application. The Court also referred to the right of the entitled person to receive, before acceptance or renunciation of a succession, information concerning the content of the estate and the content of the will or succession contract from a court, notary or other person who possesses the estate, the will or succession contract, as stated in § 121 of the Law of Succession Act. (168)

96 The deadline in which the succession can be renounced is relatively short – three months (§ 119(1) PärS). This should guarantee legal clarity as to who is the heir as quickly as possible so that the interested persons can start to exercise their rights. (169) The term shall commence from the moment the successor becomes aware, or ought to have become aware, of the death of the bequeather and of their right of succession (§ 119(1) PärS). It can be prolonged due to legal complexity of a particular case, such as uncertainty concerning the applicable law and jurisdiction. (170) Thus, as a rule, for the beginning of the term, no official announcement or notification is required. Neither does it depend on the opening of the succession proceedings. On the basis of an application of a person entitled to succeed, the notary may extend the term or specify a new term if the person entitled to inherit allowed the term to expire with good reason and the other persons entitled to succeed do not object to it. In the case of a dispute, the matter is adjudicated by a court

(168) RKTKo 24.10.2018, 2-16-2978, para 27.

(169) Draft of the Law of Succession Act 56 SE, explanatory notes p 3, <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/bf9178a0-a068-736c-7b0f-654c7b4fa81f/P%C3%A4rimisseadus> accessed 23 December 2024 (in Estonian).

(170) RKTKo 09.10.2019, 2-17-12712, p 22.

(§ 119(2) PärS), which decides whether there is a sufficiently good reason to extend the deadline. (171)

3. *The purpose and nature of the succession proceedings*

97 The purpose of succession proceedings is to establish who the heir is and to avoid further disputes. Legal clarity is also in the public interest. Since the estate passes on to the heir under operation of the law, the heir acquires the rights and obligations of an heir already before and regardless of the succession proceedings. Therefore, the succession proceedings are initiated mainly for practical reasons – to receive a succession certificate and to be able to prove the rights of an heir to third persons, such as the creditors and debtors of the bequeather, before the land register (172), commercial register (173), credit institutions, etc. Thus, the application for succession proceedings is mainly left to the discretion of the heir and other persons who have rights in respect of the estate (§ 166(1) PärS). A possibility to receive information, renounce the succession, apply for an inventory as well as the regulation in § 65^1 (5) Land Register Act (*kinnistusraamatuseadus*, hereinafter: KRS) (174) can be seen as a legal motivator for opening the proceedings: the land registry department may require the new owner of a real right or the executor of will to submit a registration application and the documents necessary for a correction of the entry to be made in the land register under the threat of a fine. While the certificate of succession has proven to be unavoidable in practice, the Land Register Act is basically the only law explicitly prescribing the certificate as exclusive proof of universal succession (§ 36^1(3) KRS, see also § 18 TMS).

4. *The rights and obligations of a notary in succession proceedings*

98 Upon receipt of the application, the notary determines whether the applicant is entitled to open the proceedings and whether there is jurisdiction to conduct succession proceedings (§ 165 (2), (3), (3^1) PärS) and confirms, via

---

(171) Draft of the Law of Succession Act 56 SE, explanatory notes p 2, <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/bf9178a0-a068-736c-7b0f-654c7b4fa81f/P%C3%A4rimisseadus> accessed 23 December 2024 (in Estonian).

(172) More information can be found on the website of the Centre of Registers and Information Systems under <https://www.rik.ee/en/e-land-register> accessed 1 April 2024.

(173) More information can be found on the website of the Centre of Registers and Information Systems, under <https://www.rik.ee/en/e-business-register> accessed 1 April 2024.

(174) A semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/519052014004/consolide> accessed 23 December 2024.

the succession register, that succession proceedings in the same succession case have not already been opened by another notary (§ 166(4) PärS). § 165(2) and (3) PärS states that succession proceedings are conducted by an Estonian notary if the bequeather's last residence was in Estonia. If the last residence of a bequeather was in a foreign State, an Estonian notary conducts succession proceedings only with respect to property located in Estonia provided that the succession proceedings cannot be conducted in the foreign State or the proceedings conducted in the foreign State do not include the property located in Estonia or the succession certificate prepared in the foreign State is not recognised in Estonia. According to § 165 (3^1), however, succession proceedings are conducted by an Estonian notary if, pursuant to Regulation (EU) No 650/2012 of the European Parliament and of the Council 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 (OJ L201/107, hereinafter: Succession Regulation), the succession proceedings are required to be conducted in Estonia by applying Articles 4–15 and 17 of the Succession Regulation. Thus, § 165(2) and (3) PärS apply if the conducted succession proceedings fall outside the scope of the Succession Regulation. A succession certificate prepared in a foreign State is recognised in Estonia pursuant to the Succession Regulation. If the Regulation is not applicable, a succession certificate prepared in a foreign State is recognised in Estonia if the procedure for the preparation and the legal effect thereof are comparable to the provisions of Estonian law concerning succession certificates. In such case, the provisions of the Code of Civil Procedure concerning the recognition of judgments of foreign courts apply to recognition. Recognition is adjudicated by the Harju County Court. The respective provisions also apply to the recognition of other succession documents (§ 165 (3^1), (4) and (4^1) PärS). Once the proceedings have successfully opened, the notary makes an entry concerning the opening of the proceedings to the succession register without delay (§ 166(4^1) PärS) and publishes a public notice of the opening in the official (electronic) publication Ametlikud Teadaanded not later than two working days after initiation of the succession proceedings (§ 168(1) PärS).

99 In short, the tasks of the notary in succession proceedings can be described as follows: (a) verification of the causa of the succession (§ 9 PärS); (b) verification of the person of the heir, in case there is more than one heir, also their share of the estate; (c) gathering information concerning the rights and obligations attached to the estate to the extent prescribed by law; (d) cooperation tasks concerning the inventory, if necessary; (e) giving legal advice to the parties to the proceedings, especially explaining the meaning of

a declaration or a transaction, legal consequences and alternatives and assuring that the rights of inexperienced or incompetent parties are not violated; (f) other tasks, including gathering and sharing information (§ 167, § 168, § 121 PärS, § 17(2) and § 23 (2) PärSKord), including gathering declarations concerning the acceptance of the inheritance and deadline for the renunciation, informing persons entitled to inherit, legatees and potential persons entitled to a compulsory portion, making inquiries at the request of the parties to the proceedings beyond the tasks to be performed ex officio (§ 167(4) PärS) and entering information in the succession register (§ 176^1 PärS).

100 Verification of the causa of the succession and the heirs includes, among other duties, a verification of the existence of the will (§ 167(1) and (1^1), § 166, §§ 19, §§ 89 PärS) and the inheritance contract (§§ 95 PärS) and the preliminary assessment of the validity of it (§ 171(1) PärS). For example, for verification of the correctness of a will signed in the presence of witnesses, a notary has the right to hear the witnesses (§ 167(5) and § 23 PärS) or, if there is a domestic will without a testator's signature, the notary does not base their judgement as to who is an heir on a document which is clearly void (§ 24 PärS), as this is the fact essential for performance of a legally correct transaction in the meaning of TõS § 18(1). In practice, the question of whether the testator intended to name an heir or a legatee often arises. In these cases, the person of a universal successor of the bequeather cannot be established without taking a position on that matter. Therefore, an interpretation of the will ([175]) before authenticating a certificate of succession or a draft of it, which lies within the competence of a notary, is necessary. The notary determines the persons who are, according to the best judgement of the notary and based on the evidence gathered during the proceedings, entitled to submit an application of renunciation or acceptance of the succession and authenticate their applications (§ 119, § 116(2) PärS), including the establishment of the fact that the term for renunciation of the succession has not expired (§ 166(2) PärS) or extension of it is justififed (§ 119(2) PärS; § 14 PärSKord).

In order to establish a person's right to inherit, the notary gathers information about the intestate heirs based on the data in the population register and

([175]) The criteria for limitation can be found at: Tiina Mikk (Karm), 'Annak pärandvarast eseme omandamise alusena' (Master thesis, Tartu University 2010) 131–132; RKTKo 24.10.2018, 2-16-2978, para 21.

in the application for succession proceedings (§ 166(3) PärS) (176), based on the data received as a result of the public notice concerning the opening of the proceedings or call procedure for identification of the heir and publishing a notice in the official publication Ametlikud Teadaanded, if the notary finds the latter necessary (§ 169 PärS). Whereas the data in the population register has legal effect, the notary may, if necessary, take into account information in other databases and archives, including the National Archives of Estonia. The notary provides information about ongoing proceedings to persons who are known to the notary and are entitled to inherit or are entitled to other rights or obligations under the last will of the bequeather, such as legatee or executor of the will, as well as intestate heirs who might have the right to inherit (§ 168 PärS) to give them a possibility to contest the validity of the will. The notary is entitled to request a written confirmation or documents or copies of them concerning information about the heirs, the shares of the estate and circumstances related to the estate from the heir, legatee and any other person who has rights in respect of the estate (§ 18(1) PärSKord). If the declarations of the participants differ significantly or are contradictory, the notary is entitled to summon all the participants and to draw up a protocol (§ 18(1) PärSKord). The notary is entitled to take a written statement given under oath (§ 32(3)(6) NotS; § 37 TõS). It can be argued that the notary's authority to gather evidence is limited, especially compared to the authority of a court. The notary does not have the right to impose fines on parties to the succession proceedings if they fail to provide necessary information or documentation. However, submission of incorrect information to a notary is punishable by a pecuniary fine or up to two years' imprisonment, as stated in § 281 of the Penal Code (*karistusseadustik*, hereinafter: KarS (177)). The Ministry of Justice is of the opinion that, in order to ascertain the existing legal filiation relationship between the potential heirs, the notary is, in case the data in the population register and archives is insufficient, entitled to use all evidence which can be used in the civil procedure. (178) It can be concluded that the above mentioned rights

(176) The initiator of succession proceedings provides information in the application for succession proceedings concerning the opening of the succession, the successors and potential recipients of compulsory portions, the wills and succession contracts and the bequeather's obligations known to the initiator of the proceedings (§ 166(3) PärS).

(177) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/508042024002/consolide> accessed 23 December 2024.

(178) A letter of response from the Ministry of Justice to the Chamber of Notaries 11 Octcober 2018 no 10-4/5746-2. Available at the Public Register of Documents of the Ministry of Justice online at <https://adr.rik.ee/jm/dokument/6016865> accessed 8 April 2024 (in Estonian); draft of the Law concerning the denunciation of the treaty between the Republic

and obligations of a notary go beyond the traditional tasks of the notary and, in many respect, resemble the tasks of a court.

101 With respect to the overview of the estate, the notary has limited rights and obligations – inquiries which notaries are obliged to make to the registers and credit institutions are listed in the Law of Succession Act and in the regulation of the Minister of Justice (PärSKord), but the result of these inquiries is not sufficient to cover the whole estate (§ 167 PärS). A more detailed overview can be acquired through an inventory of the estate. Although the purpose of the inventory under Estonian law is to limit the liability of the heir to the value of the estate (§ 143(1) PärS), it may also be used for the purpose of acquiring an overview of the estate (§ 139(5) PärS). However, the inventory is drawn up only after acceptance of the inheritance (§ 137(1) PärS). The inventory is a voluntary option for the heir, with few exceptions (see paras 126ff below). Therefore, the inventory is not necessarily part of the succession proceedings. If an application for an inventory is submitted to the notary, the notary decides whether the inventory is justified with a notarial decision (§ 16(4) and (6) PärSKord) and in case the claim of inventory is justified, appoints a bailiff who will be responsible for conducting the inventory (§ 138 PärS), unless the term for such an application has expired or an inventory has already been drawn up during the administration proceedings of the estate (§ 139(6) PärS) or by the application of another heir (§ 137(7) PärS) and there is no particular reason to draw up a new inventory (§ 139(6) and § 139(7) PärS). Once the inventory of the estate is complete, it is submitted to a notary. The notary has the right to send the inventory back to the bailiff in order to correct any deficiencies in it (§ 26^5 KTM). Making an inventory is deemed to be completed after submission of the inventory of the estate to a notary (§ 141(2) PärS). If the notary becomes aware of the necessity to apply estate administration measures, the notary is required to inform the court (§ 111(6) PärS), which may initiate administration proceedings ex officio (§ 111(2) PärS.

102 Succession proceedings end with the authentication of the certificate of succession. According to the Law of the Succession Act, a notary authenticates a succession certificate if sufficient proof is provided concerning the right of succession of a heir and the extent thereof (§ 171(1) PärS). This means that the notary decides whether the proof for verification of the universal succession is sufficient. Thus, the notary, as an impartial authority to whom the State has delegated the duty of ensuring the security of legal relationships and prevention of legal disputes (§ 2(1) NotS), is entitled to

---

of Estonia and the Russian Federation on legal aid and legal relations in civil, family and criminal matters 362 SE, explanatory notes, p 18 (in Estonian).

determine the heirs in accordance with the evidence gathered during the succession proceedings if, by the assessment of the notary, the right to inherit of the heir or co-heir has been sufficiently proven, there is no reasonable doubt that the data on the certificate is correct and, by allowing the circulation of such a public document, a potential heir's rights would not be damaged. In addition, the notary is not obliged to present the certificate for review or approval to the applicant prior to the authentication (§ 18(3) PärSKord). This shows that the notary makes an independent decision concerning the universal successor and is not bound by the applications made by the parties to the proceedings, or by the parties' assessment of the circumstances. The notary is also entitled to authenticate the certificate of succession indicating the information which has become known to the notary in the succession proceedings (§ 171(6) PärS), including cases where the acceptance of the succession follows from the fact that the term for renunciation has expired irrespective of whether this person has ever visited the notary's office in person or submitted an application of acceptance of the succession or applied for the certificate. The right of the parties to the proceedings to approach the court remains (see paras 106f). As can be seen from the above, the tasks of the notary in establishing the facts and gathering evidence in order to establish the heir are rather wide. The notarial verification of the heir is not just a formal check but substantial. The notary verifies the legal situation concerning the particular succession case in order to be able to authenticate the certificate of succession as prescribed by law. Therefore, it may be argued that the principle of ex officio examination recognised in the civil procedure applies also within the notarial succession proceeding – to the extent to which it complies with the role of the notary and the purpose of the succession proceedings. This means that the role of the notary in succession proceedings is not clearly distinguishable from the role of the court.

If there is a dispute between the parties to the succession proceedings or there are other circumstances which might be, according to the assessment of the notary, later disputable in court, dispute resolution does not, in principle, lie within the competence of the notary, but the court. The notary is entitled to postpone the performance of a notarial act in the case of collection of supplementary information or documents, including an expert opinion, until the receipt of them; at the request of an interested person who wishes to contest a fact or right concerning the content of the notarial act in a court, on one occasion, for up to ten days (§ 38(1) NotS). The performance of a notarial act is suspended on the basis of a court ruling on securing an action or on provisional legal protection until the prohibition ceases to exist (§ 38(2) NotS). It is the view of the Ministry of Justice and scholars that the notary,

103

in principle, has the right and the obligation to make a decision concerning the universal successor. Moreover, the Ministry of Justice has explained that since the competence to conduct succession proceedings has been delegated to notaries, notaries are competent to settle a succession case even when there is no public data concerning the filiation or there is a dispute concerning the validity of the will. The law does not provide the notary a right to delegate the ongoing succession case directly to the court. Therefore, the notary is obliged to settle the case despite the fact that the circumstances are unclear or there is a dispute. ([179]) If the right to inherit is not successfully established in the course of the succession proceedings, the law also provides for an option to authenticate a certificate indicating the information concerning the persons who may have the right to accept the succession (§ 171(6) PärS). The practical value of such certificate is, however, low.

104 If the notary has doubts, they are entitled to prepare a draft succession certificate and set a later term for authenticating the certificate. A notary authenticates a certificate according to the prior draft if they do not receive a court ruling prohibiting the authentication of the certificate by the date of authentication of the certificate (§ 174 PärS). The purpose of such regulation, as the Ministry of Justice has stated, is to avoid the circulation of incorrect certificates of succession and to give the parties to the succession proceedings who do not agree with the judgment of the notary the right to approach the court (PärS § 174 lg 2). ([180]) However, even if the notary does not receive a court ruling prohibiting the authentication of the certificate of succession at this stage and the notary authenticates the certificate of succession, this does not prevent the parties from filing a claim to the court at a later stage. In order to establish the existence or non-existence of the right to inherit, a person may raise a claim in contentious proceedings. ([181]) If the dispute is

---

([179]) A letter of response from the Ministry of Justice to the Chamber of Notaries 11 October 2018 nr 10-4/5746-2. Available at the Public Register of Documents of the Ministry of Justice online at <https://adr.rik.ee/jm/dokument/6016865> accessed 8 April 2024 (in Estonian); draft of the Law concerning the denunciation of the treaty between the Republic of Estonia and the Russian Federation on legal aid and legal relations in civil, family and criminal matters 362 SE, explanatory notes, p 18 (in Estonian).

([180]) A letter of response from the Ministry of Justice to the Chamber of Notaries 11 October 2018 nr 10-4/5746-2. Available at the Public Register of Documents of the Ministry of Justice online at <https://adr.rik.ee/jm/dokument/6016865> accessed 8 April 2024 (in Estonian); draft of the Law concerning the denunciation of the treaty between the Republic of Estonia and the Russian Federation on legal aid and legal relations in civil, family and criminal matters 362 SE, explanatory notes, p 18 (in Estonian).

([181]) RKTKm 12.01.2022, 2-19-1719, paras 18-23; RKTKo 16.02.2022, 2-19-10779, para 21; Draft of the Law amending the Law of Succession Act and of other Acts related to it 113 SE, explanatory notes p 12.

resolved in court, the parties to the proceedings before the civil court are determined by the draft of the succession certificate: the person entitled to inherit according to the certificate is the defendant and the person contesting that right is the claimant. In addition, the Supreme Court has acknowledged the possibility to prohibit a notary from performing a notarial act – authentication of the certificate of succession – in the course of the administration of the estate as a measure to secure an action provided for in the Code of Civil Procedure due to the dispute on who is the heir. (182)

105 Relating to the overview of the succession proceedings, it is worth mentioning that the division of the estate or fulfillment of a legacy or a compulsory share are not a mandatory part of succession proceedings. Such transactions may be undertaken upon application by the heir before, during and after the succession proceedings, keeping in mind the advantage of legal effect of the succession certificate. The law is slightly unclear with respect to the application of provisions concerning acceptance or renunciation of the inheritance also to acceptance and renunciation of a legacy. (183) This, however, does not change the fact that under Estonian law, a legacy is a damnation legacy (*legatum per damnationem*) creating a legal relationship in accordance with the law of obligations and giving the entitled person a claim arising thereof by operation of law. The legacy does not give the entitled person automatic ownership over the thing or a right designated to them by the bequeather. (184) Also a right to a compulsory portion, like a legacy, creates a legal relationship between the entitled person and the heirs and the obligation arising thereof is, under Estonian law, directed at the receipt of money the amount prescribed by law (§ 104(4) and (5) PärS). Under Estonian law, a compulsory share does not grant a right in rem, but an obligation. Concerning the legacy and compulsory share, a notary is entitled to authenticate a certificate of legatee (§ 172 PärS) and certificate of recipient of compulsory portion (§ 173 PärS). In addition, a notary is entitled to authenticate a certificate of executor of will (PärS § 87). Unlike the regulation for the certificate of the succession, these three certificates are issued only upon application.

5. *Contents, effects and revocation of certificates of succession*

106 The certificate of succession under Estonian law is non-constitutive in its nature. The estate passes as a whole on to the heirs under operation of the

(182) RKTKm 24.09.2014, 3-2-1-68-14, para 13 and 15.

(183) Tiina Mikk (Karm), 'Annak pärandist eseme omandamise alusena. Magistritööst 12 aasta hiljem' (2022) 8 Juridica 587, 595.

(184) Tiina Mikk (Karm), 'Annak pärandvarast eseme omandamise alusena' (Master thesis, Tartu University 2010) 53.

law, not under the certificate of succession (§ 2 and § 4(2) PärS). (185) The certificate does not create or terminate property rights (186) and it is not a prerequisite for the estate to pass on to the heirs (187). Certificates of succession prove persons' right of inheritance, the extent of their share of the estate (§ 171(2) PärS) (188) and the limitations or lack of limitations of the heirs' rights, such as an appointment of a subsequent heir or an executor of the will (PärS § 171(3) and (4) PärS). (189) According to § 171(5) PärS, the certificate of succession also includes information regarding the bequeather's spouse or registered partner and the marital property regimes. The law does not require a list of items belonging to the estate to be recorded on the certificate of succession, the reason being the application of the principle of universal succession. Thus, the certificate is proof of a universal successor, not of the content of an estate, even though in practice, sometimes, a list of objects belonging to the estate is included in the certificate.

107 Although it is not explicitly provided for by law, the succession certificate rather has the presumption of legitimacy, despite the modest doubts expressed in the legal literature. (190) An assumption of its correctness is not explicitly regulated. It can be concluded from TõS § 1(5) that there is a presumption that notarial instruments and notarial notations which are prepared within the competence of the notary and comply with the requirements for formal validity are correct. The Supreme Court is of the opinion that the succession certificate, as a publicly trusted document, creates a presumption of the existence of the right of the inheritance (thus, also of a property right of the heir). This presumption, however, is rebuttable if it is not in accordance with the actual legal situation. (191) If the actual legal situation is claimed to be different, the notary assesses the correctness of the certificate. Only if a notary refuses to revoke the certificate may the person who has a legitimate interest demand revocation of the certificate in court (§ 175(4) PärS). If the incorrectness of a succession certificate, certificate of legatee, certificate of recipient of compulsory portion or certificate of executor of will becomes apparent after the authentication thereof, the notary revokes it on the basis of a notarially authenticated application of the interested person or on their own initiative (§ 175(1) PärS). An application

---

(185) RKTKo 09.10.2019, 2-17-12712/24, p 15.

(186) RKTKo 05.11.2008, 3-2-1-86-08, p 16.

(187) RKTKo 13.05.2020, 2-17-13190, p 13.

(188) Villu Kõve in Commentaries to the Law of Property Act (Juura 2014) § 64^1 para 3.7.3.1.

(189) Tiina Mikk (Karm), *Pärimisõigus* (2nd edn, Sisekaitseakadeemia 2012) 113.

(190) Tiina Mikk (Karm), *Pärimisõigus* (2nd edn, Sisekaitseakadeemia 2012) 115–116.

(191) RKTKo 08.02.2006, 3-2-1-121-05, para 36.

to revoke a certificate can be filed to a notary within three years after the basis of invalidity becomes, or should have become, known, but not more than 30 years after the opening of the succession (§ 175(3) PärS). If the notary finds the claim justified, the notary conducts new succession proceedings upon the revocation of a certificate. If an entry concerning the heir has been made in the land register on the basis of a revoked certificate and it may be presumed that correction of the entry is possible, the notary submits an application for entry of an objection in the land register (§ 175(2) PärS). If a notary refuses to revoke the certificate, the person entitled to approach the court can file an application to revoke a certificate against the person who is an entitled person according to the certificate through contentious litigation and the case is heard under the same procedural rules as any other claim in contentious civil proceedings (§ 175(4) PärS). Since the certificate of succession does not create the right to inherit, but is proof of the actual legal situation already created, the person not listed on the certificate is not deprived of their right to inherit. Due to the application of the system of renunciation of succession, the only possibility where the entitled person can be deprived of their right to inherit is their declaration of intent not to inherit, provided that the term for the renunciation has not expired. The person entitled to inherit in accordance with the actual legal situation is entitled to a corrected certificate of succession. The Law of Succession Act states that if the right of succession of a person is established by a court decision substituting a succession certificate, all the information to be indicated in the succession certificate pursuant to law shall be indicated in the conclusion of the court decision (§ 171(7) PärS).

6. *European Certificate of Succession*

108 In order to ensure a smooth implementation of the Succession Regulation, the Estonian legislator has decided to extend the domestic competence of the notaries by respective amendments to the Law of Succession Act, the Notaries Act, the Notarisation Act and the Code of Civil Procedure. As a result, Estonian notaries are entitled to issue a European Certificate of Succession, which, similarly to the domestic certificate of succession, is to be notarially authenticated (§ 171(1^1) PärS). The Estonian legislator finds the highest form-requirement (notarial authentication) justified because it is important that the intention of the parties and the facts which are essential are ascertained; the meaning, legal consequences and alternatives are explained to the applicant, including the possibility to prove a person's right of inheritance with a domestic certificate of succession or a court decision; the declaration of intent of the parties is entered into the certificate clearly and

unambiguously and errors and doubts are precluded and the rights of inexperienced or incompetent parties are not violated. Thus, all the three functions – to warn, to explain and to prove – of the highest form-requirement are met. (192) Due to the fact that under Estonian law the legatee only has a claim of an obligatory nature against the heir, the Estonian legatee is not entitled to submit an application for a European Certificate of Succession. (193) Issuing a certificate concerning the legal force of a notarial instrument and issuing a certificate concerning the preparation of a notarial instrument to be executed in Estonia on the basis of the Succession Regulation is a notarial act in the meaning of the Notaries Act (§ 29(3)(8[1]) NotS). Information concerning European Certificates of Succession is entered in the succession register (§ 176[1](2) PärS). The registrar – the Estonian Chamber of Notaries (§ 176(2) PärS) – responds to inquiries from the register of wills of a foreign State, inquiries from the competent authority of a foreign State on the basis of Article 66(5) of Regulation (EU) No 650/2012 of the European Parliament and of the Council and other inquiries in the case of which a legal basis for obtaining the information exists but there is no competent authority to release the information (§ 179(2[2]) PärS).

7. *Estonian notary as 'court' in the meaning of the Succession Regulation and Taking of Evidence Regulation (recast)*

109 In 2016, when the amendments to the Law of Succession Act concerning the Succession Regulation were adopted, the Estonian legislator was of an opinion that Estonian notaries are not courts in the meaning of the Succession Regulation. The Estonian legislator explained that, in general, the latin-type of notaries do not meet the definition of a term 'court' in the meaning of the Succession Regulation. It was argued that the Estonian notaries meet the criteria of Article 3(2) the Succession Regulation with one exception – their decisions do not have a similar force and effect as a decision of a judicial authority on the same matter (Article 3(2)(b) of the Regulation). Since the decision of an Estonian notary made in the course of succession proceedings does not have a *res judicata* effect, the Estonian legislator found that the jurisdiction rules of Succession Regulation do not apply directly nor

(192) Draft of the Law amending the Law of Succession Act and of other Acts related to it 113 SE, explanatory notes p 7.

(193) Draft of the Law amending the Law of Succession Act and of other Acts related to it 113 SE, explanatory notes p 6.

are they binding for Estonian notaries. (194) However, in order to avoid parallel proceedings in different countries and circumvention of documents (possibly with a variating content), the Estonian legislator decided to extend domestically the rules of Articles 4–15 and 17 of the Succession Regulation to notaries in Estonia. As a result, Estonian notaries are entitled to assess the jurisdiction to conduct succession proceedings on the same basis as the authorities and legal professionals who conduct succession proceedings in other States and meet the criterion of the term 'court' in the meaning of Article 3(2) of the Succession Regulation. (195) Leaving aside the abovementioned blurring role of an Estonian notary, it can be questioned whether the argument that the Estonian certificate does not have a *res judicata* effect is as strong as alleged, keeping in mind that even succession certificates issued by courts in other countries, including Germany, do not have a *res judicata* effect.

110 In 2023, while drafting the amendments to the Succession Act in order to simplify cross-border succession proceedings in taking evidence, the Estonian legislator decided to supplement the law with a regulation in § 165^1 PärS, which clearly states that the Estonian notary is deemed to be a court within the meaning of Article 2(1) of Regulation (EU) 2020/1783 of the European Parliament and of the Council on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (OJ L405/1). The legislator explained that in Estonia, notaries have been given the authority to conduct succession proceedings as a first instance authority instead of the court and are therefore covered by the extended definition of 'court' within the meaning of the Regulation. (196) Although the right of the notary to apply the above-mentioned Regulation and gather evidence was deemed to derive from the law even without the above-mentioned supplementary norm, respective amendments to the Law of Succession Act have been adopted for the sake of legal clarity. However, the Estonian notary is entitled to request assistance from the court of another Member State but is not obliged to respond to a request from a court of

(194) A position that notaries cannot be considered as 'courts' in the meaning of the Succession Regulation, is also represented in the legal literature: Eve Põtter, 'Euroopa pärimismääruse kohaldamise praktika' (2021) 9 Juridica 676, 681.

(195) Draft of the Law amending the Law of Succession Act and of other Acts related to it 113 SE, explanatory notes p 5.

(196) Draft of the Law amending the Code of Civil Procedure, the Vital Statistics Act and other Acts 731 SE explanatory notes, p 9.

another Member State. The latter obligation remains with the courts. (197) Estonian notaries are considered as courts in the meaning of the Regulation 2020/1783 only with respect to succession proceedings. (198) Estonia has notified the European Commission in accordance with Article 31(3) of the Regulation. (199) The Estonian notary is entitled to issue a European Certificate of Succession.

C. *Administration of the estate by the court*

111 Under the Estonian Law of Succession Act, administration of the estate may be ordered by the court if (a) the heir is unknown or there is a dispute on who is the heir and the preservation of the estate is endangered; (b) in the case of co-heirs, one or many of them are unknown and there is a need to dispose of objects belonging to the estate; (c) a failure to implement the management measures may endanger satisfaction of a claim belonging to the creditor of the bequeather or other persons listed in the law out of assets of the estate (§ 111 PärS). (200) Under certain circumstances, the administration of the estate may also be ordered after acceptance of the succession by the heirs, especially if the activity of a heir or the heir's proprietary situation may endanger the preservation of the estate and satisfaction of the claim out of assets of the estate (§ 111(5) PärS). The administration of the estate may be ordered, supervised and terminated only by the court, in accordance with the rules in action-by-petition proceedings regulated in the Code of Civil Procedure, either upon an application or ex officio. In order to enable the court to act on its own initiative, the obligation to inform the court of the necessity to impose the administration of the estate is provided for in the Law of Succession Act for State and local government agencies, notaries and bailiffs (§ 111(6) PärS). There are no limitations as to who may inform the court about the necessity to impose the administration of the estate. The main purpose of the administration of the estate is to maintain the estate until the owner of the property is established and it will not be granted if the value of the estate is not sufficient to compensate for the expenses related to the

(197) Draft of the Law amending the Code of Civil Procedure, the Vital Statistics Act and other Acts 731 SE explanatory notes, p 13.

(198) Draft of the Law amending the Code of Civil Procedure, the Vital Statistics Act and other Acts 731 SE explanatory notes, p 9.

(199) Draft of the Law concerning the denunciation of the treaty between the Republic of Estonia and the Russian Federation on legal aid and legal relations in civil, family and criminal matters 362 SE, explanatory notes, p 18 (in Estonian).

(200) Tiina Mikk (Karm), Vaike Murumets, Urmas Volens in *Commentaries to the Code of Civil Procedure* (Juura 2018) before § 584 para 1.2 and 2.2.7.

administration or there is no justified need for State-supervised interference, for example where the estate is being managed by an executor of a will or a trustworthy candidate of a heir (§ 81(3) PärS). (201)

112 There are two types of estate administration measures: (a) appointment of an administrator of the estate and (b) implementation of measures to secure an action provided for in the Code of Civil Procedure, such as depositing an object belonging to the estate (202) or prohibiting the notary from authenticating the certification of succession (203) (§ 110(2) PärS; § 378 TsMS). If an administrator of the estate is appointed, they are entitled to manage the estate and, in principle, to dispose of objects belonging to the estate to the extent necessary to fulfil the obligations related to the estate (§ 112(4) PärS; § 589 TsMS). As a result, the heir loses the corresponding authorities, and as a rule, until the administration is terminated (§ 112(5) PärS). The rights and obligations of the administrator are provided for by the Law of Succession Act, whereby the court has a wide authority to determine the rights and obligations of the administrator. The court also has a wide authority to select the most suitable person for the task (204) and to dismiss them, taking into account the circumstances of the particular case (§ 112(1) and (2) PärS; § 586 and § 590 TsMS). In short, the task of the administrator is to protect the estate against damage and loss of value until the obstacles which prevent them from managing their estate are eliminated, and to hand it over to its rightful owner in the condition it would be in if it had been prudently managed (§ 112(3) PärS). (205) As a rule, the administrator is obliged to submit an application for opening succession proceedings (§ 112(3)(6) PärS). Since in Estonia the identification of the heir lies in the competence of the notary, the creditors are advised to apply for succession proceedings first, and, in case the heir remains unknown despite the succession proceedings, for the administration of the estate. If that is the case, the court may oblige the administrator to make reasonable efforts to identify the heir and their whereabouts. (206) For the purpose of a successful administration, an inven-

---

(201) Tiina Mikk (Karm), Vaike Murumets, Urmas Volens in *Commentaries to the Code of Civil Procedure* (Juura 2018) before § 584 para 2.2.7.

(202) Tiina Mikk (Karm), Vaike Murumets, Urmas Volens in *Commentaries to the Code of Civil Procedure* (Juura 2018) before § 584 para 2.5.c.

(203) RKTKm 24.09.2014, 3-2-1-68-14, para 13 and 15.

(204) Tiina Mikk (Karm), Vaike Murumets, Urmas Volens in *Commentaries to the Code of Civil Procedure* (Juura 2018) before § 584 para 2.4.3 and 2.4.7.

(205) Tiina Mikk (Karm), Vaike Murumets, Urmas Volens in *Commentaries to the Code of Civil Procedure* (Juura 2018) before § 584 para 1.1.g. and 2.4.6.1.

(206) Tiina Mikk (Karm), Vaike Murumets, Urmas Volens in *Commentaries to the Code of Civil Procedure* (Juura 2018) before § 584 para 1.4.d and 1.4.e.

tory of the estate is to be drawn up. Following the general division of authorities, when appointing an administrator of the estate, the court also appoints a bailiff to draw up an inventory of the estate (§ 112(1) PärS). For the purpose of informing third parties about the administration of the estate and potential restriction of the heirs' right to dispose of the objects belonging to the estate ([207]), the court records the application, variation or termination of administration measures in the succession register (§ 586(6) TsMS; § 176[1](2) PärS).

D. *Administration of the estate by the executor of the will*

1. *Appointment and acceptance of the office*

113 Under Estonian law, an executor of a will may be appointed by the testator in a will or – as a testamentary disposition – in an inheritance contract (§ 95(4) PärS). Other persons or institutions may not appoint an executor of the will, but under certain conditions, the determination of the person of the executor has been delegated to third persons. According to the Law of Succession Act, if a person renounces the duty of executor of a will or if the testator has not specified the person of executor of the will, but if based on the will, it is obvious that the testator wished to appoint an executor of their will, the notary shall appoint an advocate or another person who agrees to perform the duties of executor of the will as an executor of the will (§ 80(4) PärS). It may be argued that the same applies by way of analogy also in the case of death of the executor before the tasks of the executor have been completed. When appointing an executor of a will, a notary hears the opinions of the successors and legatees. An advocate cannot refuse to accept the duty of executor of a will without good reason (§ 80(4) PärS).

114 In principle, the person appointed as an executor of the will is not obliged to accept the office. However, the person is not entitled to refuse the office when they have accepted the succession or legacy, unless otherwise provided by the will (§ 80(1) and (2) PärS). The appointment as an heir or right to legacy is considered as a remuneration of the office (see also § 84(2) PärS). In addition, once the office has been accepted, it may not be renounced without good reason (§ 80(1) PärS).

115 The office begins with the acceptance of the office, for which an application is submitted to a notary and the notary authenticates the application. The same applies for an application of renunciation of the office. A notary may set

---

([207]) Tiina Mikk (Karm), Vaike Murumets, Urmas Volens in *Commentaries to the Code of Civil Procedure* (Juura 2018) § 586 para 3.6.

a reasonable term for the acceptance or renunciation of the office which cannot exceed one month. If a person has not submitted an application during the term set by the notary, the person is deemed to have renounced the duty of executor of the will (§ 80(3) PärS).

2. *Rights and obligations of the executor of the will*

116 The rights and obligations of the executor of the will are provided for by the Law of Succession Act, whereby the testator has a wide authority to determine the rights and obligations of the executor (§ 80(1) PärS). If the testator has not taken the liberty to determine the rights and obligations of the executor, the executor is obliged and entitled to: (a) perform the obligations of the administrator of an estate (instead of an administrator to be appointed in the process of imposing an administration of the estate by the court) or apply for administration of the estate until acceptance of the succession by the heir (§ 81(3) PärS); (b) execute legacies, testamentary obligations, testamentary directions and other obligations arising from the will or inheritance contract (§ 81(4) PärS); (c) to administer the estate prudently and ensure the preservation of the estate necessary for performance of their duties (§ 81(5) PärS); (d) to take an object belonging to the estate into their possession or to ensure in other ways the separation of the object from the property of the heir if it is necessary for the performance of the duties of the executor of the will (§ 81(6) PärS); (e) to undertake obligations with respect to the estate and dispose of objects belonging to the estate, if it is necessary for the performance of the duties of an executor of a will (§ 81(7) PärS); (f) if (and only then) a testator has made dispositions with respect to the division of an estate, divide the estate between the successors (§ 81(8) PärS); (g) to represent an heir or legatee to the extent necessary for the performance of the duties of the executor of the will (§ 81(9) PärS); (h) apply for a bankruptcy of the estate (§ 142(6) PärS); (i) perform rights and obligations arising from other acts such as the Taxation Act. In practice, the tasks of the executor are often subject to interpretation of the will (§ 28 PärS). The rights and obligations of an executor also determine their authority, such as the right to dispose of the objects belonging to the estate (§ 79 PärS).

117 Since the executor of the will has the right to dispose of objects belonging to the estate to the extent necessary to fulfil their obligations, the appointment of the executor may result in remarkable restrictions in the authority of the owner of the estate (the heir). The heir loses the right to dispose to the extent the authority is granted to the executor (§ 79 PärS). For the sake of clarity, an executor of a will is required, immediately after acceptance of the office,

to submit to the heir a list of the objects of the estate which are required to perform the obligations thereof (§ 85(2) PärS). If the executor or the heir ([208]) disposes of an object belonging to the estate, without having the right to do so, the transaction will be considered as a transaction without authority, and thus, remains without legal effect, unless there is a prior consent or subsequent approval of the entitled person (§ 114 TsÜS). There is no specific regulation regarding acquisition in good faith in the Law of Succession Act. Thus, general rules apply. In order to inform third persons about the appointment of the executor of the will, the name and the personal identification code of the executor of the will is indicated in the certificate of the succession (§ 171(4) PärS). The law does not, however, require that the certificate of succession should indicate the rights of the executor – and potential respective restrictions of the rights of the heir. This should be set out in the certificate of the executor of the will (§ 87 PärS). Thus, a certificate of executor of will sets out the rights of the executor of the will upon administration and disposal of the estate and upon taking obligations with respect to the estate (§ 87(2) PärS). The certificate is issued upon application of the executor of the will (§ 87 PärS). The law requires publication of the restrictions of the rights of the heir in transactions concerning real estate. According to § 49^2 of the Land Register Act, if a testator has granted the executor of will the right to participate in the disposal of the object belonging to the estate, then upon entering the heir in the land register, a notation concerning the executor of will is to be entered to the register ex officio.

3. *Tasks of the court*

118 The selection of an appropriate person for the office has been left to the discretion – and responsibility – of the testator (except for the requirement of full active legal capacity (§ 78(2) PärS). However, the court may become involved if there is a dispute regarding the extent of the remuneration of the executor of the will (§ 84(3) PärS) or if the heir, legatee or other persons interested in the estate have applied for dismissal of the executor and the court has to decide whether there is a compelling reason for it, as foreseen by the law as a prerequisite for the dismissal (§ 86 PärS). A court may also be involved if a dispute arises regarding any derogations from the instructions given by the testator and the executor of the will decides to approach the court. In principle, an executor of a will may derogate from the duties assigned in the will with the consent of interested persons if this is in the

([208]) Kai Kullerkupp in *Commentaries to the General Part of the Civil Code* (Juura 2023) § 114 para 3.2.

interest of executing the testamentary intention of the testator. If the interested persons do not consent to any derogation from the duties, a court settles the dispute at the request of the executor of the will (§ 81(2) PärS). In addition, the executor of the will is obliged and entitled to apply for the administration of the estate and bankruptcy of the estate (§ 81(3) and § 142(6) PärS). And finally, an executor of a will may face a court case if they fail to fulfill their tasks as prescribed by the will and the law. According to § 83(1) PärS, an executor of a will is liable for any damage caused due to a culpable breach to a successor or legatee by violating their duties. Thus, if the heir or the legatee opts for taking the case to court, the case will be handled in the court in procedural terms as any other action-by-claim case.

E. *Division of the estate*

1. *Community of the estate*

119 In accordance with the principle of universal succession, if there is more than one heir, the estate passes undivided to the heirs (co-heirs) and the estate is owned by the heirs jointly (community of the estate), as stated in § 147 PärS. Under Estonian law, the community of the estate is not considered as an independent legal person. The heirs are joint-owners – and not common owners (209) – of individual objects belonging to the estate. (210) The provisions of common ownership regulated in the Law of Property Act apply to the community of the estate and to the relations between co-heirs accordingly and to the extent not regulated by the Law of Succession Act (§ 147 PärS). The heirs manage the estate jointly, according to an agreement or depending on the nature of the transaction or a factual action, by a decision made by the majority of votes of the co-heirs (calculated by the extent of the respective share) or, in rather rare cases, independently. In any case, an obligation to cooperate applies and in case of a dispute, the case may be settled in court. (211) A co-heir cannot dispose of objects belonging to the estate or a legal share of the objects independently (§ 148(1) PärS). If a co-heir prefers not to be involved in the joint management of the estate, they may dispose of their share in the estate as a whole (§ 148 PärS). In that case,

(209) Joint ownership is ownership in undefined shares of a shared thing belonging to two or more persons concurrently (§ 70(4) AÕS). Common ownership is ownership in legal shares of a shared thing belonging to two or more persons concurrently (§ 70(3) AÕS).

(210) RKTKm 4.12.2018, 2-17-18529, para 16; RKTKo 5.06.2019, 2-17-4276, paras 13 and 14.

(211) Tiina Mikk (Karm), *Pärimisõigus* (2nd edn, Sisekaitseakadeemia 2012) 129ff; Paul Varul in Commentaries to the Law of Property Act (Juura 2014) § 72 para 3.10.

the object of the transaction is the defined share – not an individual object or a legal share thereof – the size of which corresponds to their share in the estate (§ 39 PärS). A transaction by which a co-heir undertakes to acquire or dispose of a share of the community of the estate or by which a co-heir disposes of the share of the community of the estate belonging to them is to be notarially authenticated (§ 148(4) PärS). If a co-heir sells their share of the community of an estate to a third person, the other co-heirs have the right of pre-emption (§ 149 PärS). The purpose of the community of the estate is to maintain the entirety of the estate, separate it from the personal assets of the heir and motivate heirs to liquidate the so-called forced community by dividing the objects belonging to it ([212]), preferably after the satisfaction of the claims burdening the estate and out of assets of the estate. ([213]) The community of the estate lasts until the division of the estate. ([214]) However, there is no 'deadline' for the division; the claim of division of the estate does not expire. ([215]) The heirs are solidarily liable for the performance of an obligation which is part of the estate (§ 151(2) PärS).

2. *Division of the estate*

120 Estonian law pays great respect to the private autonomy of heirs, assuming that co-heirs will divide an estate or part of it ([216]) by an agreement. The court will be involved only if the co-heirs fail to reach an agreement and approach the court.

121 Substantial law concerning the division of an estate can be found in the Law of Succession Act and in the Law of Property Act, whereas the Law of Succession Act refers to the provisions concerning division of a thing in common ownership (including the manner of a division, as stated in § 77(2) AÕS), unless otherwise provided for by the Law of Succession Act (§ 152(3) PärS; § 70(7) AÕS). As an example of the special regulation in the Law of Succession Act, irrespective of the main principle that each co-heir or a person who has acquired a share of the community of the estate (§ 148(2) PärS) may at any time request a division of the estate (§ 152(1) PärS), the

---

([212]) Tiina Mikk (Karm), *Pärimisõigus* (2nd edn, Sisekaitseakadeemia 2012) 128; Paul Varul in *Commentaries to the Law of Property Act* (Juura 2014) § 77 para 3.4.4.

([213]) Tiina Mikk (Karm), *Pärimisõigus* (2nd edn, Sisekaitseakadeemia 2012) 128; Paul Varul in *Commentaries to the Law of Property Act* (Juura 2014) § 70 para 3.5.2.

([214]) RKTKo 24.03.2021, 2-18-18277, para 17.1.

([215]) Kaupo Paal in *Commentaries to the General Part of the Civil Code* (Juura 2023) § 155 para 3.3.

([216]) Paul Varul in *Commentaries to the Law of Property Act* (Juura 2014) § 77 para 3.4.4.

division of an estate may be requested only on the condition that all heirs are known (§ 155(1) PärS) and in case the testator has not excluded nor the heirs have agreed on exclusion of the division of the estate (§ 155(2) and (3) PärS). An estate is divided among the heirs according to their shares of the estate, including the obligations and expenses (§ 151(1) PärS), based on the usual value of the objects forming part of the estate at the time of the division. By agreement of the heirs, a thing forming part of the estate may be evaluated on the basis of the special interest of an heir (§ 152(2) PärS). If upon division of an estate the value of the property remaining with an heir is greater than their share of the estate, the heir is required to pay monetary compensation to the other successors (§ 159(4) PärS).

122 The Law of Succession Act requires that the special needs and interests of each co-heir, the wishes of the majority of co-heirs and the testamentary intention of the testator pursuant to the will or inheritance contract (including testamentary disposition concerning the transfer of a particular object to a particular heir ([217])) are considered (§ 159(1) PärS). In addition, if the heirs fail to agree as to whom an object shall be transferred, the object is sold by public auction or auction among the heirs and the money received is divided among the heirs in proportion to the size of their shares of the estate (§ 159(3) PärS). Things with special sentimental value to a family will not be sold if even one heir is opposed to the sale. In this case, the object is sold by auction among the heirs (§ 160 PärS). Given that the most frequently used property regime in Estonia is currently the community of property (§§ 25 PKS), it is worth mentioning that where a bequeather was married or had entered into a registered partnership contract at the time of opening of the succession (§ 3 PärS) and the partners have chosen the community of property to govern their marital property rights and obligations, or where despite the termination of the property regime the joint property of the spouses or registered partners has not been previously divided, the share of the deceased spouse in joint property forms part of their estate (§ 39 PKS). As a rule, the share of the deceased spouse is half of the value of the joint property (§ 37(3) PKS). ([218]) After the death of one spouse or registered partner, the provisions of the Law of Succession Act concerning co-heirs apply to the division of the joint property of the spouses or registered partners (§ 39 PKS). Thus, in the process of division of the estate, an heir has the right to demand division of the objects belonging to the joint property

([217]) RKTKo 24.03.2021, 2-18-18277, para 16.2.
([218]) RKTKo 24.03.2021, 2-18-18277, para 20.6.

based on the marital property regime of an estate. (219) Where the spouses have chosen the community of accrued gains (§§ 40 PKS), a claim for a 'set-off' belongs to the estate, that is, the claim is inheritable (§ 53(3) PKS).

123 Since the co-heirs are joint-owners and are entitled to dispose only jointly, a declaration of intent of each co-heir is required for the division of the estate (§ 148(1) PärS). The contract concerning the division of the estate is subject to contract law, family law, property law and rules of the General Part of the Civil Code. As a result, the division of the estate is subject to two types of contracts: (a) a contract of obligation for the purpose of the plan of the division of the estate and (b) a contract of transfer of each right and obligation to fulfill the obligations arising from the contract of obligation. Also, legal representative of a person with limited active legal capacity is required to present a prior consent of the court (§ 188(1)(2) PKS). An agreement on the division of the estate is, in principle, form-free. However, in order to enable the transfer of ownership from the joint property of the heirs to the single property of a particular heir – which is the essence of the division (§ 152(1) PärS) – the rules of singular succession (as opposed to those on universal succession) apply. (220) Thus, the form requirement may derive from the rules concerning the transfer of the rights and obligations belonging to the estate. If real estate is a part of the estate, such agreements must be notarially authenticated (§ 119 and § 120 AÕS) and followed by the constitutive entry in the land register (§ 64^1 AÕS). Depending on the applicable type of transfer, also the transfer of a share of a limited liability company may be subject to a notarially authenticated form, followed by an entry in the commercial register in the list of shareholders (§ 149(4), (4^1) and (6) ÄS). The obligation of a notary to explain is designed in accordance with the general rules for authentication and substantial law, including the obligation to explain the meaning, legal consequences and alternatives, to ensure that the rights of inexperienced or incompetent parties are not violated, discuss the concerns concerning the compliance of the transaction with the law and, in limited cases, refuse to perform a notarial act in cases prescribed for by the law (see paras 98ff above). If, however, a dispute arises concerning the validity of the contract, the parties to it may approach the court and file a claim in contentious civil proceedings. (221) Since the notary may voluntarily provide conciliatory services, an option for mediation by a notary is also available (§ 34 NotS).

---

(219) RKTKo 24.03.2021, 2-18-18277, para 20.6.

(220) Tiina Mikk (Karm), *Pärimisõigus* (2nd edn, Sisekaitseakadeemia 2012) 140.

(221) RKTKo 25.09.2013, 3-2-1-83-13, para 13ff; RKTKo 3-2-1-82-86, para 14; AÕS-Komm I/Varul, § 77, 3.4.2.2.

In case of a dispute concerning the division of the estate, a court shall divide the estate at the request of an heir (§ 152(4) PärS). A division of the estate is handled in the civil court. As there is no special procedural regulation for the estate division, a claim for the division of the estate is brought and heard as an action-by-claim case in accordance with the rules of contentious proceedings. The case law concerning the division of a thing in common ownership, as well as the division of marital joint property is applicable, where appropriate. Thus, the estate can be divided in court only in the manner requested by the parties. The court may draw the parties' attention to the fact that none of the requested manners are suitable, but the court may not choose the manner of the division. (222) The court decision substitutes the declaration of intent (§ 68 TsÜS) of the heir who disagreed with the heir whose claim has been satisfied by the court pursuant to § 68(5) TsÜS. This means that the court decision substitutes the agreement on transfer of ownership (223) and the consent of persons concerned necessary for the entry (224) (§ 34^1 KRS), but not the entry in the land register itself, which is still necessary for the transfer of the ownership (225). If the court satisfies the claim to sell the thing in a public auction, the court decision constitutes an enforceable title and the thing will be sold by a bailiff in the course of enforcement proceedings. (226) In the case of sales, the principle of substitution applies (§156 (1) PärS). **124**

In addition, the testator may assign the division of the estate to an executor of a will (§§ 78 PärS). As a rule, an executor of a will is entitled to dispose of the objects belonging to the estate (§ 81(7) PärS). An executor of a will may derogate from the duties assigned in the will with the consent of interested persons if this is in the interest of executing the testamentary intention of the testator. If the interested persons do not consent to derogation from the duties, a court settles the dispute at the request of the executor of the will (§ 81(2) PärS). **125**

F. *Liability of the heir and the insolvency of the estate*

In principle, the estate, including the bequeather's rights as well as obligations, except those which by their nature are inseparably bound to the person **126**

---

(222) RKTKo 21.12.2004, 3-2-1-143-04, para 17.

(223) Karin Sein and Paul Varul in *Commentaries to the General Part of the Civil Code* (Juura 2023) § 68 para 3.5.1; Villu Kõve in *Commentaries to the Law of Property Act* (Juura 2014) § 64^1 para 3.8.1 and 3.8.2.

(224) RKTKo 29.05.2013, 3-2-1-42-13, para 12.

(225) RKHKo 15.03.2016, 3-3-1-82-15, paras 22.1 and 22.2.

(226) Paul Varul in *Commentaries to the Law of Property Act* (Juura 2014) § 77 para 3.3.4.

of the bequeather or which pursuant to law do not transfer from one person to another, transfer as a whole to the heir (§ 1, 2 and 130 PärS). An heir is required to perform all the obligations of the bequeather (§ 130(3) PärS). The heirs have the right to limit their liability through inventory of the estate (§ 137 PärS) or through the bankruptcy of the estate (§ 142(6) PärS). If the estate is insufficient, an heir performs the obligations out of the heir's own property unless the successor has, after making an inventory, performed the obligations pursuant to the procedure provided by law, the estate has been declared bankrupt or the bankruptcy proceedings have been terminated by abatement without declaring bankruptcy (§ 130(3) PärS). Actions of the heir in bad faith upon preparation of the inventory may lead to the loss of the privilege of limited responsibility (§ 144 PärS). As a result of the inventory, the heir's liability is limited to the value of the estate – *pro viribus hereditatis* (§ 143(1) PärS). As a result of the estate bankruptcy, the heir's liability is limited to the assets of the estate – *cum viribus hereditatis* (§ 143(4) PärS).

127 The inventory is a voluntary option for the heir (§ 137(1) and (2) PärS), except for cases where the obligation of inventory is prescribed for by law. An inventory is obligatory if a person with limited active legal capacity, a local government or the State is the heir (§ 136 PärS). Bankruptcy proceedings, on the other hand, are obligatory. If the persons obliged to submit a petition for the declaration of bankruptcy, such as the heir, the executor of the will or the administrator of the estate, become aware, or should have become aware, of the circumstances from which it can be presumed that the estate is insufficient, they are obliged to file a petition for the declaration of bankruptcy to the court (§ 137 (2^1); § 142(6) and § 142(1) PärS).

128 The application for the inventory is submitted to the notary and only after acceptance of the inheritance (§ 137(1) and (2) PärS), but no later than three months after the heir becomes aware, or should have become aware, of the circumstances from which it can be presumed that the estate is insufficient for covering the claims of the creditors of the bequeather (§ 137(2) PärS). The inventory is not carried out by the notary, but by a bailiff, appointed by the notary (§ 138 PärS). The regulation concerning the rights and obligations of a notary, bailiff, heirs and persons entitled to apply for an opening of the succession proceedings have been proven to be slightly insufficient. This lack of regulation is to be overcome, where possible, by interpreting the norms regulating the profession of a notary and a bailiff and the purpose of the inventory. The notary is obliged to forward information they have become aware of to the bailiff and the notaries have limited authority to supervise the inventory. The main responsibility of the bailiff is to prepare an inventory of the estate which sets out all inheritable things, rights and obligations existing at the time of the opening of the succession, their description and appraisal

necessary for their designation and valuation (§ 139(5) PärS). The bailiff has the right to receive information concerning the estate from an heir, credit institutions and other persons in possession of the estate or who have information concerning the estate (§ 139(3) PärS). In order to determine the obligations of the bequeather, call procedures are carried out in the course of making an inventory (§ 140(1) PärS). The inventory is deemed to be completed after submission of the inventory of the estate to a notary (§ 139(5) and § 141(2) PärS)

129 A petition for a declaration of bankruptcy of the estate is to be submitted to the court (§ 137 (2) and § 142(6) PärS). The procedural rules of bankruptcy proceedings are regulated in the Law of Bankruptcy Act and in the Code of Civil Procedure. In principle, bankruptcy proceedings consist of different procedural acts, of which some are considered as an independent part of the court proceedings or are allocated to the supervision of the court and some are carried out in out-of-court proceedings. For example, initiating bankruptcy proceedings, issuing the declaration of bankruptcy and approving the list of creditors are dealt with under the action-by-petition procedure (§ 475(1)(12^2) TsMS) and disputes over recovery of assets and contestation of the decisions of the general meeting of creditors are dealt with under the action-by-claim procedure. The majority of the activities during the bankruptcy proceedings are, however, carried out by a professional trustee in bankruptcy as regulated in the Law of Bankruptcy Act (§§ 54 PankrS). The right to act as a trustee is granted to a person with active legal capacity who, as a rule, (1) has acquired an officially recognised Bachelor's degree and who has at least two years' professional experience in the field of finance, law, management or accounting; (2) is honest and of high moral character; (3) has oral and written proficiency in Estonian; (4) has passed the examination of trustees; (4) has undergone the training of trustees. A trustee must have the confidence of the court and the creditors and a trustee cannot be an employee of the court and they must be independent of the debtor and the creditors (§ 56 and 57 PankrS). Upon declaration of bankruptcy, the debtor's right to manage and dispose of the bankruptcy estate transfers to the trustee unless otherwise provided by law (§ 36(1) PankrS).

G. *Conclusion to succession law*

130 Under Estonian law, succession proceedings lie in the comptetence of a notary. Upon application, the notary verifies the causa of the succession, establishes the facts, gathers and assesses evidence in order to verify the person entitled to inherit (determining the potential candidates to inherit; authenticating the declarations of renunciation and acceptance of the inheri-

tance) and their share of the estate (in case the information in the population register and archives is insufficient, the notary is entitled to use evidence which can be used in a civil procedure), informes the persons who have or might have rights concering the estate such as legatees, recipients of compulsory portion, gathers some information concerning the rights and obligations belonging to the estate, cooperates with the bailiff concerning the inventory of the estate, gives legal advice to the parties to the succession proceedings, authenticates the certificate of succession, as well as revokes the certificate, if the notary finds it justified. Upon application of the heirs, the notary prepares and authenticates the agreement on the division of the estate. The notary is entitled to authenticate a certificate of legatee, of the recipient of the compulsory share and of the executor of the will only upon the application of an entitled person. In certain cases, the notary is entitled to appoint a substitute executor of the will. The notary does not resolve disputes.

131 The administration of the estate and insolvency proceedings, as well as the dismissal of the executor of the will and decisions on revocation of the certificate of succession in case the notary has refused to do so lie within the competence of a court.

IV. Status of Natural Persons

A. *Name changes*

1. *General rules for personal names*

132 The principles of, and the procedure for, the assigning and application of names of natural persons are regulated in the Names Act (*nimeseadus*, hereinafter: NS). (227) A personal name is the official name of a person which is entered into the population register in the cases provided by law. A personal name consists of a given name (first name) and a surname (§ 3(1) NS). The assigning of a personal name is the first documentation of the personal name by an Estonian administrative authority or court (§ 3(2) NS). Application of a personal name refers to the documentation of a personal name entered in a document issued to a person in a foreign State by an Estonian administrative authority or court (§ 3(3) NS).

133 Rules for names in Estonian law are generally quite liberal and respect foreign naming traditions. There are rules for the number of given names –

(227) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/523012024010/consolide> accessed 23 December 2024.

up to three names, written as several words or two names linked by a hyphen, are pemitted (§ 7(1) NS). These rules only apply when a given name is assigned by Estonian authorities; thus, in the case of application of foreign given names, there is no strict limit in the law for the number of given names (§ 7(2) NS). Similar rules exist for surnames – upon assigning, a surname may consist of one name, or two names linked by a hyphen (§ 6(1)(1) NS); upon application, of one or several names (§ 6(1)(2) NS). There are, however, limits to the number of characters that can be used when entering names in documents. According to the Identity Documents Act (*isikut tõendavate dokumentide seadus*, hereinafter: ITDS), (228) if a person's given name is longer than 30 characters or their surname is longer than 28 characters, the name is entered in a document so that the letters at the end of the name which cannot be entered in the corresponding data fields are not written (§ 9^1(2) ITDS). In addition, there is a general rule which states that a name may not contain numbers or non-alphabetical signs or be contrary to good morals, either separately or together with other parts of a name (§ 6(5) and § 7(2) NS). Estonian surnames do not reflect a person's gender, marital status or other features that can be found in some other cultures. There are still rules in law that enable persons permanently residing in Estonia with different cultural background to use their naming traditions, ie to have a joint surname for spouses that has differences in spelling (§ 6(2–4) NS).

There is a rule in law that requires the existence of a 'good reason' to assign a given name which does not correspond to the gender of the person (§ 7(3)(2) NS). Estonian given names as words do not have a grammatical gender (the Estonian language is generally gender neutral, including pronouns), but there is, of course, a tradition to regard some names as female and some as male. There are also a few given names that are deemed to be more gender neutral, ie they are used equally for men and women. (229) There are also some names that in Estonia are deemed to be female (or male) but are used for the other gender in neighbouring countries. (230) If, due to their citizenship, family relations, national identity or other circumstances, a child or the parents of a child have personal connections to the foreign-language name tradition and the name applied for complies therewith, it is possible to assign it as a given name also in Estonia (§ (4) NS).

134

(228) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/516012024005/consolide> accessed 23 December 2024.

(229) For example, as of 1 January 2024, 106 men and 117 women in Estonia have Keit as their given name, see <https://www.stat.ee/nimed/keit> accessed 30 March 2024.

(230) For example, as of 1 January 2024, 1,733 women and 22 men in Estonia have Maris as their given name, see https://www.stat.ee/nimed/maris> accessed 30 March 2024. Maris (or to be precise, Māris) is a male name in Latvia.

135 The Names Act also requires that the spelling of an Estonian personal name is in accordance with the rules of orthography of the Estonian language. (231) The spelling of a non-Estonian personal name is to be in accordance with the rules of orthography of the relevant language (§ 5(2) NS). A non-Estonian given name must be in use in another State as a given name (§ $7(1^1)$ NS). Any name that contains 'foreign' letters ie c, q, w, x and y is considered as non-Estonian. These letters are not used in Estonian but are quite common in Estonian given names. There are even examples of foreign versions of a name being used more often than the Estonian version. (232) A few years ago, there was a lengthy dispute about this rule. The civil status office, supported by the Ministry of the Interior, refused to accept the given name, Nelery for a newborn girl. The Tartu Circuit Court decision, which was final in this case, ruled that this name must be accepted, although it includes the foreign letter 'y'. The court decided that a parents' right to choose the name of their child outweighs the need to preserve national naming traditions. (233) After that decision, it is somewhat unclear how § 5(2) and § $7(1^1)$ of Names Act should be applied.

2. *Change of personal name*

136 There are two general grounds for changing a personal name – first, when it is connected to some change in a person's status (marriage, divorce, annulment of marriage, adoption, change of gender-marker (§§ 10 NS)), and second, at the request of a person (§§ 16 NS). As an example of the latter: if a person wishes to use the surname of their parents, grandparents or great-grandparents; wishes to use, in the case of a surname consisting of several names, only one name (§ $17^1(1)(1)$ and § $17^1(1)(2)$ NS) or any other good reason, such as a wish to abandon an unconventional first name or surname which is not suitable to be used as a surname (§ $17^1(2)(1)$ and § 19(1)(1) NS); a wish to have an Estonian surname ($17^1(2)(4)$ NS) or a wish to avoid harmful economic or social consequences arising from the first name or surname (§ $17^1(2)(3)$ and § 19(1) 3) NS). If the name is being changed, general rules for personal names apply (see previous subchapter). Additional restrictions regarding the grounds and rules for acceptable names are listed

---

(231) This rule applies both for given names and surnames, but only if a name is assigned. Names already in use, even if they are not in accordance with the rules of modern orthography of the Estonian language, can still be used.

(232) For example, as of 1 January 2024, 983 women in Estonia have Ly as their given name, see <https://www.stat.ee/nimed/ly> accessed 22 December 2024 and only 492 women have Lii as their first name, see <https://www.stat.ee/nimed/lii> accessed 30 March 2024.

(233) Tartu RKo 12.01.2021, 3-19-116.

in the law (§ 16, § 17, § 18 and § 19 NS). As a rule, a new first name, surname or personal name (ie both a new first name and a surname at the same time) is assigned to a person only once (§ 16(4) NS).

137 A change of personal name may be made by an Estonian civil status office or court (§ 3^2(2) NS). The court changes a personal name only when the necessity to change the name is connected to another case being heard in court. The majority of such cases concern the necessity to change the name due to a divorce or an adoption. As explained above, in Estonia, a divorce is often granted by a notary or civil status office. The court grants a divorce only if the spouses disagree about the divorce or the circumstances relating to the divorce or if a civil status office or a notary is not competent to grant a divorce (§ 65(1) PKS). Rules for the restoration of a surname upon divorce are the same for the civil status office, the notary and the court – the previous surname of a person may be restored on the basis of their application, otherwise the surname used during marriage is retained (§ 11 NS). The court also has sole competence to decide on annulment of marriage (§ 9 PKS) and to declare an adoption invalid (§ 166 PKS). Upon annulment of a marriage, the surname of a person used before the marriage was annulled is restored (§ 12 NS). Adoption, on the other hand, is decided only by the court (§ 159 PKS). The court may assign the child a new first name and the surname of the adoptive parents on the basis of an application by the adoptive parents (§ 13 NS). Upon assigning a personal name to a child who is ten years of age or older, their consent is required. The wishes of a child younger than ten years of age is also considered if the development level of the child so permits (§ 4(5) NS). Upon declaration of invalidity of adoption, the personal name of the child before adoption is restored (§ 14(1) NS). However, if the child does not agree to such restoration, they may keep the name of their adoptive parent(s) (§ 14(2) NS). The court may also assign a new surname to the child (§ 8^1(2) NS) in the course of the judicial establishment or contestation of fatherhood: these procedures are also exclusively within the competence of the court (§ 94 PKS). If the name change is decided by the court, the rules of civil procedure apply (§ 2(2) NS), including the question as to when the court decisions come into force.

138 All other name changes are made by a non-judicial authority – the civil status office. In case of changing the personal name at the request of a person, the respective application must be submitted to the competent civil status office. The digitally signed application can be submitted by email. (234) If fatherhood is acknowledged voluntarily after the registration of the birth of a child

(234) See also Changing names" in the State portal eesti.ee <https://www.eesti.ee/en/family/changing-names> accessed 1 April 2024.

(§ 87 PKS), the application is submitted to a civil status office (not the court) (§ 26(1^1) PKTS), which assigns the surname of the father to the child if the parents agree (§ 8^1(1) NS). The decision regarding the name change is made either by the civil status office or the Ministry of the Interior. The decision regarding the change of the name enters into force upon making an entry in the population register (§ 3(1) NS). Disputes arising from the decisions of the civil status office are resolved in an administrative court. A person who finds that their rights under the Names Act have been violated may submit a challenge to the Ministry of the Interior or an action to an administrative court within 30 days (§ 24(1) NS). This is a general right to dispute every administrative decision in an administrative court. Rights that can be violated are foremost the rights of a person who has applied for a name change, but it may also be the rights of a third party if their rights are affected.

139 It is worth mentioning that disputes arise concerning the child's name which are, even though the change of name has been assigned by a non-judicial authority, resolved by the civil court in accordance with the rules of action-by-petition procedure. If parents have joint custody, they must agree on the change of name of their child. If one of the parents does not consent to the change, a court may, at the request of a parent, grant powers of decision in this matter to one parent (§ 119 PKS). ([235]) This decision, however, does not have a binding effect to the civil status office or administrative court, because in such cases, the civil law court only decides that one of the parents is entitled to decide the name change independently, but it does not decide on the change of the name. If the court finds the request justified, the entitled parent is entitled to decide the change of name of a child as well as to apply for the name change to the civil status office independently.

3. *Effects of name change*

140 The application for a name change in an administrative procedure is not considered a civil law transaction in the sense of TsÜS or the law of obligations. A change of a personal name enters into force upon making an entry in the population register (§ 3(1) NS). This change has *erga omnes* binding effect – a personal name entered in the population register is presumed correct (§ 3^1(1) NS). The widespread use of personal identification numbers in all documents and services, both public and private, ensures that changes to personal names do not cause significant problems in the identification of the person.

([235]) See, for example, TlnRKm 21.10.2016, 2-16-1080.

B. *Gender Recognition*

1. *General overview*

To the best knowledge of the author, the first known legal act to regulate gender reassignment (recognition) in Estonia was Directive No 91 by the Minister of Social Affairs of 24 April 1991 on the Establishment of Mandatory Processes for Gender Reassignment (*soovahetuse kohustuslike protseduuride kehtestamine*). This Directive was declared to be repealed when the current regulation was adopted. The Regulation of the Minister of Social Affairs, which lays down Common Requirements for Medical Operations for Gender Reassignment (*soovahetuse arstlike toimingute ühtsed nõuded*, hereinafter: SATÜN), (236) was passed on 7 May 1999. Another legal act to regulate this matter is Chapter 3^1 of PKTS that regulates changes of data in the population register due to reassignment of sex. This is entirely an administrative procedure in nature, no civil law courts are involved. **141**

SATÜN has as its legal basis (237) § 8(1)(6) of Public Health Act (*rahvatervise seadus*, hereinafter: RTerS) (238), but this is an article about the general duties of the Ministry of Social Affairs, (239) not a specific provision for gender reassignment. There have been discussions about regulating gender reassignment procedures in the law, but so far these attempts have not been successful due to lack of political consensus. (240) **142**

2. *Procedure in SATÜN*

In order to have one's gender-marker in official documents changed, a person must first submit an application to the Ministry of Social Affairs and **143**

---

(236) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/509072019001/consolide> accessed 22 December 2024.

(237) There are three legal Acts noted in the preamble of SATÜN, but the one mentioned first – the Health Services Organisation Act (*tervishoiukorralduse seadus*) – is no longer in force. The third is PS, which is not noted as a legal basis.

(238) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/501062023004/consolide> accessed 22 December 2024.

(239) § 8 (1)(6) of RTerS provides that the duties of the Ministry of Social Affairs are to plan and organise implementation of national programmes, projects and other measures for the creation of a physical and social environment which is safe for health, prevention of health disorders and disease, and health promotion.

(240) The latest attempt to change procedure for gender reassignment was draft 486 SE for a new Public Healthcare Act (*rahvatervishoiu seadus*), initiated by the Government of the Republic in 2021. This draft Act was dropped from the proceedings upon the expiry of the mandate of the Parliament in 2023, as is the fate of all draft acts and resolutions on which the proceedings were not completed during the mandate of the Parliament.

request a decision by the medical assessment committee convened by the Minister of Social Affairs about the possibility of gender reassignment. According to § 2 of SATÜN, in its decision, the medical assessment committee takes into account whether the following conditions apply to the applicant for gender reassignment: (a) occurrence of transsexual identity in the anamnesis at least two years before making the decision; (b) a psychiatrist's decision which precludes that the gender reassignment request is caused by a mental disorder; (c) concurrency of chromosomal and gonadal sex confirmed by a genetic study.

144 A positive decision of the medical assessment committee is the basis for a directive of the Minister of Social Affairs authorising medical operations necessary for gender reassignment: hormonal treatment may be commenced after transsexuality has been diagnosed and in case of social adaptation of the applicant for gender reassignment, gender reassignment surgery is permitted after one year from the issue of a directive on the person. Gender reassignment surgery is not mandatory for an applicant for gender reassignment. ([241]) The final decision of the medical assessment committee on gender reassignment is given to the applicant for gender reassignment when at least two years have passed since the commencement of medical operations and treatment. A person may apply for the restoration of birth gender on the basis of a written application and decision of the medical assessment committee (§ 5 SATÜN).

3. *Change of data in the population register*

145 The final decision of the medical assessment committee on gender reassignment, together with an application to amend the gender data in the population register, must be submitted to a civil status office. Upon gender reassignment, the new first name, sex (gender-marker) and personal identification number of the person are entered in the population register. If, in accordance with cultural tradition, gender is also reflected in their surname, their new surname is also entered in the registry.

146 It is worth noting that personal identification numbers in Estonia include a gender marker, so in order to have correct data in documents after gender reassignment, personal identification numbers must also be changed. ([242]) As

---

([241]) See also article about gender reassignment in the State Portal eesti.ee: <https://www.eesti.ee/en/family/gender-reassignment> accessed 17 March 2024.

([242]) Personal identification numbers consist of 11 digits. The first number depends on a person's century of birth and sex, ie 1 means a man born between 1800 and 1899; 2: a woman born between 1800 and 1899; 3: a man born between 1900 and 1999; 4: a woman born between 1900 and 1999, etc.

the gender marker of a personal identification number is binary, it also means that there there are only two options to note a person's gender in their personal identification number – male or female.

4. *Declaration of intent in administrative procedure*

147 As explained above, the procedure of gender reassignment is administrative in nature, so formally applications in this procedure are not considered civil law transactions in the sense of the TsÜS or the law of obligations. The question of validity of the declaration of intent may arise in the relationship between the applicant and the provider of medical services. Under Estonian law, this legal relationship is considered as a contractual relationship and all rules of the law of obligations apply. However, this may only affect the possibility of making claims towards the provider of medical services, not the validity of administrative decisions.

148 A question of State liability may arise in case a person's rights are violated upon the exercise of powers of public authority and performance of other public duties. State liability is regulated in the State Liability Act (*riigivastutuse seadus*, hereinafter: RVastS). (243) It should be noted that, under Estonian law, compensation for damage for State liability is considered as an administrative matter, not a civil law tort claim.

C. *Protection of Adults*

1. *General overview*

149 In Estonia, the appointment and supervision of a guardian for an adult lies within the competence of the civil court and the appointment of a guardian is only possible where the personal and proprietary rights of persons with limited active legal capacity need to be protected by appointing a legal representative (§ 207 PKS). (244) The rules regulating guardianship can be found in the General Part of the Civil Code, the Family Law Act and the Code of Civil Procedure. Appointment of a guardian is an action-by-petition case. Thus, the court has a remarkably more active leading role compared to contentious proceedings.

150 The rules for guardianship have not been changed lately. There has not been a lively public discussion encouraging changes to the current solution. Nor

(243) Semi-official English translation can be found online under <https://www.riigiteataja.ee/en/eli/520032023005/consolide> accessed 23 December 2024.

(244) Triin Uusen-Nacke and Triin Göttig in *Commentaries to the Code of Civil Procedure* (Juura 2018) § 324 para 1.b.

are there, at least so far, any implications of the intention of the Estonian legislator to change the system completely. There has, however, been some discussion as to how to better deal with some challenges, for example, how to support family members who act as guardians or how to better ensure that the wishes of the ward are also considered, not just their best interests. ([245]) A special web page was launched recently to support guardians, especially natural persons acting as a guardian of their family member. ([246])

2. *Procedure for appointing a guardian*

151 If an adult has limited active legal capacity ([247]), a court appoints a legal guardian to them if the interests of this person cannot be protected by granting authorisation (power of attorney) and through family members or other assistants (§ 203 PKS; §§ 520–532 TsMS). A power of attorney is a unilateral act that can be given when a person has full legal capacity. To be used in all situations, it should be notarially authenticated. There is no ex lege powers of representation for close relatives in the case of incapacity.

152 A court appoints a guardian to an adult on the basis of an application of the person, their parent, spouse, registered partner or adult child or rural municipality or city government or on its own initiative (§ 203 PKS). During the proceedings for the appointment of a legal guardian, the court appoints a representative to an adult of limited active legal capacity if this is needed in the person's interests (§ 520(1) TsMS). The representative must, among other things, personally meet the person whose placement under legal guardianship the court is dealing with and hear them without the presence of the judge (§ 520(4) TsMS). The court may appoint a temporary legal guardian for a period of up to six months and this period may be extended to up to one year (§ 521 TsMS).

153 The person whom the court has been petitioned to place under legal guardianship is heard by the court personally (§ 524 TsMS). Their family members and other persons close to them are also invited to provide an

---

([245]) See <https://www.sm.ee/sites/default/files/documents/2024-02/T%C3%A4isealiste eestkoste uuring l%C3%B5pparuanne 2023.pdf> accessed 5 April 2024, containing a study on the organisation of guardianship of adults in Estonia for the Ministry of Social Affairs (in Estonian), conducted in 2023.

([246]) Eestkostja teejuht, <https://eestkostja.kohus.ee/taiskasvanu/taisealise-eestkoste/> accessed 5 April 2024.

([247]) Persons who have attained 18 years of age (adults), but due to mental disorder are permanently unable to understand or control their actions, have limited active legal capacity (TsÜS § 8 (2)). The limited active legal capacity of an adult affects the validity of the transactions carried out by the person strictly to the extent that the person was unable to understand or control their actions (TsÜS § 8 (2)).

opinion (§ 525 TsMS). If the court has information or a reason to believe that a person suffers from a mental illness or congenital dementia, the court commissions an expert assessment in order to determine the need for appointing a legal guardian to the person. The expert must examine the person personally or question them before stating their opinion (§ 522(1) TsMS). Only a psychiatrist may be used as the expert to conduct an expert assessment for this purpose (§ 522(1^1) TsMS).

154 To respect the right to self-determination and the right to private life, the protection should be offered to the extent necessary, but not more: as much as necessary and as little as possible. Transactions of a ward are not invalid just because a guardian is appointed, they are only presumed to be invalid in that situation (§ 8(3) TsÜS). Also, transactions of a person with limited active legal capacity may be deemed to be invalid without appointing a guardian or post mortem (§ 8(2) TsÜS). Thus, since the validity of the transactions of the ward depends on their ability to understand their actions and to conduct them ([248]), the guardian is appointed only to perform such tasks for which the guardianship is necessary (§ 203(2) PKS).

155 Legal guardians are appointed for a period of up to five years (§ 526(3) TsMS). After this period, the court must decide whether to terminate or to extend the guardianship (§ 526(2)(5) TsMS). Guardianship must be terminated as soon as the need for it has ended (§ 529 TsMS). The court has the right to determine the 'tailor-made' rights and obligations of the guardian, grant an approval of the court for transactions with relatively high legal and economic risk (§§ 187 and 188 PKS), dismiss the guardian, including upon the respective application of the ward (§§ 193, 194, 19 and 202).

3. *Jurisdiction*

156 Estonian courts may appoint a legal guardian if: (a) the person in need of legal guardianship – or the ward – is a citizen of the Republic of Estonia, or has their residence in Estonia; (b) the person in need of legal guardianship – or the ward – needs the protection of Estonian courts due to another reason, including situations where the person's property is situated in Estonia (§ 110 TsMS). A guardianship case is heard by the court in whose judicial district the person in need of guardianship is resident (§ 110(3) TsMS), which means that all county courts are competent to appoint a guardian, but there is a special unit in the Pärnu County Court that exercises court supervision of all guardianship cases (§ 16^2 KS). Court supervision is regulated in § 193 and § 194 of the Family Law Act.

([248]) Triin Uusen-Nacke and Triin Göttig in *Commentaries to the Code of Civil Procedure* (Juura 2018) § 325 para 2.b.

4. *Right to vote*

157 According to § 57(2) of the Constitution of the Republic of Estonia, Estonian citizens who have been divested of legal capacity by a court do not have the right to vote. The wording of this article is somewhat outdated, because, according to laws in force today, a court does not divest anyone of their legal capacity, but only appoints a legal guardian to the person who does not have full active legal capacity in order to improve their legal situation ([249]), if needed. Together with other legal acts, this article of the Constitution is interpreted to mean that if the court establishes a legal guardianship for managing all affairs of the ward, the ward loses the right to vote (§ 526(5) TsMS). This, however, does not deprive the courts of the right and obligation to establish, on a case-by-case basis, the extent of the protection needed and ordered.

V. Conclusion

158 In Estonia, the role of non-judicial authorities has been gradually increasing, leaving within the authority of the court mainly cases where there is a dispute between the parties or where the status relationship is established or terminated. Divorce upon mutual agreement was acknowledged already in 1922, before the Soviet occupation. Under current law, spouses may choose whether to file a joint application for a divorce to the competent civil status office or a notary. Succession proceedings were delegated to notaries under Soviet law and have remained in the competence of notaries despite the attempt to shift the competences after Estonia regained its independence in 1991. In succession cases where an inventory is to be drawn up, it is conducted by a bailiff. In 2022, the option of State-funded family mediation services coordinated by the Social Insurance Board were introduced, aimed at helping parents reach an agreement concerning the contact arrangements and, in certain cases, maintenance and even termination of joint custody of an underage child. The reasonably liberal approach to increase the number of proceedings alternative to court proceedings continues: new initiatives in the field of consumer law are under discussion.

159 The arguments for delegation of competences to non-judicial authorities can be summarised as follows: (a) to increase the number of alternative proceedings and extra-judicial agreements and decrease the number of court-cases; (b) the experience of a tradition and a notary's duty to explain helps to fulfil

---

([249]) Triin Uusen-Nacke and Triin Göttig in *Commentaries to the Code of Civil Procedure* (Juura 2018) § 325 para 2.b.

the role of preventive legal care, such as ensuring legal security and legal peace and the protection of persons who have little legal knowledge; (c) legal advice from highly qualified notaries can motivate the parties to consider what is the most suitable option for them and, alternatively, make changes in order to meet their specific expectations even more; (d) proceedings before a mediation body are often considered to be supportive, encouraging cooperation and relying on the experience that a voluntary agreement motivates the fulfilment of the agreement; (e) the convenience of being able to enter into several agreements at one time and within one and the same proceeding; (f) out-of-court proceedings take place in a casual atmosphere designed not to resemble the court; (g) in many cases, out-of-court proceedings are cost-effective for the parties, help to save resources of the public sector and decrease the burden of taxpayers who are not involved in the proceedings. Although the shift of competences may raise theoretical and dogmatic discussions, it can be said that the delegation of tasks which traditionally fall into the scope of the administration of justice has been an informed choice of the Estonian legislator – also the so far non-traditional tasks of the notary are justified by the idea of legal peace and as such, are compatible with the traditional role of the notary.

FRANCE

by *Stéphane Berre*

I. Introduction and overall considerations

French law is a written law belonging to the family of Latin laws. It is primarily based on the law passed by Parliament, which consists of two chambers: the National Assembly and the Senate. In accordance with the principle of the hierarchy of norms, the law must respect France's international and European commitments and comply with the general principles of law that have constitutional value; a specific court – the *Conseil constitutionnel* – ensures this. As a general and impersonal text, the law is implemented by the executive mainly by means of decrees and orders subject to review by the administrative courts. **1**

There are other secondary sources: usage and custom, and professional practices. The place of judicial case law is debated here; more than a source of law, it is a source of interpretation of positive law.

Traditionally, family law has come under the jurisdiction of the judicial courts under the control of the *Cour de cassation*. It is the ordinary courts – judicial tribunal at first instance, court of appeal at second instance – that have jurisdiction. However, specialised magistrates have been established within these courts. These include the family court judge, who has jurisdiction over divorce and legal separation proceedings, the exercise of parental authority and relations between a child and their grandparents, the guardianship of minors, disputes relating to the allocation of first names, procedures for changing first names, etc; the children's judge, whose role is to protect children in danger and try juvenile offenders, and a specialised judge, who is responsible for setting up and monitoring protection schemes for vulnerable adults. (1) **2**

Over the last few decades, the French legislature has embarked on a far-reaching process to divert family and inheritance law from the courts (2) – as in many other areas. This movement has taken two forms, which still coexist in French law. The first has historically involved the simplification of

(1) Aurélie Fautre-Robin, 'Les fonctions prioritaires du juge aux affaires familiales' [2016] La Gazette du Palais 9; Marc Juston, 'Le juge aux affaires familiales du XXIe siècle' [2013] La Gazette du Palais 17.

(2) Ingrid Maria, 'Simplification et modernisation du droit de la famille: mythe ou réalité? Actes du colloque tenu à Grenoble les 30 et 31 mars 2017' in *Connaissances et savoirs* (Collection Droit civil et procédures 2018); Stéphanie Moracchini-Zeidenberg, 'La contractualisation du droit de la famille' [2016] Revue trimestrielle de droit civil 773.

legal procedures, without going so far as to do away with the courts. This trend towards simplification is still ongoing. The Law of 23 March 2019, known as the Justice Programming Act 2018–2022, bears witness to this. For example, it introduced the possibility for a judge to make a decision without a hearing if the parties agree. This Law has also enabled a protected adult to vote, marry or enter into a civil partnership without prior judicial authorisation; previously, such acts were subject, depending on the level of protection, either to the prior authorisation of a judge or to the assistance of a curator. (3) The second and latest major manifestation of this trend are the Laws of 23 June 2006 and 18 November 2016 on the modernisation of justice in the 21st century. The former completed the de-judicialisation of matrimonial property regime changes; the latter introduced divorce without a judge into French law. (4)

3 This process of de-judicialisation of family law echoes developments in other branches of law and the spirit of French society to favour the use of alternative dispute resolution methods – eg, mediation or conciliation. (5) It is often presented as a way of speeding up the processing of cases, given the heavy workload of the French courts.

The de-judicialisation of family and inheritance law is also seen as a means of achieving certain budget savings. (6) However, this is disputed, and some see it as simply transferring the cost from the State to individuals: for example, in the case of divorce without a judge, each spouse must now have their own lawyer. This is undoubtedly a measure to protect the consent of each spouse. The fact remains, however, that this has increased the costs of a divorce compared with the previous law, where it was possible to appoint a joint lawyer. (7)

---

(3) Nathalie Baillon-Wirtz, 'La loi du 23 mars 2019 et les nouvelles mesures de déjudiciarisation du droit des personnes et de la famille' [2019] Revue Juridique Personnes et Famille 5; Sylvie Moisdon-Chataigner, 'Déjudiciarisation du mariage, du divorce et du Pacs' [2019] JCP éd n°31; Sophie Prelot, 'Loi de programmation 2018–2022 et de réforme pour la justice, une nouvelle déjudiciarisation du droit des personnes et de la famille' [2019] Droit et patrimoine 10; Alex Tani, 'Simplification et déjudiciarisation de la gestion du patrimoine de la personne protégée' [2019] JCP éd n°32.

(4) Solange Mirabail, 'Déjudiciarisation du divorce et de la séparation de corps: une réforme inachevée' [2020] La Gazette du Palais 17.

(5) Anne Leborgne, 'Plaidoyer en faveur de la médiation familiale pour une justice apaisée' [2015] Revue Juridique Personnes et Famille 3.

(6) Pierre Dauptain, 'Le juge et le notaire à l'heure de la déjudiciarisation' [2017] Cahiers de la Justice 161.

(7) Paula Aboudaram, 'Le coût social du divorce' [2014] La Gazette du Palais 44; Clotilde Brunetti-Pons, 'De quelques réflexions autour d'un phénomène de déjudiciarisation en droit des personnes et de la famille' [2022] La Gazette du Palais 7.

A few definitions are necessary for a proper understanding of the following developments. **4**

Jurisdiction refers to the judge's power to rule on a factual situation submitted to them, in accordance with the prescribed procedure. By extension, it also refers, in an organic sense, to all the bodies vested with this power: judicial court/court of appeal/court of cassation for the judicial courts, administrative court/administrative court of appeal/council of state for the administrative courts.

The judicial function can be divided into the non-contentious judicial function (the judge is seised of a case when there is no dispute, because the law so requires) and the contentious judicial function (the judge is seised of a dispute that they must decide). It is the former, the non-contentious judicial function, that is most affected by the changes in the law; it is being weakened in favour of an amicable jurisdiction, administered by professionals other than judges.

Judicial decision refers to the decision handed down by a judge, which puts an end to the trial. It has the authority of *res judicata*, even if this quality is contested for decisions of non-contentious jurisdiction.

In terms of statistical data, there is no general register but scattered studies that make it possible to assess the extent of de-judicialisation in a given area: for family law (<https://www.justice.gouv.fr/sites/default/files/migrations/portail/art_pix/RSJ2021%206.2.pdf>) and for matrimonial property regimes and succession law (<https://www.csn.notaires.fr/fr/rapport-annuel-du-notariat>). **5**

II. Family law

French family and inheritance law has undergone major changes since the beginning of the 21st century, particularly under the influence of the case law of the European Court of Human Rights and the Court of Justice of the European Union. It is strongly imbued with principles such as equality and non-discrimination, respect for private life and the right to lead a normal family life, a right which is mainly invoked by foreign nationals residing in France in order to bring their families to France. However, it does not go so far as to recognise a right for people 'né(e) sous X' (ie, an anonymous birth) to know their father and mother or as a result of medically assisted procreation. **6**

The main sources of French family and inheritance law are the following four Codes: the Civil Code (C civ), the Code of Civil Procedure (C civ Proc), the Code of Social Action and Families and the General Tax Code. Alongside the judge, the main professionals involved in the de-judicialisation of the

French laws of family, successions, testaments and gifts are the mediator, the agent for the legal protection of persons and, of course, the lawyer and the notary. (8) All must perform their duties impartially and, like the judge, respect the adversarial principle.

A. *Divorce and legal separation (9)*

1. *Civil partners*

7 The civil solidarity pact is a contract 'concluded by two natural persons of full age, of different sexes or of the same sex, to organise their life together' (C civ, Article 515-1). As such, it may be declared null and void under the conditions of ordinary law. There are specific impediments based on a family relationship or the existence of a marriage or another civil solidarity pact; these are sanctioned by the nullity of the pact (C civ, Article 515-2). In all cases, the civil solidarity pact must be declared null and void by a court. Except in cases of the impediments mentioned supra, the judge retains sovereign discretion to determine whether the partners' consent was free and sincere.

The pact is dissolved by the death of one of the partners or by the marriage of one or both of the partners. In this case, dissolution takes effect on the date of the event. The civil registrar of the place of registration of the civil solidarity pact or the notary who registered the pact, informed of the marriage or death by the competent civil registrar, registers the dissolution and arranges for the formalities to be carried out.

The civil solidarity pact may also be dissolved by a joint declaration by the partners or a unilateral decision by one of them. In the first case, partners who decide to terminate the civil solidarity pact by mutual agreement must submit or send a joint declaration to this effect to the civil registrar of the place of registration or to the notary who registered the pact. In the second case, the partner who decides to terminate the civil solidarity pact serves notice on the other partner. A copy of this notification is given or sent to the civil registrar of the registration or to the notary who registered the pact.

The judge intervenes only to rule on the maintenance of children and if the partners do not agree on the property consequences of their separation; they may then appoint an expert to draw up a plan for the liquidation and division

(8) Stéphane David, 'Le rôle accru du notaire à l'aune de la déjudiciarisation' [2020] JCP éd n°41.

(9) Françoise Dekeuwer-Defossez, 'La déjudiciarisation des séparations de couples: acte 2 (en attendant l'acte 3 ?)' [2018] Revue Juridique Personnes et Famille 7.

of their property interests. The judge also retains jurisdiction over enforcement issues such as non-payment of child support, etc.

2. *Spouses*

Marriage is a contract 'concluded by two natural persons of different sexes or of the same sex' of full age (C civ, Articles 143 and 144); it is also an institution recognised by law and, because of this, separation and divorce are subject to specific procedures. **8**

Legal separation allows spouses to remain married while being authorised to live separately and this option is often taken by spouses who are opposed to the principle of divorce for personal or religious reasons, or for financial reasons when one of the spouses has little or no income. Legal separation may be amicable or judicial; the procedure is the same as for divorce (C civ, Article 296). It always entails separation as to property (C civ, Articles 1441 and 302), while leaving intact all the obligations between spouses other than that of cohabitation: duty of support, duty of fidelity, etc (C civ, Articles 299ff). (10)

Divorce needs to be granted by a judge or a civil law notary. It is granted by a judge in the event of a fault-based divorce, or a divorce requested by one of the spouses. In the case of a divorce by mutual consent, the spouses have a choice (infra, para 10).

They can have their agreement recorded by a judge (C civ, Article 232); the court will homologate the agreement and grant the divorce if it is convinced that the will of each of the spouses is genuine and that their consent is free and informed. It may refuse homologation and not grant the divorce if it finds that the agreement does not sufficiently protect the interests of the children or of one of the spouses (C civ Proc, Article 1100).

If the spouses are both capable and no minor child asks to be heard by the judge (C civ, Article 229-2), the spouses may choose to divorce by an agreement countersigned by their lawyers and filed with a notary. The latter's remit is much narrower than that of the judge (C civ, Article 229-1, para 2): they merely ensure that the agreement complies with the rules of form laid down by the Civil Code (C civ, Article 229-3) and that the spouses have not signed it until after the expiry of the fifteen-day period of reflection available to each of them (C civ, Article 229-4). (11)

---

(10) Mirabail, 'Déjudiciarisation du divorce' (n 4) 17 and Solange Mirabail 'Réforme de la justice et séparation de corps' [2019] La Gazette du Palais 17.

(11) For the point of view of a notary: Nicolas Randoux, 'La déjudiciarisation: opportunité ou danger?' [2018] Defrénois 15. For the point of view of a lawyer: Jean-Marie

9 The rules of international jurisdiction are set out in the Brussels IIb Regulation (Article 3). Procedurally, French law applies as the law of the forum. In the case of a non-judicial divorce, and as specified in the circular from the Minister of Justice dated 26 January 2017, notaries holding the agreement are not subject to rules of territorial jurisdiction. Their role is to receive all documents emanating from French or foreign parties, whether domiciled in France or abroad as long as French law applies to their divorce. At this point, it should be pointed out that France applies the Rome III Regulation to all divorce proceedings initiated after 21 June 2012 in order to determine the law applicable to the divorce.

French law recognises and applies the principle of litispendence, both within the European Union (Brussels IIb Regulation, Article 20) and in relations with third countries (C civ proc, Article 100). However, it is more difficult to apply in the latter case.

Foreign divorce judgments are automatically recognised in France if they were issued in a Member State of the European Union; otherwise, they are subject to the exequatur procedure under ordinary law or a simplified procedure if there is a bilateral agreement between France and the foreign State. The French court will check in particular that the adversarial principle has been respected. (12)

10 The services of a lawyer – or two, if needed – are compulsory in all cases of divorce, whether judicial or not. However, the grounds for the divorce need only be stated if the divorce is granted by a judge; the petitioning spouse must provide evidence of these grounds.

The choice of procedure is free, and the spouses may at any time switch from a contentious divorce to an amicable divorce, whether judicial or not (C civ Proc, Article 1123). However, there are certain impediments to divorce without a judge: incapacity of one of the spouses, or the existence of a minor child who asks to be heard by the judge (supra, para 7). It should be noted that the judge cannot ask to hear the child themselves; the request must come from the child or from one of their parents. The child is assisted by a lawyer, one of their parents or their legal representative during the hearing.

In a divorce without a judge, the out-of-court authorities have competence over maintenance obligations and parental responsibility.

Burguburu, 'Le barreau de famille et la Justice du XXIe siècle' [2014] La Gazette du Palais 3.

(12) Alain Devers and Michel Farge, 'La déjudiciarisation et la simplification du droit de la famille. Conséquences en droit international privé' in Sylvain Bernard and Michel Farge (eds), *Les mutations contemporaines du droit de la famille* (Presses universitaires de Grenoble 2020).

Judicial divorce begins with a writ of summons or a joint petition by the spouses to the court (C civ Proc, Articles 1075ff). The spouses are then summoned to a preliminary hearing, which allows the judge to refer the spouses to an amicable procedure, to take provisional measures (allocation of accommodation, payment of alimony, etc), to appoint an expert – eg, a notary – to prepare the liquidation of the matrimonial property regime. Once the case is ready, the judge sets a date for the hearing, at the end of which they indicate the date of deliberation, ie, the date on which the divorce judgment will be handed down. It becomes final once the time limits for appeal or appeal to the Supreme Court – *Cour de cassation* – have expired (C civ Proc, Articles 1083ff). **11**

In a divorce without a judge, the spouses first draw up a divorce agreement with the help of their lawyers, which sets out all the personal and property consequences of the divorce. Each of the lawyers sends the draft agreement to their client by registered letter with acknowledgement of receipt. The spouses have 15 days in which to consider the agreement. At the end of this period, the spouses and their lawyers sign the agreement in triplicate. One copy is filed with a notary within seven days of signing; it is this filing that makes the divorce final (C civ, Articles 229-1ff). The notary only carries out formal checks: they verify that the agreement includes all the mandatory information and that the spouses have respected their period of reflection. They are not required to check the substance of the agreement.

In all cases, the divorce is then published in the civil register.

a) *Divorce*

Divorce is constitutive and entails the dissolution and liquidation of the matrimonial property regime. Ideally, such matters are dealt with at the same time as the divorce is granted: if the spouses disagree on the consequences of the divorce, the judge may grant the divorce and appoint a notary to prepare the liquidation of the matrimonial property regime. **12**

Inheritance rights are lost. Survivor's pension rights may be retained under conditions that vary according to the applicable pension scheme.

One spouse may have to pay the other a compensatory allowance in the event of a disparity in the respective living conditions of the former spouses. The criteria for awarding such a compensatory allowance are defined by law and are subject to the judge's unfettered discretion. These include the length of the marriage, the age and state of health of the spouses, their qualifications and professional situations, their estimated and foreseeable assets and income after the matrimonial property regime has been settled, their respective pension situations, etc (C civ, Article 271).

These effects are the same regardless of whether the divorce is judicial or not. Once the judgment or agreement has become final, it is enforceable.

b) *Nullity*

Nullity results in the retroactive annulment of the marriage: it is deemed never to have existed. As an exception, a marriage may be declared putative where the spouses married in good faith. The past effects of the marriage subsist, and the children born of the union remain considered as children born of the marriage of their parents (C civ, Articles 201 and 202).
Nullity can be requested within five years of the marriage, or within 30 years for the most serious cases of nullity – eg, incest (C civ, Articles 180ff).

c) *Divorce by mutual consent*

In the case of a divorce by mutual consent, the spouses' agreement cannot be called into question: the judge's approval removes any irregularity that may have affected the agreement. On the other hand, a divorce by mutual consent without a judge is a contract governed by ordinary law. One of the spouses can apply to have the divorce agreement declared null and void, either relatively or absolutely. The fact that the agreement was concluded by a lawyer does not prevent such an action, even if the legislator has imposed an obligation for each spouse to have a lawyer to ensure a contractual balance.

13 The divorce agreement is subject to ordinary contract law, particularly as regards the integrity of consent. If the consent of one of the spouses is vitiated, they may apply to the court for the agreement to be declared null and void – which may result in the divorce being declared null and void – or for it to be revised by mutual agreement or by the judge.
In the case of divorce without a judge, there is less risk, as the notary must examine whether the spouses have actually consented before receiving the deed of deposit of their agreement.

14 The spouses' divorce agreement takes effect between them when it is signed and filed with a notary. Its enforceability against third parties is subject to publication in the civil status registers, on the margin of their birth certificates and, where applicable, marriage certificates.
It is subject to prior review by the judge only if the matter was referred to them in the context of a divorce by mutual consent: they must check that the agreement respects the interests of the spouses and the children. The judge's approval gives the agreement the force of *res judicata*.
In both cases, the divorce agreement may be revised or amended to accommodate changes that could not have been anticipated at the time of the divorce. The most common grounds for revision are child custody (Civil

Code, Article 373-2-13) and compensatory allowance (Civil Code, Article 276-3). If the spouses agree, they may draw up a new agreement; for the sake of formal parallelism, this must be concluded in the same way as the initial agreement. If no agreement is reached, the family court will rule on any requests for modification submitted to it, on the basis of the evidence provided by the parties.

15 The divorce decree may be contested by either spouse in a contentious divorce proceeding; an appeal is governed by ordinary law.

In all cases, the divorce agreement may be challenged before the court by third parties – eg, creditors if they consider that it infringes their rights. The action is time-barred after five years. (13)

16 France applies the European instruments of private international law; and the competent judicial authorities issue the certificates provided for in Articles 36(1) and 66(1)(a) of the Brussels IIb Regulation. (14) The deed drawn up by the notary is automatically recognised within the European Union (Article 65 of the Brussels II ter Regulation).

B. *Parenthood*

17 French law allows a child's filiation to be established in respect of both parents, whether of different or the same sex. There are only two exceptions to this principle. The first concerns children of parents between whom there is an impediment to marriage based on kinship (C civ, Articles 161 and 162); if the child's filiation has already been established with regard to one of their parents, it cannot be established with regard to the other by any means whatsoever (C civ, Article 310-2). The second concerns children born abroad by surrogate motherhood. This practice is prohibited under French law (C civ, Article 16-7), which only recognises medically assisted procreation for heterosexual couples, female couples, or single women. For children born abroad by surrogate motherhood, the transcription of a foreign civil status record is limited to the biological parent alone (C civ, Article 47); the second 'intended' parent must go through an adoption procedure.

The establishment of a parent-child relationship with a third person is prohibited.

18 Filiation may be established in three ways.

Firstly, it may result from the effect of the law. The mother's filiation is established by the mention of her name on the birth certificate (C civ, Article

(13) Mustapha Mekki, 'Le divorce par consentement mutuel conventionnel à la lumière du droit commun des contrats' [2017] La Gazette du Palais 16.

(14) Aude Letouvier, 'Les divorces internationaux confrontés à une déjudiciarisation nationale manifeste' [2021] Droit et Patrimoine 12.

311-25). The father's filiation is established by presumption when the child is conceived or born during the marriage and the birth certificate mentions the mother's name (C civ, Article 312). Failing this and, under certain conditions, where the child is born more than 300 days after the spouses separated, this presumption is set aside (C civ, Article 313).

Secondly, and failing this, by voluntary acknowledgement of the child (C civ, Article 316). This acknowledgement must be entered in the birth certificate or by any other authentic instrument; it may take the form of a will if it meets the specific formal requirements for an authentic will (C civ, Article 970). This acknowledgement produces its effects only in respect of the person making it.

Lastly, filiation may be established by possession of status, proven by a notarised deed signed by the notary and witnesses, of whom there must be at least three (C civ, Article 317).

Failing this, filiation may be established judicially as part of a contentious procedure - legal action to establish paternity or maternity. These procedures fall within the jurisdiction of the courts (C civ, Articles 318ff).

19 Jurisdiction is defined by the bilateral agreements concluded by France with certain foreign States. Failing this, the French court has jurisdiction if the action to establish or contest parentage is brought against a person domiciled in France.

The procedure is governed by French law, although the court must check whether the action is admissible under the national law of the mother or, failing that, of the child.

Lis pendens and the recognition of foreign judgments are governed by the applicable bilateral agreement and, failing that, by the rules of ordinary law (see supra 9).

20 Where filiation is not established automatically – by presumption – it may be established spontaneously by an acknowledgement recorded in an authenticated deed. It may also be established judicially, provided that the child's filiation has not already been established and corroborated by possession of status. Representation by a lawyer is compulsory. If the child is a minor, the action is time-barred ten years after their birth; if they are of age, the action must be brought within ten years of coming of age. The action may be declared inadmissible in certain cases, in particular, where there is absolute incest between the child's alleged parents. French law recognises two categories of incest: absolute incest, between close relatives (parent-child, brother-sister), and relative incest between more distant relatives (uncle/aunt-nephew/niece). Absolute incest is considered particularly serious from a social point of view and no exemption is possible. Relative incest, on the other hand, can be waived by a dispensation issued by the public prosecutor.

Conversely, it is not possible to terminate a legally established parent-child relationship by agreement. Legal action to contest parentage is required. If the action is successful, the parent-child relationship is cancelled retroactively, and the civil status records concerned must be updated. The rights and obligations of the parent whose filiation is annulled disappear. Parental authority linked to filiation also disappears, whether in terms of its exercise or rights and duties. Even if a parent-child-relationship is annulled, the court may, in the child's interest, grant the person who raised the child visiting rights (C civ, Article 337).

21 The proceedings take place before the court in the defendant's place of residence. The main task of the hearings is for the claimant to prove by any means possible the reality of the parent-child relationship claimed.

The use of genetic or biological tests to establish biological parentage is permitted, but only where such tests have been ordered by a judge. Tests carried out by the parties without judicial authorisation have no legal value. Recourse to forensic blood tests is automatic when a party so requests. In such cases, the judge is obliged to grant the expert opinion. However, the person concerned may always refuse to submit to such expert evidence. The judge is then free to draw any necessary conclusions.

22 Reference to the ordinary law of obligations is of little relevance here. The amicable establishment of filiation is based on a unilateral acknowledgement. This acknowledgement is a solemn act. It may be challenged on the grounds of lack of consent – false recognition – but such cases are rare.

23 Acts and decisions establishing a parent-child relationship, whether judicial or not, are declaratory. They take effect at the child's birth.

These documents and decisions may be challenged if filiation has been established on a false basis. The false declarant may then be held civilly liable and ordered to pay damages to the true parent or child. If the challenge is successful, the parent-child relationship is annulled; a new parent-child relationship must necessarily follow.

C. *Adoption*

24 There are two forms of adoption under French law: simple adoption (C civ, Article 364) and full adoption (C civ, Article 356).

Simple adoption confers on the adopted person a filiation that is added to their original filiation; the adopted person retains their rights in their original family. The adopted person adds the adopter's name to their original name; a maintenance obligation arises between the adopted person and the adopter, but the obligation of the biological parents remains in place on a subsidiary basis (C civ, Article 367). The adopted person is entitled to inherit

from both families (C civ, Articles 368 and 368-1). However, as far as inheritance tax is concerned, the relationship created by simple adoption is not taken into account when calculating inheritance tax, with a few exceptions.

Full adoption confers on the child a filiation that replaces their original filiation: the adopted child ceases to belong to their family by blood, except in the case of adoption of the child of the spouse, civil partner or cohabitee. The adopted child takes the name of the adopter; a reciprocal maintenance obligation arises between them. The adopted child is excluded from the succession of their family of origin. They become a forced heir of their adoptive family, as well as of the adopters' ascendants (adoptive grandparents); for tax purposes, they are taxed as a child.

Adoption must be granted by a court (C civ, Articles 353 and 361); a notary may intervene to obtain the prior consent of the adopter and the adopted person, but never to grant the adoption. [15] It is irrelevant whether the adopted person is a minor or an adult.

25 The rules governing jurisdiction are set out in the Code of Judicial Organisation, which designates one judicial court per court of appeal. The competent court must comply with the procedure set out in the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

An adoption duly granted abroad has the same effect in France as a full adoption if it completely and irrevocably terminates the pre-existing parent-child relationship. Otherwise, it produces the effects of a simple adoption. It may be converted into a full adoption if the required consents were expressly given with full knowledge of the facts. In any event, an adoption granted abroad may be recognised in France if it has been granted under conditions that do not contravene the principles of international public policy.

26 Adoption is subject to age conditions – eg, a maximum difference of fifty years between the adopted person and the adopter (C civ, Articles 344 and 361) – and must be agreed to by all those concerned: biological parent, where applicable, child, and adopter. It may be applied for by a single person or a couple of partners or spouses; cohabitees may not adopt together. In some cases – eg, adoption of a ward of the nation – the adopter must first obtain administrative approval.

If the adopted person is over the age of 13, their consent must be obtained unless they are unable to give it (C civ, Articles 348-7 and 361).

The use of a lawyer is compulsory if the child was taken into care after the

---

[15] Dauptain, 'Le juge et le notaire' (n 6).

age of 15 (C civ Proc, Article 1168). The public prosecutor is a party to the proceedings to ensure that the procedure is not abused.

The procedure begins with a petition filed with the court. The court has six **27** months in which to check that the conditions have been met and order the adoption.

Once the adoption judgment has become final, it is published on the margin of the civil status records.

The rules of ordinary law apply as necessary to consent to adoption. In **28** particular, the consent of the adopter and the adopted person must be freely given and sincere.

The adoption judgment is declaratory: it has retroactive effect from the **29** child's birth. It is irrevocable except on serious grounds.

The conditions of adoption are subject to the national law of the adopter or, **30** in the case of adoption by a couple, to the common national law of the two members of the couple on the day on which the adoption application is lodged or, failing that, to the law of their common habitual residence on the day on which the adoption application is lodged or, failing that, to the law of the court seised (C civ, Article 370-3). However, adoption may not be granted if the national law of both members of the couple prohibits it.

A foreign minor may not be adopted if their national law prohibits such an institution, unless the minor was born and habitually resides in France.

In all cases, adoption requires the consent of the child's legal representative.

D. *Parental responsibility*

Parental authority involves the parents, the judge under whose authority the **31** services providing help and assistance to minors are placed, and the public prosecutor, who has jurisdiction in the event of a criminal offence – eg, child abduction.

Parental authority is granted on the basis of parental status; it can only be withdrawn by court order. This withdrawal is liable to occur if the parent is convicted of a crime committed against the child, or of having subjected the child to ill-treatment or endangerment (C civ, Articles 378 and 378-1). In principle, all parental rights are withdrawn unless the judge considers that partial withdrawal would provide sufficient protection for the child while preserving the child's bond with the 'defective' parent (C civ, Article 379-1).

An action for the withdrawal of parental authority is brought before the court either by the public prosecutor, a family member or the child's guardian, or by the departmental child welfare service to which the child is entrusted.

Conflicts of jurisdiction shall be resolved in accordance with the Brussels IIb **32**

Regulation; proceedings shall be governed by the law of the forum, subject to the provisions of that Regulation.

33 Parental authority is exercised jointly by the parents (C civ, Article 372), even if they are separated, under the supervision of the court for most serious events, eg, interrupting the child's schooling before the age of 16, having the child undergo certain surgical operations for religious reasons, etc. The matter is referred to the judge by means of a petition (C. civ proc, Article 1180-6); they give a ruling in camera in the child's interests. The child's wishes are also taken into account if they are capable of discernment.

If the interests of the child are compromised, the judge may order the deprivation of parental authority or even entrust the child to a third party or a public institution. (16)

34 Agreements are possible, but only to organise the exercise of parental authority or to delegate it to a third party, such as a stepparent. It is only in the event of the predecease of one of the parents that the surviving parent may, by means of a will, appoint the child's guardian.

These rules do not apply to third parties. Third parties may give or bequeath property to a minor child and entrust the management of the property to a person freely designated; this person may be a relative or a professional known for their skills.

In all cases, the judge will intervene if the child's interests are at risk.

35 Agreements relating to parental authority and legal administration may be challenged on the grounds of lack of consent or on the grounds that they are not in the child's best interests.

36 These decisions are constitutive. They take effect as soon as they are validated by the judge.

37 Once validated, the agreement is enforceable until revoked. This revocation must be pronounced by the judge who decides on the basis of the evidence provided by the claimant.

The action may only be brought by the child's parents or the public prosecutor.

38 The conflict-of-laws rules are those set out in the Brussels IIb Regulation.

E. *Matrimonial property regimes*

39 French law recognises the concept of matrimonial property regimes and distinguishes between legal matrimonial property regimes and contractual matrimonial property regimes.

---

(16) For practical information, see <https://www.service-public.fr/particuliers/vosdroits/F3132?lang=en> accessed 15 January 2025.

40 The legal regime is that of a community of acquests, properties acquired during the marriage. It applies in the absence of a marriage contract prior to the marriage for all spouses married in France since 1 February 1966. Property acquired for valuable consideration or created during the marriage is, subject to exceptions, held in common; property owned by the spouses at the time of the marriage or acquired by them as a gift or inheritance during the marriage remains theirs alone.

By agreement, the spouses can choose an appropriate community regime: they can exclude from their community assets that, under the legal regime, should have been held in common; they can also extend the community, eg, by adopting a universal community regime. The spouses can also change the way in which the community property is divided and, in the case of death of one spouse, provide for full distribution to the survivor.

They may also prefer to adopt a regime of separation as to property or a regime of participation in acquests: this regime operates as a regime of separation during the marriage and is similar to a regime of community at the time of its dissolution.

In all cases, the spouses are subject to a primary matrimonial property regime, which is a matter of public policy. It contains provisions designed to ensure equality between the spouses, their contribution to household expenses, protection of the family home, etc.

41 All matrimonial agreements must be drawn up before the celebration of the marriage, by deed before a notary, in the presence and with the simultaneous consent of all the persons who are parties thereto, or their proxies (C civ, Article 1396). The marriage contract must be received before the marriage takes place, but it only takes effect on the day of the marriage.

During their marriage, the spouses may decide to change their matrimonial property regime by notarial deed (C civ, Article 1397). The change of matrimonial property regime must be justified by the interests of the family, as assessed by the notary. (17) Court approval is no longer required, except in the event of opposition to the change of matrimonial property regime by the couple's adult children (18) or creditors.

The change of regime takes effect in relations between the spouses as soon as the notarial deed is signed (or the judgment of homologation, if this is required). It may be invoked against third parties within three months of its

---

(17) Christelle Rieubernet, 'L'illusoire exigence de conformité du changement de régime matrimonial à l'intérêt de la famille' in *Mélanges en l'honneur de Claire Neirinck* (LexisNexis 2015) 411.

(18) Nathalie peterka, ‚Déjudiciarisation du changement de régime matrimonial en présence d'enfants mineurs' [2018] JCP éd n°40.

publication in the birth certificate of each of the spouses and their marriage certificate. These formalities are carried out by the notary. (19)

42 On the other hand, a court may intervene if one of the spouses is no longer able to express their will or is acting against the common interests of the spouses (C civ, Articles 217ff).

III. Succession law

43 French inheritance law is based on succession to the person: the heirs continue the legal person of the deceased. As such, they are seised of the deceased's assets on the day of their death and, in principle, have to pay all their debts. This automatic transfer is not compulsory, and the heirs may accept or renounce the succession.

The law determines who is entitled to inherit based on the presumed fondness of the deceased (C civ, Article 734). However, the deceased may make bequests in their will and depart from the legal rules of transference. French law requires the production of an original declaration in writing for these wishes to be implemented; oral wills are not permitted. Four forms of will can be distinguished:

1. Holographic will, which is the most common. It must be written in full, dated and signed by the testator (C civ, Article 970).
2. Authentic will, which is drawn up by two notaries or by a notary assisted by two witnesses (C civ, Article 971). It must be dictated by the testator in the continuous presence of the second notary or the witnesses. In all cases, it must be read to the testator, who signs it.
3. Very rare today, the sealed will is drawn up by the testator who presents it to the notary, in the presence of two witnesses, in a sealed envelope (C civ, Article 976).
4. International wills were created by the Washington Convention of 26 October 1973 and introduced in France on 1 December 1994.

Whatever its form, the will must respect the share of inheritance reserve of their descendants or, failing that, their surviving spouse.

44 With the exception of the departments of Alsace and Moselle, where the court must intervene to issue a certificate of inheritance proving the status of heir (Law of 1 June 19234, Articles 75 to 77; regional C civ, Articles 2353ff), the court intervenes in the settlement of an estate mainly in the event of a dispute between the heirs. The court in the place where the deceased last resided has jurisdiction. It can rule on the devolution of the estate (action for

(19) Paul-André Soreau, 'Déjudiciarisation du changement de régime matrimonial: suite et fin!' [2019] JCP éd n°41.

petition of inheritance), supervise the completion of the inventory of the estate, order the division of the estate, etc. It has extensive powers to do so. They may summon the parties to attempt conciliation, appoint an expert to assist them – a notary, for example, to carry out the liquidation of the estate – impose fines or injunctions, etc.
Apart from these contentious cases, the judge may intervene to compensate for the failure of an heir to settle the estate. They may then appoint a representative to take part in the liquidation and division of the estate in the name and on behalf of such heir, under their responsibility and under the supervision of the judge.

A. *Devolution of the estate*

1. *Principles common to legal and testamentary successions*

45 In principle, acceptance or renunciation of an inheritance results from a decision by the successor. There is no prescribed form for acceptance: it may be tacit, although it is customary to record it in a notarial deed. Renunciation must be express; it may be made before a notary or by declaration to the clerk of the court in the place of death.
The heirs may also declare that they accept the succession up to the amount of the net assets in order to limit the extent of their liability to the assets received; this declaration is made by notarial deed, is publicised to warn creditors and requires a notarial inventory of the succession to be drawn up. (20)
By way of exception, acceptance of the succession may be forced where the successor has committed fraudulent concealment of the inheritance or has not opted for renunciation within the time allowed. Similarly, renunciation of the succession is presumed in the absence of an acceptance within ten years of the death. The estate then devolves to the next ranking heirs; if there are no 6th degree relatives, it devolves to the State.
46 The international jurisdiction of French courts is determined by Regulation (EU) no°650/2012 of 4 July 2012.
The law applicable to proceedings brought before the French courts are governed by French law as the law of the forum.
47 The devolution of the estate is recorded in a notarial deed drawn up by a notary, in accordance with the declarations of the heirs. The heirs certify, under their own responsibility, that they are the only parties entitled to

(20) Ludivina Fabra, 'Déjudiciarisation de l'acceptation pure et simple de la succession' [2019] JCP éd n°36.

inherit the estate. In practice, it is the notary, a legal professional, who identifies the potential heirs from among the deceased's relatives; they do this on the basis of the civil status information they have been able to gather or, in the event of difficulty, with the help of a genealogist. (21) The notarial deed may be supplemented by an inventory of the estate's assets, which is not, in principle, compulsory.

If the deceased owned real estate, a certificate of real estate ownership must be drawn up by a notary.

This attests to the transfer of ownership of the deceased's property to their heirs.

Finally, an inheritance declaration must be submitted to the tax authorities within six months of the death in order to pay any inheritance tax that may be due. This declaration is a snapshot of the deceased's assets at the time of death; it is usually drawn up by the notary but can also be done by anyone else – the beneficiaries themselves, their lawyers or financial advisers.

48 The ordinary law of obligations applies. The acceptance or waiver of the succession may be challenged on the grounds of lack of consent.

49 There are two ways to contest the transfer of an estate. Either it is the status of heir itself that is challenged; a person claiming to be an heir must provide proof, by any means, of their relationship to the deceased or of the will they are invoking. Or it is the acceptance or waiver of the inheritance that is challenged; in addition to being challenged by the successor on the basis of a defect in consent, the deceased's or the heir's creditors may also have the acceptance or waiver of the inheritance declared unenforceable if it had been made in violation of their rights.

2. *In case of testamentary succession, or agreements as to succession*

50 Agreements as to succession are prohibited. This is an unwritten rule of public policy that prohibits a person from organising the transfer of their own estate by irrevocable agreement, or a presumptive heir from definitively disposing of their rights in the succession of a person still alive: they may not assign or renounce their rights in a future estate to a third party. Such an agreement is absolutely null and void and may be invoked within five years by any person with an interest in it, including the public prosecutor. The prohibition, based on the immorality of such agreements and the prohibition of *votum mortis*, is not general, however, and there are exceptions.

Some of these are long-standing. On the one hand, to facilitate inheritance settlements, it is possible for a person, during their lifetime, to make a

(21) Dauptain, 'Le juge et le notaire' (n 6).

donation-partage or gift-sharing of their assets between the presumptive heirs; this deed combines two legal transactions into one: a donation and a division. It is a true family pact by which the disposing persons themselves distribute their assets between their successors. In addition, spouses may give each other gifts *mortis causa*, also known as contractual institutions (C civ, Articles 1094-1ff); these instruments are very often used in practice and are valid because, although they are gifts, they are freely revocable.

Other exceptions are more recent; they have existed since 1 January 2007 – the date on which the Law of 23 June 2006 reforming the law of succession and gifts came into force. The law now recognises the validity of the posthumous mandate (C civ, Articles 812ff), by which the principal appoints a third party to manage the assets that will make up their succession upon their death. Even more radically, it allows, subject to strict formal conditions, early renunciation of an action for reduction (C civ, Articles 929ff), whereby a presumptive forced heir can renounce an action for reduction in advance. This waiver is made in favour of one or more specified persons. It is an act that is still debated today, with some people seeing it as an infringement of the reserved portion of the estate.

51 It is the civil law notary who is competent to open the will and file it in their office. Where the legatee is not an heir, it is also the notary who is competent to verify the formal legality of the will and, in the absence of opposition, to allow the legatee to take possession of the bequeathed property. In the event of opposition, it is the court which must rule and order the legatee to be given possession. In certain cases, depending, in particular, on the nature of the legacies, it is the legal heirs who must authorise the legatee to take possession of the bequeathed property; they consent to the delivery of the legacy. The will is registered with the tax authorities.

If there is no will, no formalities are required. French law considers that the heirs 'continue' the person of the deceased. In this capacity, they automatically become the owners of inheritance assets by the mere effect of death.

52 If testamentary provisions affect the rights of forced heirs, they are not null and void. They are subject to a limitation of their effects, known as a reduction to the available portion.

This reduction may be amicable if the forced heirs and the legatees are able to reach an agreement. Failing this, it is established by the court in the place where the deceased was domiciled, which may call on the services of a notary as an expert. The action must be brought within five years of the death or, at the latest, within ten years of the death if the forced heir had no prior knowledge of the infringement of their rights.

B. *Certificates of succession*

53 Proof of capacity as heir or legatee is most often provided by the production of a notarial deed issued by a notary. The purpose of this deed is to prove the status of heir or legatee and may, if necessary, be supplemented by the production of a copy of the will. This deed is based on the declarations of the parties; in Alsace and in the department of Moselle, the procedure is different and is based on a solemn affirmation made before the judicial court of the place of residence of the deceased.

In the case of executors, a notarised copy of the will is proof of their status.

54 European Regulation no 650/2012 of 4 July 2012 determines the competent authority and cases of *litispendence* . In France, it is the notary who is competent to issue a European Certificate of Succession. However, the notary cannot be described as a court within the meaning of the Regulation. They do not have the power to rule on their own authority on points in dispute between the parties concerned; rather, their jurisdiction depends solely on the will of the parties.

55 To draw up the notarial deed, the notary must carry out the necessary civil status checks. If necessary, they may suggest the services of a genealogist in the most complex cases. In the event of a dispute, the court has jurisdiction, and its decision will establish the status of heir or legatee.

56 A notarial deed or, if the division of the estate is challenged, a court judgment, can be provided to prove heirship. They may be contested under the conditions set out supra 49 in the event of false declarations by the parties.

57 In an international context, the notary may issue a European Certificate of Succession as provided for in Articles 46 (3) (b) or 59 (1) (2) of the Succession Regulation.

C. *Administration of estates*

58 The notary responsible for settling the estate is freely chosen by the heirs; the Code of Professional Conduct for Notaries governs cases where several notaries are chosen.

There are generally four main stages in the settlement of an estate:

1. Drawing up the notarial deed by the notary, which establishes the division of the estate.
2. Drawing up an 'inventory': the notary gathers all the assets and liabilities that make up the deceased's estate. They act as the heirs' agent and, on their behalf, contact the deceased's banks, pension funds, employers, creditors – in particular, tax authorities or the administrative departments that pay out social assistance, etc – to ascertain

whether the deceased's assets and liabilities are in order. This inventory does not necessarily take the form of an inventory in the strict sense of the term; it is not compulsory except in special cases – for tax reasons or when an heir intends to accept the estate up to the amount of the net assets, for example.

3. Mortgage and tax formalities. The notary carries out the necessary formalities to record the transfer of the property owned by the deceased. They prepare the declaration of inheritance that the heirs must file with the tax authorities within six months of the death, together with any inheritance tax that may be due.
4. Distribution of the estate.

If the deceased had drawn up a will, another stage will be necessary if the legatee is not one of the heirs. French law does not recognise the legatee's right to inherit: they become the owner of the bequeathed property as a result of the death, but cannot take possession of it. This requires a specific formality which, depending on the nature of the legacy, is either an issuing of the legacy or a delivery into possession. Both must be agreed by the legal heirs and are the subject of a specific notarial deed.

59 The deceased may have entrusted the management of all or part of their estate to a third party: a mandatary or executor. A posthumous agent is designated by a written mandate. The executor is appointed by will.

The judge only intervenes in the event of a disagreement between the beneficiaries or in the event of a dispute over acts carried out by the agents and executors of the will. If necessary, they may appoint a court-appointed administrator. It is up to the claimant to prove their allegations under the conditions of the ordinary law of evidence.

60 The division of the inheritance is amicable. It must respect the principle of equality between the heirs. They are the ones who freely determine the composition of the allocations.

The judge does not intervene except in the event of disagreement – in which case the division is judicial – or when one of the heirs is a protected person and there is a conflict of interest with their legal representative, eg, when both are joint heirs.

61 The task of the posthumous executor is to manage the property of the succession in the interests of the heirs and to carry out the necessary acts of administration; they may receive payment from the creditors of the succession and take legal action. The appointment of an executor does not divest the legal heirs of their rights.

The executor's role is to ensure that the provisions of the will are properly carried out. The executor's powers are more or less extensive depending on whether or not the deceased has heirs with or without a minimum share.

Deeds concluded by a posthumous agent or executor may be challenged before the court either on the grounds that they exceed their powers or

because they are not in accordance with the interests of the heirs or the wishes of the deceased.
Deeds concluded by either of them have the same value as deeds concluded by the heirs. In particular, they do not have the force of *res judicata*.

IV. Status of natural persons

A. *Name changes*

62 A change of name may be requested for a legitimate reason, in order to francise a foreign name, to take the name of a parent who has not passed on their own name, or to take the name of a spouse.
The application is submitted to the civil registry, which is part of the Ministry of Justice. They examine the merits of the application. Their refusal may be challenged before the administrative courts.

63 The request for a change of name is submitted electronically to the relevant department. The latter may ask the *Procureur de la République* to conduct an investigation or refer the matter to the *Conseil d'Etat* (Council of State) in the event of difficulties. The services of a lawyer are not compulsory.
There is no statutory time limit for this process, which varies from a few months to a few years depending on the difficulty of the case.
The decision to change a name is published in the Official Journal, and an entry is made in the civil status registers.

64 The ordinary law of obligations does not apply to decisions taken by the administrative authority.
Appeals are possible from third parties who may object to the change of name in order to protect their own. Deadlines are very tight: appeals must be lodged with the *Conseil d'Etat* within two months of publication in the *Journal officiel* (22).

B. *Gender recognition*

65 Sex reassignment is permitted under French law. It may be obtained following legal proceedings brought before the court in the place of residence or birth of the person concerned. (23) French law does not recognise gender neutrality. In a judgment handed down on 31 January 2023, the

(22) The *Journal Officiel* is the official publication of the French Republic. Its purpose is to inform citizens of the laws, decrees and orders that apply to them or to inform them of the workings of the public authorities.

(23) Laurence Herault, 'État-civil de demain et transidentité' [2018] Mission de recherche Droit et Justice.

European Court of Human Rights ruled that in doing so, France had not failed to fulfil its positive obligation to guarantee the right to respect for private life, protected by Article 8 of the European Convention on Human Rights of the intersex person who claimed to have such an indication on their birth certificate (24).

66 The applicant must be an adult or an emancipated minor. The application is made by petition; a lawyer is not required. The applicant must provide proof of several facts to show that their gender does not correspond to that shown on their birth certificate. The evidence may be provided by any means: witness statements, attestations, etc.

The judge makes their decision on the basis of the case file or, if they consider that additional information is required, they may summon the claimant to be heard. (25)

67 The applicant's consent must be free and informed; this is verified by the judge during the procedure.

The decision to reject the application may be appealed by the applicant under the conditions of ordinary law. If the application is accepted, the civil status records are amended to take account of this as soon as the judge's decision has become final (C civ, Article 61-7); the judgment is declarative. The name change can only occur after the decision has become final.

Sometimes, specific steps may be required: eg, transgender people who were married before their sex change must obtain permission from the public prosecutor to remain married.

C. *Protection of adults*

68 The protection of adults traditionally falls within the remit of the courts, and, more specifically, the courts dealing with protection disputes. It is this judge who can order a judicial protection measure and who supervises conventional protection measures.

Since a 2007 reform, judicial protection measures have been subsidiary; they only apply if the person concerned has not organised their own protection or if other rights do not protect them sufficiently – matrimonial property law in particular (C civ, Article 428). (26)

69 A request for legal protection may be made by the adult themselves, the person with whom they are living as a couple, a parent or relative, the public

(24) Y v France App no 76888/17 [ECtHR, 31 January 2023].

(25) Anne Debet, Marie Mesnil, Anne Laude, Olivier Saumon, 'La démédicalisation du changement de sexe à l'état civil: une conception renouvelée du sexe et du genre' [2017] Journal de droit de la santé et de l'assurance maladie 6.

(26) Gilles Raoul-Cormell, 'Assistance et représentation dans la protection juridique des majeurs' [2021] Droit de la famille 12.

prosecutor or a third party, such as a doctor or the director of a residential establishment. The application must be accompanied by a detailed medical certificate and any other supporting evidence. The judge makes their decision after hearing the person to be protected and the applicant; this judgment is a constitutive one. For the duration of the procedure, the judge may order the implementation of a legal protection measure: this makes it possible to protect the vulnerable person without depriving them of their legal capacity.

70 If the adult has anticipated their own vulnerability by drawing up a mandate for future protection (C civ, Article 477), the mandate is implemented by producing, at the clerk's office of the court, a medical certificate drawn up by a doctor on a list drawn up by the public prosecutor (C civ, Article 481). The judge does not check the content of the mandate a priori; when the time comes, they can be referred by any interested party to verify that the mandate sufficiently protects the mandate's interests (C civ, Article 484). If this is not the case, the judge may order a judicial protection measure.

Whether protection is the result of a mandate or a judicial measure, the wishes of the adult must be followed as often as possible. The protected adult always retains the possibility of carrying out strictly personal acts, eg, recognising a child.

71 Deeds drawn up by a protected person may be challenged by the other party on the grounds of incapacity: this is a case of relative nullity, and the limitation period accrues in five years. The Civil Code also provides for a special regime for acts performed shortly before the start of the protection measure; these acts can be annulled more easily than under ordinary law (C civ, Article 464).

Acts carried out by the protected person's representative may be challenged on grounds of lack of consent of the protected adult, conflicting interests or exceeding their powers. For the most serious acts, the judge's authorisation is required.

72 It is always possible for the protected person to ask for the protection measure to be lifted on the ground that it is no longer necessary. This requires the production of a detailed medical certificate. As long as the judge has not given a ruling, the protection measure remains in force.

In addition, judicial protection measures are, in principle, valid for only five years; they may be renewed, as many times as necessary, on the basis of a medical certificate. As an exception, when it appears that the protected person's condition is unlikely to improve, the measure may be ordered for an unlimited period.

V. Conclusions

73 The de-judicialisation of French family and personal law is now indisputable and is set to continue over the next few years. (27) This ongoing trend raises the question of its limits. (28) Is it desirable, or even possible, to divert family law completely from the courts? (29) This would be a major departure from French law, which traditionally sees the courts as the guarantor of individual freedoms and fundamental rights. (30)

One thing is certain: this de-judicialisation has very clearly altered the division of roles between the judge and legal professionals, mainly lawyers and notaries, who have been forced to diversify their activities and adapt the conditions under which they carry out their duties. (31)

74 Few question the merits of these changes, even if the lack of coherence on the part of the legislator is sometimes pointed out and may give rise to fears of incomprehension on the part of litigants. (32)

It should also be noted here that the judicial judge enjoys an independence that can be described as natural and that is constitutionally guaranteed. The independence of notaries, who appear to be the primary beneficiaries of the de-judicialisation of family and personal law, is not as strong; it is more contingent. It is for this reason that notarial deeds have been described as imperfect authentic instruments, unlike court decisions, which are perfect authentic instruments. (33)

75 On the other hand, the arrangements for implementing the de-judicialisation are often criticised. (34)

Firstly, because the transfer of powers that it entails is not accompanied by the transfer of appropriate resources. Lawyers and notaries do not have the same investigative resources as judges to assess the legitimacy of the deed presented to them. They can assess the legality or appropriateness of the

---

(27) Nathalie Reterka, 'Déjudiciarisation programmée de la gestion patrimoniale' [2018] JCP éd n°33.

(28) Sylvie Cimamonti and Jean-Baptiste Perrier, 'Les enjeux de la déjudiciarisation' [2018] Mission de recherche Droit et Justice.

(29) Niels Delmarche, 'La famille a-t-elle encore besoin de juges?' [2020] Droit de la famille 17.

(30) Hugues Fulchiron, 'Obligation d'entretien: coup d'arrêt à la déjudiciarisation: pas de pouvoir de révision pour les directeurs des CAF' [2019] Droit de la famille 16.

(31) Violette Gorny, 'Même le meilleur des notaires ne peut remplacer le juge et l'avocat' [2008] La Gazette du Palais 4.

(32) Marie Lamarche, 'Crise de la justice versus déjudiciarisation et conventionnalisation: les impératifs pédagogiques' [2022] Droit de la famille 4.

(33) Nicolas Randoux, 'La déjudiciarisation: opportunité ou danger?' (n 11).

(34) Anaïs Vanel, 'Le déni de justice en droit patrimonial de la famille' [2021] Revue de la recherche juridique 109.

deed, but it is very difficult to assess its legitimacy, even though this is at the heart of the role of the non-contentious court.
Secondly, because it would tend to turn the law into a market in which the professionals concerned would seek to secure a monopoly to the detriment of others and, ultimately, the litigant. Economic logic must not take precedence over free and equal access to the law, nor over the interests of those subject to the law, for whose sole benefit the diversion of legal proceedings should be carried out. (35)

(35) Estelle Farine, 'La déjudiciarisation. Désimplication souhaitable ou risque d'arbitraire social' [2015] Droits 185.

GERMANY

by *Aron Johanson*

I. Introduction

German law is a civil law system that still very traditionally adheres to the concept of the court and thus, in the area of family and succession law, hardly allows for out-of-court proceedings and seldom assigns any competencies to non-judicial authorities. This is especially true for proceedings concerning the status of a person; regarding merely proprietorial interests, however, German law is somewhat more liberal. **1**

A. *Codification*

Even though Germany has a federal structure, with the Federal States (*Länder*) generally having the right to legislate (Articles 70, 30 of the German Basic Law – *Grundgesetz*), (1) both substantive and procedural law in family and succession matters is (almost exclusively) federal law as the Federation (Bund) exercised its concurrent legislative power (*konkurrierende Gesetzgebungskompetenz* – Articles 72(1), 74(1)(1), and 74(1)(2) Basic Law). The Federal States can therefore only enact deviating laws where the Federation expressly authorises this. In the past, the most relevant deviation was the assignment of specific tasks in succession law, which are usually carried out by the probate court (*Nachlassgericht*), to special State-employed, civil servant notaries (*verbeamtete Notare*) in Baden-Württemberg. However, this divergence has since been abolished (see below para 142). **2**

Substantive family and succession law is part of private law and is therefore regulated mostly in the fourth and fifth book of the German Civil Code (*Bürgerliches Gesetzbuch*, hereinafter: BGB). The first three books of the BGB cover the general part, the law of obligations, and the law of property. In part, family and succession law also refers to these books, but in other places, it also differs considerably from the general principles as will be shown in the following report. **3**

---

(1) Quasi-official English translation of the most important German laws (including *inter alia* the Basic Law [*Grundgesetz*], the Civil Code [*Bürgerliches Gesetzbuch*], the Civil Procedure Act [*Zivilprozessordnung*], the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction [*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*], and the Act on Senior Judicial Officers [*Rechtspflegergesetz*]) can be found online: <https://www.gesetze-im-internet.de/index.html>. However, it may take some time until recent amendments are translated into English. Thus, the English version is not necessarily the latest version of the law.

4 It is also worth mentioning the German fundamental rights (*Grundrechte*) relating to family and succession law stipulated in the German Basic Law, which has constitutional status in Germany. These include the fundamental right to marriage (Article 6(1) Basic Law), the fundamental right to parental responsibility (Article 6(2) Basic Law), and the fundamental right to inheritance (Article 14 Basic Law).

B. *Interpretation of the law*

5 Germany has a distinctive system of case-law which – even though not formally binding – has considerable persuasive authority on the interpretation of the law. The Federal Court of Justice (*Bundesgerichtshof*, hereinafter: BGH) is the highest German court in civil matters, including family and succession law. Where the infringement of constitutional law is concerned, the Federal Constitutional Court (*Bundesverfassungsgericht*, hereinafter: BVerfG) has the final say.

6 In addition to case-law, there is a large body of literature from scholars including but not limited to Article-by-Article commentaries ([2]) and journal articles ([3]) that assists in the interpretation and the filling of gaps in laws. The courts also often refer to scholars' opinions found in the scientific literature in their reasons for a judgment.

C. *Family and probate courts*

7 In the area of family and succession law, specialised family and probate courts (*Familien- und Nachlassgerichte*) are established, which are part of the so-called non-contentious jurisdiction (*freiwillige Gerichtsbarkeit*). Proceedings before these courts ([4]) are conducted according to the rules of the Act

---

([2]) This report will refer to the most important Article-by-Article commentaries in its footnotes.

([3]) The most important journal in family law matters is *Zeitschrift für das gesamte Familienrecht* (FamRZ) which also covers succession law matters. Noteworthy are also *Der Familien-Rechts-Berater* (FamRB), *Forum Familienrecht* (FF), *Das Jugendamt* (JAmt), *Neue Zeitschrift für Familienrecht* (NZFam), and *Das Standesamt* (StAZ). Journals for succession law include inter alia *Zeitschrift für die Steuer- und Erbrechtspraxis* (ZErb), and *Zeitschrift für Erbrecht und Vermögensnachfolge* (ZEV).

([4]) Matters covered by the family courts are, for example, marital matters, parent and child matters, parenthood matters, adoption matters, matters concerning the marital home and household objects, matters concerning protection from violence, matters concerning the equalisation of pension rights, matters concerning maintenance, and matters concerning marital property law (§ 111 FamFG). Matters covered by the probate courts are, for instance, those that concern the special official custody of dispositions *mortis causa*, securing the estate, including curatorship of estates, the opening of the disposition *mortis causa*, determination of

on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*, hereinafter: FamFG), which partly varies from the rules of contentious civil proceedings as set out in the German Code of Civil Procedure (*Zivilprozessordnung*, hereinafter: ZPO). (5)

D. *Judges and senior judicial officers*

8 In the family and probate courts, not all tasks are carried out by judges (*Richter*) who are fully qualified lawyers (*Volljuristen*) and have therefore passed two State examinations (*Staatsexamen*). Some tasks are assigned to so-called senior judicial officers (*Rechtspfleger*), who are also authorised to make decisions within their scope of functions. The legal status of senior judicial officers and the tasks assigned to them are regulated in the Act on Senior Judicial Officers (*Rechtspflegergesetz*, hereinafter: RPflG). According to its § 9, senior judicial officers are – like judges – not bound by the directions of a superior but only by law and order (factual independency – *sachliche Unabhängigkeit*). Also, their decisions can be appealed (§ 11 RPflG) and will then usually be reviewed by judges of the higher regional court (*Oberlandesgericht*, hereinafter: OLG). Senior judicial officers are civil servants of the higher judicial service (*gehobener Justizdienst*) who have completed a three-year preparatory service (*Vorbereitungsdienst*), which consists of specialist studies and vocational practical study periods, and have passed the senior judicial officer examination (§ 2(1) RPflG). Although they are an independent organ of the judicial administration, (6) they are not considered to be judges in the sense of the German Basic Law and thus do not exercise judicial powers. (7) Nevertheless, no one doubts that decisions by senior judicial officers are 'decisions' in a European understanding as they are 'other

---

the heirs, the acceptance of declarations that are to be submitted to the probate court pursuant to statutory provisions, certificates of inheritance, certificates of executorship, and other certificates to be issued by the probate court, execution of a will, estate administration, and property division matters (§ 342 FamFG).

(5) To make it even more complicated, a different set of rules applies depending on the subject matter. In marital matters (including divorces), matters concerning maintenance, and matters concerning marital property law, the FamFG refers very widely to the provisions of the ZPO, so that the rules of contentious civil jurisdiction apply almost in their entirety *mutatis mutandis* regarding these matters (§ 113 FamFG). On the other hand, the FamFG has its own distinct set of rules for other family matters which are non-contentious in nature.

(6) Kornelia Schmid in *NomosKommentar Rechtspflegergesetz* (Nomos Verlagsgesellschaft 2012) § 1 RPflG para 1.

(7) BVerfG FamRZ 2000, 731, 732–733.

authorities [...] which exercise judicial functions' (cf, eg, Article 3(2) Succession Regulation). (8)

II. Family law

9 On 1 July 1977, the First Marriage Law Reform Act (9) came into force, which has had a decisive influence on German family law to this day. In addition to considerable changes in divorce law (see below para 19), the Act implemented the family courts (*Familiengerichte*) as an independent branch of civil jurisdiction. These newly implemented courts were henceforth competent for all family law matters (eg, divorces, child law settlements, and disputes over property rights and maintenance), which until then had to be decided by different courts. The German legislator still largely adheres to these specialised family courts today, with the result that hardly any family law competences lie with non-judicial authorities.

10 § 23a(1)(1) in conjunction with § 23b(1) of the German Courts Constitution Act (*Gerichtsverfassungsgesetz*, hereinafter: GVG) stipulates that district courts (*Amtsgerichte*, hereinafter: AG) establish special divisions for family cases, which are the family courts. The Higher Regional Courts are competent for appeals against family court decisions, § 119(1)(1)(a) GVG. The court of final instance is the German Federal Court of Justice, which has established its own senate for family law matters.

11 Within the execution of family law, the youth welfare offices (*Jugendämter*) also play a vital role, as they are responsible for child and youth welfare. Nonetheless – as will be shown – they cannot render decisions without court involvement. The youth welfare offices' services and functions are defined in Book Eight of the Social Code (*Sozialgesetzbuch – Achtes Buch*, hereinafter: SGB VIII).

12 Substantive family law is mainly regulated in the fourth book of the BGB (§§ 1297–1888 BGB). This is consistent: although family law in detail has connections to public law (especially social law), it is to be assigned to private law in its entirety, because it primarily regulates rights and obligations between subjects of private law. (10)

---

(8) Exemplary for Article 3(1)(g) and (2) of the Succession Regulation: Case C–20/17 *Oberle* [2018] FamRZ 1262; Anatol Dutta in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2024) Art. 3 EuErbVO para 19.

(9) *Erstes Gesetz zur Reform des Ehe- und Familienrechts* of 14 June 1976, BGBl. 1976 I, p 1421; notwithstanding the name, there has never been a Second Marriage Law Reform Act.

(10) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 1(24); Karlheinz Muscheler, *Familienrecht* (4th edn, Verlag Franz Vahlen 2017), para 7; Walter Rolland, 'Privatrecht und Familienrecht' in Peter Gottwald, Erik Jayme, and Dieter

Within private law, family law has the function of determining the personal status (eg gender, relationship, and marital status) of each individual, which is defined as a central legal characteristic of a natural person attributed by family law and is intended to last for a long time, is made recognisable to the public in some way, can cause legal consequences (not necessarily at the moment) in various areas of law, and creates substantive rights and obligations for the person. (11) As this personal status affects all areas of life and law, it must be established in a legally secure manner and must have a certain permanence. Therefore, the establishment of many status-changing legal transactions under family law are regulated differently from the general law of obligations. For example, they are regularly not subject to conditions, require a particular form, and must be carried out personally. Statutory representation is only permissible in exceptional cases, and even then, only in the case of persons lacking legal capacity. Most legal transactions under family law provide for an age limit of 14 from which the person may declare the transaction themselves. For some transactions, however, the consent of the legal representative is still required. As a rule, the declaration of the statutory representative alone is not sufficient. **13**

Besides the personal status element, family law relationships must have permanence under German law since they are often structured as continuous legal relationships. A continuing legal relationship that has been put into effect erroneously can regularly only be reversed with difficulty. (12) The consequence of these two permanence requirements is that rights to unilaterally terminate legal relationships under family law (eg, the right to the annulment of marriage, divorce, or contestation of parenthood) are considerably restricted. German law demands, in general, a two-part process for these rights, which requires a judicial act in addition to a formal declaration of intent. The legal family law relationship is finally terminated by the sovereign judicial act, which is constitutive and becomes a *res judicata*. (13) **14**

Schwab (eds), *Festschrift für Dieter Henrich zum 70. Geburtstag* (Verlag Ernst und Werner Gieseking 2000) 484–485.

(11) Karlheinz Muscheler, *Familienrecht* (4th edn, Verlag Franz Vahlen 2017), para 95.

(12) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 3(6).

(13) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 3(25, 26); Karlheinz Muscheler, *Familienrecht* (4th edn, Verlag Franz Vahlen 2017), para 128.

A. *Preliminary remarks about marriages, partnerships, and other relationship forms*

15 Before examining specific family law matters, a few words of clarification on German marriage law are in order: since 1 October 2017, German marriage law has introduced same-sex marriages (14) to which the same regulations apply as do to different-sex marriages as German law does not differentiate between these two types of marriages (§ 1353 BGB). (15) Therefore, all references to marriage and spouses in this report refer equally to same-sex and different-sex marriages.

16 In addition to marriage, registered life partnerships (*eingetragene Lebenspartnerschaft*), which were open for persons of the same sex, have also existed since 1 August 2001. (16) However, a life partnership can no longer be entered into since the introduction of same-sex marriage, ie, since 1 October 2017. The provisions on registered life partnerships are therefore only applicable to life partnerships that were entered into in Germany prior to 1 October 2017 or that were entered into abroad, to the extent that German law is applicable thereto (§ 1 Act on Registered Life Partnerships – *Lebenspartnerschaftsgesetz*). A registered life partnership has – generally speaking – the same effects as a marriage. In fact, the Act on Registered Life Partnerships widely applies the provisions on spouses and marriages *mutatis mutandis* to life partnerships with only few deviations. This is also true for grounds for divorce/dissolution of the life partnership and the law on divorce/dissolution proceedings (§ 15 Act on Registered Life Partnerships and § 270 FamFG).

17 Further, there might be a new regulated relationship form in the future to which up to six people, who have an actual personal relationship of proximity other than love, can opt for: the community of responsibility (*Verantwortungsgemeinschaft*). So far, however, the Federal Ministry of Justice (*Bundesministerium der Justiz*) has only published key points (*Eckpunkte*) which they want to consider when drafting the new law. (17) According to these key points, the community of responsibility will not have any conse-

---

(14) *Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts* of 20 July 2017, BGBl. 2017 I, p 2787.

(15) The only exception can be found in conflict of laws, where different connecting factors are used for different-sex and same-sex marriages (cf, Article 13(1) and Article 17b(4) and (1) Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*)).

(16) *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften* of 16 February 2001, BGBl. 2001 I, p 266.

(17) *Eckpunkte des Bundesministeriums der Justiz für die Verantwortungsgemeinschaft* of 2 February 2024 <https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/

quences under civil status law, instead the law will merely provide building blocks for notarised relationship contracts. Thus, – as far as this can currently be anticipated – courts will neither play any role in establishing nor in dissolving the community of responsibility. Due to the uncertainty of the ultimate legal regulations, however, this relationship form will not be discussed further in the report. It also appears that the new federal government (*Bundesregierung*), which has been in office since May 2025, will no longer pursue this new partnership form.

18 Finally, non-marital and unregistered cohabitation (*nichteheliche Lebensgemeinschaft*) is hardly regulated in Germany and only gives rise to a few rights and obligations in social law and maintenance law ([18]) which can also be enforced in court. However, because these forms of relationship are generally so unregulated and therefore still largely subject to the private autonomy of the parties, and barely establish any enforceable rights and obligations, non-marital cohabitation is not dealt with further in the report.

B. *Divorce and legal separation*

19 German divorce law has remained virtually unchanged for almost half a century. In 1977, the First Marriage Law Reform Act abolished the principle of fault (*Verschuldensprinzip*) and introduced the principle of breakdown (*Zerüttungsprinzip*) as the fundamental ground for divorce. In doing so, it de facto considerably strengthened the private autonomy of the parties, but still maintains the judicial monopoly on divorce.

20 From the time of the final and binding divorce, the legal consequences are governed by the post-marital regime, which is intended to bring about a fair balancing of the interests of the terminated relationship. In Germany, this is mainly achieved through the equalisation of accrued gains (*Zugewinnausgleich*, §§ 1372ff BGB), the equalisation of pensions rights (*Versorgungsausgleich*, § 1587 BGB), post-marital maintenance (*nachehelicher Unterhalt*, §§ 1569ff BGB) and the allocation of the matrimonial residence and household objects (§§ 1568a, 1568b BGB). In terms of child law, the divorce does not have any legal consequences. In these cases, it is only legally relevant whether the parents live apart (cf, §§ 1671(1), 1687 BGB, see below para 73).

Eckpunkte/Eckpunkte_Verantwortungsgemeinschaft.pdf?__blob=publicationFile&v=2> accessed 28 May 2025.

([18]) Examples for regulations of non-marital cohabitation by the German legislator can be found in: Anatol Dutta 'Paarbeziehungsregime jenseits der Ehe' (216 (2016)) AcP 609, 616–618.

1. *Procedural rules: judicial monopoly on divorce*

21 According to § 1564 BGB, a marriage may be dissolved by divorce only by a judicial decision on the petition of one or both spouses (irrespective of the consensual or contentious nature of the procedure). The marriage is dissolved upon the decision becoming final and binding. The decision is thus constitutive in nature. In addition, in Germany, decisions on the post-marital matters mentioned in the previous paragraph are to be made jointly with the divorce when they were filed at the latest two weeks prior to the oral argument in the first instance in the divorce proceeding by one of the spouses (§ 137(2) FamFG). There are two reasons for this: (19) Firstly, during the divorce proceedings, the spouses should be warned of the actual legal consequences of their divorce. Secondly, the economically weaker spouse is to be protected from being divorced without a binding clarification of the divorce consequences. This joinder of divorce proceedings and ancillary proceedings (*Verbund von Scheidungs- und Folgesachen*, § 137 FamFG), and the resulting creation of a one-stop-shop-principle that abolished the previously existing patchwork of jurisdictions, is another milestone of the First Marriage Law Reform Act. Until then, a patchwork of jurisdiction existed as a chamber of the regional court (*Landgericht*) was competent for divorces. Parental custody rights were decided by the district court acting as the guardianship court (*Vormundschaftsgericht*), post-marital maintenance claims were decided by a civil judge at the district court, and either the district court or the regional court – depending on the disputed amount – were competent for the matrimonial property consequences. (20)

22 However, due to the mandatory joinder of divorce proceedings and ancillary proceedings, the parties have very limited procedural freedoms which the spouses cannot circumvent: According to German law, spouses cannot dissolve their marriage through a private divorce – even if they would mutually agree to this. The divorce is not subject to arbitration (see below para 108). The spouses do not even have discretion regarding jurisdiction, as stated in § 122 FamFG exemplary for local jurisdiction. Additionally, there is mandatory representation by an attorney before the family courts according to § 114 FamFG. (21)

---

(19) BT-Drucks. 7/650, 85, 86.

(20) Anatol Dutta, 'Stand des Scheidungsrechts in Deutschland' in Anatol Dutta, Dieter Schwab, Dieter Henrich, Peter Gottwald, and Martin Löhning (eds), *Scheidung ohne Gericht?* (Verlag Ernst und Werner Gieseking 2017) 36.

(21) In case the other spouse agrees to the divorce, that spouse does not need to be represented by an attorney, § 114(4)(3) FamFG. Hence one attorney for both spouses would be enough. Critical of that provision: Anatol Dutta, 'Stand des Scheidungsrechts in

The joinder of divorce proceedings and ancillary proceedings also affects international jurisdiction since, if the German courts have international jurisdiction for the divorce, they also have, in general, jurisdiction for the ancillary proceedings (§ 98(3) FamFG). However, this international jurisdiction is not exclusive (§ 106 FamFG); in addition, international law agreements and EU law still have priority over § 98(3) FamFG (§ 97 FamFG), meaning that the application of the Brussels IIb Regulation, the EU Maintenance Regulation, the EU Matrimonial Property Regulation, and the Hague Convention on Protection of Children may assign an ancillary proceeding to a court other than the court of the divorce proceedings which would be accepted by German law. **23**

2. *Substantive rules:* de facto *private autonomy*

In Germany, a marriage can only be dissolved by divorce if it has broken down. The marriage has broken down if the conjugal union of the spouses (*eheliche Lebensgemeinschaft*) no longer exists and it cannot be expected that the spouses restore it, § 1565(1) BGB. Theoretically, therefore, a look into the past (marriage analysis) as well as into the future (marriage prediction) is necessary. (22) In these cases, living apart is not necessarily a decisive factor to determine a breakdown. (23) However, to determine whether the marriage has broken down, German law works with two irrebuttable presumptions in § 1566 BGB – it is therefore not possible to prove the opposite – that largely undermine the theoretical principles: Firstly, it is irrebuttably presumed that the marriage has broken down if the spouses have lived apart for one year and both spouses petition for divorce or the respondent consents to divorce. Secondly, if only one spouse petitions for divorce and the spouses have lived apart for three years, it is irrebuttably presumed that the marriage has broken down. According to § 1567(1) BGB, the spouses are living apart if there is no domestic community between them and a spouse recognisably does not intend to create this because they reject the conjugal union. Hence, one spouse can unilaterally decide to live apart from the other spouse. Living apart within the same matrimonial residence is also sufficient. It is only important that there is no longer a common household and that an occa- **24**

Deutschland' in Anatol Dutta, Dieter Schwab, Dieter Henrich, Peter Gottwald, and Martin Löhning (eds), *Scheidung ohne Gericht?* (Verlag Ernst und Werner Gieseking 2017) 41.

(22) Rüdiger Ernst, '§ 2. Materielles Recht' in Dieter Schwab and Rüdiger Ernst (eds), *Handbuch Scheidungsrecht* (8th edn, Verlag C.H.BECK 2019) 209, 211–216.

(23) Anatol Dutta, 'Stand des Scheidungsrechts in Deutschland' in Anatol Dutta, Dieter Schwab, Dieter Henrich, Peter Gottwald, and Martin Löhning (eds), *Scheidung ohne Gericht?* (Verlag Ernst und Werner Gieseking 2017) 37.

sional meeting between the spouses is not an indented expression of a personal relationship. (24) It is not surprising that these presumptions were met with criticism when they were introduced and were described as a way of terminating a marriage with three years' notice. (25) In fact, the critics struck a nerve, as spouses are able to obtain a divorce in court before the expiry of the one-year living apart period with white lies (eg, about the commencement of their time living apart within the same matrimonial residence); the family courts with the procedural means at hand will often not be able to detect these lies with reasonable effort. (26) This leads to the impression that the court proceedings are merely a farce – indeed a 'tribute to hypocrisy' (27) – if the spouses have a mutual will to divorce. (28)

25 In addition to the unanimous will to divorce, there is in fact also a unilateral possibility to terminate the marriage by filing for divorce in court. On the one hand, after the three-year period of living apart, the breakdown is irrebuttably presumed, hence all prerequisites for the divorce are met (§ 1566(2) BGB). On the other hand, a spouse can also unilaterally apply for divorce before the expiry of the three-year living apart period. Contrary to the above-mentioned marriage analysis and prediction, in practice the courts hardly examine any substantive legal prerequisites: It is usually sufficient that the petitioning spouse substantiates that they are definitively turning away from the other spouse and no longer wish to continue the marriage; any desire of the other spouse to maintain the marriage is irrelevant. (29) As a result 'anyone filing for divorce in Germany today can be almost 100% sure of actually being divorced'. (30) Therefore, it can be stated that a unilateral

---

(24) BGH FamRZ 1978, 671.

(25) Friedrich Wilhelm Bosch, 'Eherecht in Gefahr?' (1971) FamRZ 57, 64.

(26) Uwe Diederichsen, 'Das Verfahren vor den Familiengerichten nach dem 1. EheRG' [1977] NJW 649, 655; Anatol Dutta, 'Stand des Scheidungsrechts in Deutschland' in Anatol Dutta, Dieter Schwab, Dieter Henrich, Peter Gottwald, and Martin Löhning (eds), *Scheidung ohne Gericht?* (Verlag Ernst und Werner Gieseking 2017) 42.

(27) Ingeborg Schwenzer, 'Registerscheidung?' in Peter Gottwald, Erik Jayme, and Dieter Schwab (eds), *Festschrift für Dieter Henrich zum 70. Geburtstag* (Verlag Ernst und Werner Gieseking 2000) 539.

(28) Uwe Diederichsen, 'Das Verfahren vor den Familiengerichten nach dem 1. EheRG' [1977] NJW 649, 655.

(29) BGH FamRZ 1979, 285, 287; BGH FamRZ 1979, 422; BGH FamRZ 1979, 1003; OLG Hamm BeckRS 2023, 38226 paras 28–33; Ludwig Bergschneider, 'Härtefallscheidung vor Ablauf des Trennungsjahres – § 1565 II BGB' (2016) NZFam 158.

(30) Only 0.2% of divorce petitions were dismissed in 1993: Dieter Henrich, 'Die Ehe: Ein Rechtsinstitut im Wandel' in Dieter Henrich, Erik Jayme and Fritz Sturm (eds), *Ehe und Kindschaft im Wandel* (Verlag für Standesamtswesen 1998) 43 (own translation).

repudiation divorce (*einseitige Verstoßungsscheidung*) is – within the strict procedural boundaries – practically possible in Germany. (31)

26 The hardship clause (*Härtefallklausel*) in § 1568 BGB contains the only exceptions when a marriage is not dissolved although it has broken down: first, the maintenance of the marriage is in the interests of minor children of the family, exceptionally, necessary for particular reasons, or second, reasons of extraordinary circumstances would constitute such a severe hardship for the respondent, who rejects the divorce, that the maintenance of the marriage, exceptionally, appears to be advisable, even taking into account the concerns of the petitioner. However, this hardship clause leads a shadowy existence. In the past 25 years, only four decisions have been published in which the divorce was not granted due to that provision. (32) This therefore does not undermine the basic assumption that, in Germany, a marriage can de facto be divorced autonomously and unilaterally.

3. *Shift to out-of-court divorce?*

27 Since the courts hardly ever review the prerequisites for the divorce anyway but rather base the divorce solely on the will to divorce, the question arises why German law still adheres to judicial divorce at all. In fact, for the past 25 years, there have been discussions among German practitioners and scholars as to whether the competence for consensual divorces should be assigned to registry offices or notaries. (33) However, all these reform considerations have failed just like the draft bill for the introduction of simplified divorce proceedings without legal representation (34) if the spouses

---

(31) Anatol Dutta, 'Stand des Scheidungsrechts in Deutschland' in Anatol Dutta, Dieter Schwab, Dieter Henrich, Peter Gottwald, and Martin Löhning (eds), *Scheidung ohne Gericht?* (Verlag Ernst und Werner Gieseking 2017) 43.

(32) AG Korbach NJW-RR 2001, 1157; OLG Stuttgart NJW-RR 2002, 1443; OLG Schleswig MDR 2006, 874; AG Berlin-Tempelhof-Kreuzberg FamRZ 2014, 1780 (repealed by KG 31 Oct 2014 – 3 UF 66/14). Critically discussed by Anatol Dutta, 'Stand des Scheidungsrechts in Deutschland' in Anatol Dutta, Dieter Schwab, Dieter Henrich, Peter Gottwald, and Martin Löhning (eds), *Scheidung ohne Gericht?* (Verlag Ernst und Werner Gieseking 2017) 48–51.

(33) Summarised by Bettina Heiderhoff, 'Alternativen zur Eheauflösung durch gerichtliches Gestaltungsurteil' (2011) StAZ 262, 263ff. See also Günter Otto, 'Ehescheidungen durch Standesbeamten?' (1999) StAZ 162; Lore Maria Peschel-Gutzeit, '„Scheidung light" – Neuland oder Sackgasse?' (1999) FPR 127; Ingeborg Schwenzer, 'Registerscheidung?' in Peter Gottwald, Erik Jayme, and Dieter Schwab (eds), *Festschrift für Dieter Henrich zum 70. Geburtstag* (Verlag Ernst und Werner Gieseking 2000) 533.

(34) *Ergänzter Referentenentwurf zum Gesetz zur Reform des Verfahrens in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* of 14 February 2006, pp

agree on the divorce and the most essential post-marital issues, and if no joint children exist.

28 The main reasons for these failures are likely to be threefold: First, the judicial monopoly on divorce could be constitutionally established in Articles 6 (protection of marriage) or 92 (judicial power vested in judges) of the Basic Law. (35) Yet this constitutional imperative depends on the traditional understanding of what falls within the core area of the courts or whether the conjugal lifetime principle is still up to date, meaning that this is not carved in stone in the event of a changing understanding in German society. (36) Second, and this argument is perhaps more convincing, German law wants to have a one-stop-shop-principle through the joinder of divorce proceedings and ancillary proceedings, which not only warns the spouses about the legal consequences of the divorce but is also intended to protect the economically weaker spouse (see above para 21). Related to this, third, the workload of the courts will hardly be reduced by allowing out-of-court divorces (37) because – even if the spouses had to agree on the post-marital issues before the out-of-court divorce – one spouse can always demand judicial review of this agreement. And, more importantly, the availability of this judicial review is non-negotiable due to the already high degree of private autonomy concerning post-marital agreements (cf, especially § 1408 BGB, see below paras 100–101). (38)

346–348. Critically on this Winfried Born, 'Vereinfachtes Scheidungsverfahren – Lockvogelangebot oder ernsthafte Alternative?' (2006) FamRZ 829; Ernst Sarres, 'Der Ehescheidungsprozess – Liberalität statt rechtssichere Kontinuität' (2007) FPR 241.

(35) Günter Otto, 'Ehescheidungen durch Standesbeamten?' (1999) StAZ 162, 163–165.

(36) Bettina Heiderhoff, 'Alternativen zur Eheauflösung durch gerichtliches Gestaltungsurteil' (2011) StAZ 262, 267–270; Günter Otto, 'Ehescheidungen durch Standesbeamten?' (1999) StAZ 162, 165; Ingeborg Schwenzer, 'Registerscheidung?' in Peter Gottwald, Erik Jayme, and Dieter Schwab (eds), *Festschrift für Dieter Henrich zum 70. Geburtstag* (Verlag Ernst und Werner Gieseking 2000) 540–541.

(37) Anatol Dutta, 'Stand des Scheidungsrechts in Deutschland' in Anatol Dutta, Dieter Schwab, Dieter Henrich, Peter Gottwald, and Martin Löhning (eds), *Scheidung ohne Gericht?* (Verlag Ernst und Werner Gieseking 2017) 55; disagreeing: Ingeborg Schwenzer, 'Registerscheidung?' in Peter Gottwald, Erik Jayme, and Dieter Schwab (eds), *Festschrift für Dieter Henrich zum 70. Geburtstag* (Verlag Ernst und Werner Gieseking 2000) 540.

(38) Anatol Dutta, 'Stand des Scheidungsrechts in Deutschland' in Anatol Dutta, Dieter Schwab, Dieter Henrich, Peter Gottwald, and Martin Löhning (eds), *Scheidung ohne Gericht?* (Verlag Ernst und Werner Gieseking 2017) 55.

It can, therefore, be summarised that an out-of-court divorce is not to be expected in Germany, at least not in the near future. (39) **29**

4. *Annulment of a defective marriage*

If the marriage was not validly entered into, German law provides for two possible consequences: first, if not even the mandatory minimum requirements for entering into a marriage have been met (eg, one spouse had not attained the age of 16 when entering into the marriage, or the marriage is not entered into before a registrar), the marriage is null and void from the beginning (*Unwirksamkeit der Ehe*). Second, if the marriage violates provisions other than rules of order, the marriage is defective and may be annulled with *ex nunc* effect (*Aufhebbarkeit der Ehe*) with similar consequences as a divorce, § 1318 BGB. The grounds for annulment are listed in § 1314 BGB and include, among others, the marriage of a 16- or 17-year-old, marriage between relatives, marriage under a condition, marriage in a state of unconsciousness, marriage under deception or unlawful duress, or a marriage of convenience (ie, the spouses do not intend to enter a conjugal union, cf, § 1353(1) BGB). Furthermore, there are grounds when an annulment is excluded (§ 1315 BGB) as well as time limits after which an annulment petition can no longer be submitted (§ 1317 BGB). **30**

The annulment procedure is similar to the divorce procedure: upon application, the family court decides on the annulment (§§ 111(1), 121(2), 124 FamFG) with binding effect. However, unlike for divorce proceedings, there is no joinder of annulment proceedings and ancillary proceedings. (40) In addition to the spouses, the competent administrative authority is also entitled to file an annulment petition (§ 1316 BGB). Under certain circumstances, the latter as a rule is to file or – in the case of the marriage of a 16- or 17-year-old, § 1316(3)(2) BGB – even must file an annulment petition. The competent administrative authority is determined by statutory order of the State governments. (41) **31**

In summary, it can be said that courts play a central role in annulment proceedings. Due to the administrative authorities' power or duty to file an **32**

(39) Likewise Anatol Dutta, 'Stand des Scheidungsrechts in Deutschland' in Anatol Dutta, Dieter Schwab, Dieter Henrich, Peter Gottwald, and Martin Löhning (eds), *Scheidung ohne Gericht?* (Verlag Ernst und Werner Gieseking 2017) 51–56.

(40) This follows from a systematic argument as the provision on the joinder of divorce proceedings and ancillary proceedings (§ 137 FamFG) is listed in the Chapter on 'Proceedings in Divorce Matters and Ancillary Proceedings'; see also BGH FamRZ 1989, 153, 154; BGH FamRZ 1982, 586.

(41) An overview can be found in Marina Wellenhofer in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 1316 BGB para 8.

application, a marriage that is against public interests can be annulled without the initiative of the spouses. In such a case, the spouses are only involved as respondents in the annulment proceedings (§ 129(1) FamFG).

C. *Parenthood*

33 German law still follows the traditional approach to parenthood by only recognising motherhood and fatherhood. In principle, legal parenthood should follow genetic descent. Therefore, co-motherhood and co-parenthood cannot be established in Germany (except through adoption), (42) however, co-motherhood established outside Germany can be partially recognised. It is noteworthy that the former government has agreed in its coalition agreement to enable co-motherhood in the future. (43) To initiate this reform, the Federal Ministry of Justice has already published some key points which they want to consider when they are reforming parenthood law. (44) According to those key points, co-motherhood will be possible but parenthood will still be limited to two parents only. (45) Yet the timing and exact content of this reform remain uncertain, particularly given that Germany has had a new federal government since May 2025, and it is unclear whether the new government intends to pursue the project at all. This report concentrates therefore mainly on the currently applicable law. However, it will also address the planned reform insofar as it serves to answer the Project's research question. Among assisted reproduction techniques, in-vitro fertilisation and sperm donation are legal (in the latter case, special regulations apply regarding fatherhood). Egg donation and surrogacy are illegal but partially recognisable.

---

(42) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 657.

(43) Coalition agreement between SPD, Bündnis 90/Die Grünen, and FDP, 'Mehr Fortschritt wagen' (2021) 101. See also item I.8 of the resolutions of the 94th Conference of German Justice Ministers of autumn 2023.

(44) *Eckpunkte des Bundesministeriums der Justiz für eine Reform des Abstammungsrechts* of 16 January 2024, <https://www.bmj.de/SharedDocs/Downloads/DE/Themen/Nav_Themen/240115_Eckpunkte_Abstammungsrecht.pdf?__blob=publicationFile&v=2> accessed 28 May 2025. In the meantime, the Federal Ministry of Justice has apparently already drawn up draft bills but did not publish them before the editorial deadline.

(45) It is worth mentioning that the Federal Constitutional Court also recognised more than two legal parents as a possibility by constitutional law in an *obiter dictum*. In this case, however, each parent could be granted a different set of rights, cf, BVerfG FamRZ 2024, 846ff.

Since parenthood belongs to the personal status and therefore has *erga omnes* effect, a court involvement by way of the two-part process is generally necessary for a dissolution to ensure legal certainty. (46) **34**

1. *Motherhood*

§ 1591 BGB states that 'the mother of a child is the woman who gave birth to it.' This ipso iure legal maternity usually corresponds to biological but not always to genetic maternity since the egg donor, who is the genetic mother, will not become a legal mother. (47) However, in those medically-assisted procreations techniques which are legal in Germany, such as artificial insemination or in-vitro-fertilisation, this allocation also corresponds to genetic maternity. Therefore, § 1591 BGB enables a quick, uncomplicated, and, in the vast majority of cases, accurate establishment of motherhood. (48) **35**

§ 1591 BGB establishes maternity *ipso iure* without the involvement of the courts. The entry in the birth certificate/register does not establish maternity, but only has an evidentiary effect so that the presumption resulting from the entry in the certificate/register can be rebutted (§ 113(1)(2) FamFG, § 418(2) ZPO). An incorrect entry in the register may be corrected indefinitely. If true motherhood is disputed, a family court proceeding concerning parenthood can be carried out (§ 169(1) FamFG). Thus, even a mother-child relationship that has been lived for many years (eg, because the clinic mistook the child after birth) can be corrected after the mistake has been discovered. (49) The mother's will or a declaration of intent is not relevant for the establishment of maternity according to § 1591 BGB, and neither is the reason for conception. (50) Therefore, through the connection to birth, legal motherhood is also established in the case of sexual assault. **36**

---

(46) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 52(5).

(47) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 53(2); D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 657.

(48) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 53(2); D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 657.

(49) At least, in this case, the apparent mother (*Scheinmutter*) will regularly be granted a right to have contact with the child (§ 1685(2) BGB), cf, J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 53(9).

(50) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 53(5).

37 Motherhood established *ipso iure* immediately after birth cannot be dissolved. ([51]) It can only be overwritten through adoption with the new mother-child relationship to the adoptive mother.

2. *Fatherhood*

38 German law (§ 1592 BGB) provides for three possibilities to establish legal fatherhood: first, the man who is married to the mother at the date of the birth is *ipso iure* father. Second, a man can acknowledge fatherhood. And third, fatherhood can be judicially established. However, there can only be one legal father at a time, ie, under certain circumstances, the still existing fatherhood must first be contested so that another man can become the legal father.

a) *Ipso iure fatherhood*

39 If the mother of the child is married at the date of the birth, her husband is the legal father of the child (§ 1592(1) BGB). In case the husband dies before the birth of the child, § 1593 BGB states that the same rule continues to apply if the child is born within 300 days after the dissolution of the marriage (ie, the date of the husband's death). If the mother has remarried in the meantime and therefore both, the deceased ex-husband (cf, § 1593(1) BGB) as well as the new husband (cf, § 1592(1) BGB) would be legal fathers, the law resolves this conflict in favour of the new husband. However, if the new husband's fatherhood is successfully contested, the fatherhood position is revived in favour of the deceased ex-husband. Except for the last case, no judicial involvement is required to establish these *ipso iure* fatherhoods.

40 If the mother is married to another woman, this other woman could *ipso iure* be the second legal mother in the future, according to the key points on a reform to parenthood law. ([52]) However, this law is not in force yet and it remains unclear whether the new government, which has been in office since May 2025, intends to pursue the project.

b) *Acknowledgement*

41 The second option to establish fatherhood is through acknowledgement (*Anerkennung der Vaterschaft*). Acknowledgement is a unilateral declaration

---

([51]) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 657.

([52]) *Eckpunkte des Bundesministeriums der Justiz für eine Reform des Abstammungsrechts* of 16 January 2024 p 6, <https://www.bmj.de/SharedDocs/Downloads/DE/Themen/Nav_Themen/240115_Eckpunkte_Abstammungsrecht.pdf?__blob=publicationFile&v=2> accessed 28 May 2025.

of intent not requiring reception. However, it can only become effective if no fatherhood of another man exists (cf, § 1594(2) BGB). The birth of the child is not a prerequisite (cf, § 1594(4) BGB), but the child must already have been conceived. As an act specifying status (not changing status), acknowledgement is subject to rules that are typical for status law, but which deviate from the general law of obligations: (53) eg, the acknowledgement must not be subject to a condition or a stipulation as to time (§ 1594(3) BGB). Although a stipulation as to time is inadmissible, the man can revoke his acknowledgement if it has not become effective within one year (§ 1597(3) BGB). This can be the case, for example, if the mother and the child have not approved the acknowledgement within one year as the approval is a mandatory prerequisite for an effective acknowledgement (§ 1595 BGB). Another difference from the general law of obligations can be found in the provisions on persons with limited capacity to contract: These persons (at least if they are over 14 years old) may only acknowledge without representatives. However, approval of the legal representative is still required (§ 1596 BGB). For a person who has no capacity to contract, the legal representative may acknowledge. The formal requirements are also stricter than in the general law of obligations. The acknowledgement of fatherhood, like the approval of the mother, requires public certification. The certification can be carried out by a notary public, judicial officer at the district court, civil registrar, official of the youth welfare office, or the family court if the parenthood case is pending there.

Any man can acknowledge fatherhood, provided that all the prerequisites just mentioned – especially no existing legal father and the mother's approval – are met. This applies to the sperm donor as well as to inter- and transgender (woman-to-man) persons, at least if the transgender person did not give birth to the child. (54) However, a co-mother cannot acknowledge fatherhood. (55) Because genetic descent is not verified in the acknowledge- **42**

(53) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 54(21).

(54) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 54(23, 24); D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 666.

(55) The situation could be different de *lege lata* in the case of a man-to-woman transgender person, at least if this person is also the sperm donor, cf, BGH FamRZ 2018, 290. The situation might also change *de lege ferenda* if the Federal Ministry of Justice's key points actually become applicable law; cf, *Eckpunkte des Bundesministeriums der Justiz für eine Reform des Abstammungsrechts* of 16 January 2024, <https://www.bmj.de/SharedDocs/Downloads/DE/Themen/Nav_Themen/240115_Eckpunkte_Abstammungsrecht.pdf?__blob=publicationFile&v=2> accessed 28 May 2025. However, it is unclear whether the

ment process, deliberately false acknowledgements are also tolerated by the legal system. (56) In this way, fatherhood is, to a certain extent, placed at the disposal of the mother and the intended father, and 'hidden stepchild adoptions' are made possible. (57) Criminal liability for the falsification of a civil status pursuant to § 169 of the German Criminal Code (*Strafgesetzbuch*) does not apply in these cases. (58) Furthermore, the non-genetic but by false acknowledgement legal father also enjoys the protection of parental fundamental rights according to Article 6(2)(1) of the German Basic Law. (59) The law only draws a line in the case of wrongful acknowledgement of fatherhood for migration purposes (cf, § 1597a BGB). (60) However, even in these cases, an effective acknowledgement is possible. (61)

43 If all the above prerequisites are met, the acknowledgement of fatherhood takes effect automatically without the involvement of a court or other authority. (62) If, on the other hand, the fatherhood is acknowledged contrary to one of the above-mentioned provisions (§§ 1594 to 1597a BGB), the acknowledgement is ineffective (§ 1598(1) BGB) and is treated as if it did not exist. An incorrect entry in the civil status register caused by the ineffective acknowledgement must be corrected by court order (§ 48 Civil Status Act – *Personenstandsgesetz*). However, only the above-mentioned provisions lead

---

new German government, which has been in office since May 2025, intends to pursue the project.

(56) KG FamRZ 2020, 109; D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 666.

(57) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 54(22).

(58) OLG Hamm, FamRZ 2008, 1783, 1784; LG Düsseldorf, FamRZ 2008, 1077.

(59) BVerfG NJW 2008, 2835.

(60) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 668.

(61) KG StV 2023, 677; see also the main findings of this judgment in FamRZ 2023, 1723. This could change in the future if the draft bill of the Federal Ministry of Justice (*Bundesministeriums der Justiz*) and of the Federal Ministry of the Interior and Community (*Bundesministeriums des Inneren und für Heima*t) were to become actual law according to which, effective recognition of fatherhood in cases where there is presumed fatherhood of convenience (*Scheinvaterschaft*; in particular for migration reasons) should be subject to approval by the foreigners' authority (*Ausländerbehörde*). Thus, in the future, stricter administrative but not judicial control could be exercised, cf, *Referentenentwurf des Bundes-mi des Innern und für Heimat und des Bundes-mi der Justiz. Entwurf eines Gesetzes zur besseren Verhinderung missbräuchlicher Anerkennungen der Vaterschaft* of 30 April 2024, <https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE_missbr_Anerkennung-_Vaterschaft.pdf?__blob=publicationFile&v=2> accessed 28 May 2025.

(62) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 674.

to the ineffectiveness of the acknowledgement; the provisions of the general part of the BGB on defective, voidable, unlawful, and immoral legal transactions, on the other hand, do not apply to the acknowledgement of fatherhood. (63) Nevertheless, ineffective acknowledgements become effective when five years have passed since the entry into a German civil status register (§ 1598(2) BGB). Thus, an incorrect entry in the register – irrespective of whether the defects are recognisable or not – leads to full legal fatherhood *ex nunc* through the passage of time. (64) Yet, the possibility of a judicial contestation of the acknowledged fatherhood remains. (65) § 1598 BGB applies equally to the approval and the revocation of acknowledgement.

44 According to the key points on a future reform to parenthood law, another woman will also be able to acknowledge parenthood. In this case, it is likely that the same rules will apply as for the acknowledgement of fatherhood by a man. (66) However, this law is not in force yet and it is unclear whether the new German government, which has been in office since May 2025, intends to pursue the project.

c) *Judicial establishment*

45 Finally, there is the possibility of having fatherhood judicially established, provided that no other legal father exists (§ 1600d BGB); otherwise, the existing fatherhood would first have to be contested. The judicial establishment of fatherhood requires that the mother, the child, or the man who believes to be the genetic father file an application (§ 171 FamFG). The court can only establish the man from whom the child is genetically descended as the father, (67) which is why a genetic expert opinion must usually be obtained during the proceeding. (68) The court decides by way of an order which is effective – when final and binding – in favour of and against everybody (§§ 116(1), 184(2) FamFG). A complaint of appeal may be lodged against the court's order (§ 58(1) FamFG). After the decision becomes final

(63) BGH FamRZ 1985, 271.

(64) BT-Drucks. 13/4899, 85, 86; OLG München FamRZ 2011, 1310, 1311.

(65) BGH FamRZ 1985, 271.

(66) *Eckpunkte des Bundesministeriums der Justiz für eine Reform des Abstammungsrechts* of 16 January 2024 p 6, <https://www.bmj.de/SharedDocs/Downloads/DE/Themen/Nav_Themen/240115_Eckpunkte_Abstammungsrecht.pdf?__blob=publicationFile&v=2> accessed 28 May 2025.

(67) This does not apply to sperm donors, § 1600d(4) BGB.

(68) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 54(53, 66); D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 705.

and binding, it has full *res judicata* effects and can thus not be challenged or contested, yet the proceedings can be reopened due to the narrow prerequisites set out in §§ 578ff ZPO (eg, most severe violations of procedural rules), which are hardly relevant in practice. Additionally, § 185 FamFG provides for a specific reopening ground: the existence of a new expert opinion on parenthood that would lead to a different decision. (69)

d) *Contestation*

46 A fatherhood that legally exists by virtue of marriage to the mother or by recognition (not by judicial establishment) can be contested. The contestation constitutes a private right and is successful if the legal father is not the genetic father (ground for contestation). It leads to judicial parenthood proceedings (§§ 169ff FamFG), whereby the existing legal fatherhood is terminated by the court after a successful contestation. This termination has a *res judicata* effect and, like the judicially established fatherhood, can only be challenged on the narrow grounds for reopening under §§ 578ff ZPO and § 185 FamFG (*inter alia*, the existence of a new expert opinion on parenthood that would lead to a different decision, see above para 45). The contestation of effective legal fatherhood must therefore be strictly distinguished from a legally incorrect entry of fatherhood in the register of births (eg, because the marriage of the registered man to the mother did not validly exist at birth or because the registered man did not validly acknowledge the fatherhood according to § 1598 BGB, see above para 43). In these cases, the registered man is not the legal father, and the registry office can correct the register of its own motion or on the basis of a court order according to §§ 46ff of the Civil Status Act (*Personenstandsgesetz*).

47 Fatherhood can only be contested within two years from the time when the person entitled learns of the circumstances that argue against the fatherhood (§ 1600b BGB). Entitled to contest fatherhood are the legal father, the mother, and the child (§ 1600(1) BGB). The man who declares in lieu of an oath that he had sexual intercourse with the mother during the period of conception is only entitled to challenge if there is no social and family relationship (*sozial-familiäre Beziehung*) between the legal father and the child (§ 1600(2) BGB). This prerequisite considerably restricts the rights of the genetic father since in this way the fatherhood could solely be in the power of the mother (with the help of another man). For instance, (70) the

(69) BGH FamRZ 1984, 681.

(70) The example is inspired by Marko Oldenburger, 'Die sozial-familiäre Beziehung als Mittel zur Verhinderung der Vaterschaft?' (2023) NZFam 817, 818ff.

unmarried mother could ask another man to acknowledge fatherhood which would be fully effective. The genetic father's application for contestation would have to be rejected if the mother (untruthfully) submits during the proceedings that the child has regular contact with the legal father, resulting in the establishment of a social and family relationship.. This is the case as the burden of proof lies with the contesting party (71) and proof to the contrary is hardly possible – if at all, the proof can only be provided at considerable expense with the help of a private detective agency. This instance shows clearly that even the involvement of a court in fatherhood matters cannot ensure that the genetic father can obtain legal fatherhood despite the lack of a social and family relationship between the child and the pseudo father. For this reason, among others, the Federal Constitutional Court has also deemed the current provision of § 1600(2) and (3)(1) BGB to be incompatible with the fundamental right to parental responsibility under Article 6(2) Basic Law. The legislator must therefore make improvements by 31 March 2026 and create a new provision that enables genetic fathers to contest the fatherhood of another man more effectively if they have tried to establish a social and family relationship with their child. (72)

48 The key points of the reform of parenthood law also provide for a simplification for the contestation of parenthood of the person who is married to the mother who gave birth to the child at the time of birth. This spouse would be – as shown – the *ipso iure* parent of the child (§ 1592(1) BGB). If, on the other hand, that simplification enters into force, no court involvement will be required for contestation in these circumstances anymore since, under the new law, spouses should be able to jointly declare before a civil registrar within eight weeks after the birth that the married parent who did not give birth to the child is not the legal parent (*Erklärung des Nichtbestehens der Elternschaft*). After this joint declaration, the civil registrar should examine, based on the available files, whether the parent who did not give birth to the child cannot be the genetic parent, for example, through a negative genetic expert opinion. Parenthood will subsequently be terminated upon certification of the joint declaration of the spouses by the civil registrar, which is constitutive in nature. (73) However, this law is not in force yet and it is unclear whether the new German government, which has been in office since May 2025, intends to pursue the project.

---

(71) BGH FamRZ 2007, 538, 540.

(72) BVerfG of 3 June 2025 – 1 BvR 2017/21 and BVerfG FamRZ 2024, 846ff. In the same judgment, the Federal Constitutional Court also considers more than two parents as a possible option by constitutional law, cf, fn 45.

(73) *Eckpunkte des Bundesministeriums der Justiz für eine Reform des Abstammungsrechts* of 16 January 2024 p 13–15, <https://www.bmj.de/SharedDocs/Downloads/DE/Themen

e) *Out-of-court fatherhood changes – an exception*

49 As has been shown, under current German law, a court must always be involved in a constitutive manner in order to terminate or change fatherhood. However, § 1599(2) BGB constitutes *de lege lata* an exception, which is somewhat contrary to the German legal system as it puts fatherhood fully at the disposition of the parties if the child is born after a divorce petition is pending in court. Usually, in this case, the still married but soon divorced man is the *ipso iure* father (§ 1592(1) BGB, see above para 39). If, however, a second man acknowledges fatherhood no later than one year after the order granting the divorce petition has become final and binding and the mother and the still legal father approve, this second man becomes the legal father at the moment when the order granting the divorce petition becomes final and binding. Logically, by virtue of establishing the fatherhood of the second man, the original *ipso iure* fatherhood established through marriage is terminated. The approval of the mother and *ipso iure* father can only be ineffective according to § 1598 BGB (see above para 43). (74)

50 § 1599(2) BGB is intended to reflect the reality that children born during divorce proceedings usually do not descend from the soon-to-be ex-husband. (75) Therefore, the provision aims to spare the parties involved from a cumbersome contestation process, including a costly genetic expert opinion. (76) However, criticism arises from the fact that, in this party-autonomous change of fatherhood, the best interests of the child are not overseen by an impartial authority. (77) Nevertheless the former government wanted to widen the possibility for out-of-court fatherhood changes. According to the key points of the reform of parenthood law, this option should also be available if no divorce petition is pending in court for up to eight weeks after the birth of the child if all three parties (mother, *ipso iure* father, and acknowledging father) declare accordingly. (78) However, this law is not in

---

/Nav_Themen/240115_Eckpunkte_Abstammungsrecht.pdf?__blob=publicationFile&v=2> accessed 28 May 2025.

(74) Thomas Rauscher in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (Sellier/de Gruyter 2011) § 1599 BGB para 98; Marina Wellenhofer in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 1599 BGB para 72.

(75) Gerhard Wagner, 'Unterhalt und Statuswechsel nach dem KindRG' (1999) FamRZ 7, 9; Marina Wellenhofer in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 1599 BGB para 63.

(76) BT-Drucks. 13/4899, 139.

(77) Hans Friedhelm Gaul, 'Ausgewählte Probleme des materiellen Rechts und des Verfahrensrechts im neuen Abstammungsrecht' (2000) FamRZ 1461, 1464.

(78) *Eckpunkte des Bundesministeriums der Justiz für eine Reform des Abstammungsrechts* of 16 January 2024 p 11, <https://www.bmj.de/SharedDocs/Downloads/DE/Themen/

force yet and it is unclear whether the new German government, which has been in office since May 2025, intends to pursue the project.

f) *Future prospect: parenthood agreement*

51 The key points of the reform of parenthood also provide for a parenthood agreement (*Elternschaftsvereinbarung*), which will not require court involvement. With the parenthood agreement, it should be legally established who, in addition to the mother who gave birth to the child, should assume the second legal parental position. The following points are to be considered in the legal framework: (79)

- The parenthood agreement takes precedence over other criteria establishing legal parenthood (marriage, acknowledgement, or judicial establishment) and directly establishes parenthood.
- The parenthood agreement must be publicly recorded by a notary, the youth welfare office, or the civil registry office.
- The parenthood agreement should only be permissible before the conception of the child.
- The parenthood agreement should usually only apply to the first child conceived and born within the next three years after concluding the agreement.
- The parenthood agreement should be revocable. The revocation must be publicly recorded.

52 Even though this law is not in force yet – and it is unknown if and with what exact content the law will come into force – all the key points of the reform of parenthood show that court involvement is likely to become less important regarding parenthood issues in the future. However, it is unclear whether the new German government, which has been in office since May 2025, intends to pursue the project.

D. *Adoption*

53 Before the German legislature introduced judicial decree adoption in 1976, adoption was a legal contract between the child (with the consent of the conjugal parents) and the adoptive parent, which was approved by the court

---

Nav_Themen/240115_Eckpunkte_Abstammungsrecht.pdf?__blob=publicationFile&v=2> accessed 28 May 2025.

(79) *Eckpunkte des Bundesministeriums der Justiz für eine Reform des Abstammungsrechts* of 16 January 2024 p 6–8, <https://www.bmj.de/SharedDocs/Downloads/DE/Themen/Nav_Themen/240115_Eckpunkte_Abstammungsrecht.pdf?__blob=publicationFile&v=2> accessed 28 May 2025.

(§ 1741 BGB old version). (80) Nowadays, adoption is regulated in §§ 1741ff BGB. A distinction must be made between the adoption of minors and the adoption of adults; the former is only permitted as a full adoption (ie, family ties to the family of origin are removed), whereas in the case of the latter, a simple adoption (ie, family ties to the family of origin are maintained) is the rule. The State, with its various authorities, exercises a watchdog function (*Wächteramt*) in cases of adoption. A court decision by the family court is thus necessary for the establishment, supervision, and – if at all possible (see below paras 60–62) – termination of the adoption (§§ 111(4), 186 FamFG). The adoption procedure is initiated upon application by the adoptive parent and ends with the constitutive pronouncement of the family court (§ 1752(1) BGB).

54 As will be shown, the initiating application to the court (as well as the necessary consents) requires notarial recording. (81) This formal requirement dates back to the days when adoption was seen as a contract (82) and is sometimes regarded as an unnecessary relic of the past by German scholars, since the functions associated with the notarial recording (warning, evidence preserving, and counselling) could also be performed by the other State actors that must be involved anyway, such as the family court and the youth welfare office. (83) In practice, however, the role of the notary goes far beyond that of a mere recording body. This is because – particularly in the case of the adoption of adults – notaries are the first quasi-State authority to be entrusted with the adoption wishes of the parties involved. They can therefore have a considerable influence on the outcome of the adoption procedure by taking the facts and presenting them in such a way that the substantive requirements (in particular the existence of a parent-child relationship) are met in the adoption application. In many cases, the family court will subsequently accept the facts established by the notary and will rarely exercise its own discretion. Conversely, the notary can also prevent an adoption if they are not convinced that the prerequisites are met. On the one

---

(80) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 70(4); D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 1013.

(81) §§ 1750(1)(2) and 1752(2)(2) BGB, see below para 55.

(82) Cf, Martin Löhnig and Saskia Lettmaier in Mathias Schmoeckel, Joachim Rückert and Reinhard Zimmermann, *Historisch-kritischer Kommentar zum BGB, Band IV* (Mohr Siebeck 2018), §§ 1741 ff.(88).

(83) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 70(33); Alexander Lüderitz in *Münchener Kommentar zum BGB* (3rd edn, Verlag C.H.BECK 1992) § 1752 BGB para 2; T Rauscher, *Familienrecht* (2nd edn, C.F. Müller Verlag 2008), para 1173.

hand, they are obliged to discuss doubts about the prospects of success with the parties involved before recording the application (cf, § 17(1) Notarisation Act – *Beurkundungsgesetz*) so that the parties may already abandon their plans and the courts do not become involved in the first place. If, on the other hand, the parties persist in their wish to adopt, the notary has nevertheless to submit an adoption application to the court but they can draw the court's attention to what they consider to be a lack of the prerequisites for adoption by means of skillful wording in the adoption application. However, the notary's influence is likely to be less in the case of the adoption of minors than in the case of the adoption of adults due to the mandatory involvement and hearing of the youth welfare office (that is then likely to be the out-of-court body whose opinion the court regularly follows) and the longer preparation phase of the adoption in which notaries are not involved. [84]

1. *Adoption of minors*

a) *Adoption procedure*

55 In the case of the adoption of minors, the State's watchdog function already begins with the adoption placement, which is carried out by the youth welfare offices or the welfare associations; private placement is prohibited (§§ 2, 5, 6 Adoption Placement Act – *Adoptionsvermittlungsgesetz*). If adoptive parents have been found, adoption is admissible if it serves the best interests of the child, and it is to be expected that a parent-child relationship (*Eltern-Kind-Verhältnis*) will arise between the adoptive parents and the child (§ 1741(1) BGB). As a rule, the adoptive parents should have the child in foster care for a reasonable period before the adoption is pronounced (probationary period – *Probezeit*, § 1744 BGB). Furthermore, the child – if they are over the age of 14 – and their parents must consent. The consent may not be given until the child is eight weeks old (§§ 1746, 1747 BGB). In exceptional cases, the consent of a parent is to be substituted by that of the family court, eg, the parent persistently grossly violates their duties to the child or has shown by their conduct that they are indifferent to the child (§ 1748 BGB). The consent as well as the initiating application require notarial recording, [85] may not be subject to a condition or a stipulation as to time and are irrevocable (§ 1750 BGB). Although the family court must pro-

[84] J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 70(33).

[85] For criticism regarding this formal requirement, see above para 54.

nounce an adoption if all these requirements are met, the court still has a certain amount of discretion because the prerequisites 'in the best interests of the child' and 'expected parent-child relationship' are very vague legal terms. (86) During the adoption proceedings, an expert opinion must be obtained from the adoption agency and the youth welfare office (§§ 189, 194 FamFG). The adoptive parent and the child are to be heard in person; the other parties involved (eg, children of the adoptive parent(s)) should be heard (§ 192 FamFG). The court appoints a guardian *ad litem* (*Verfahrensbei*) for minors involved to the extent necessary for representing their interests (§ 191 FamFG).

b) *Effect of consent*

56 Due to the fact that the legal parents must consent to the adoption, parenthood is, to a certain extent, at the discretion of the legal parents if they agree with the adoptive parents. This can become problematic if the genetic but not legal father is against the adoption as the genetic father has no explicit right of veto (*e contrario* § 1747(1)(2) BGB) if a legal but not genetic father exists. (87) Thus, the law gives *de facto* priority in parenthood to third parties who are willing to adopt over the genetic father. (88)

57 On the consent of the legal parents, their parental custody is suspended, and the youth welfare office becomes the guardian of the child (§ 1751 BGB). If, however, the consent loses its force (eg, the application is revoked, the adoption is refused, or the child is not adopted within three years after the consent becomes effective, § 1750(4) BGB), parental care does not automatically fall back to the legal parents. Rather, the family court, with the involvement of the youth welfare office (§ 50(1) SGB VIII), must grant custody to the legal parents again, provided that no alienation between the child and their legal parents has taken place in the meantime that would be detrimental to the child's welfare. The situation is different if the consent was ineffectively given or was subsequently avoided with *ex tunc* effect on the

(86) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 70(88).

(87) Dagmar Coester-Waltjen, 'Statusrechtliche Folgen der Stärkung der Rechte der nichtehelichen Väter' (2013) FamRZ 1693, 1697; Martin Löhning in *beck-online.GROSSKOMMENTAR* (Verlag C.H.BECK 1 July 2023) § 1747 BGB paras 23–26; critical of this legal situation are Martin Löhning and Daniel Rottmann, 'Der leibliche, nicht rechtliche Vater im Adoptionsverfahren' [2023] NZFam 1009.

(88) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 70(55). See also D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), paras 1029–1032. The determination of genetic fatherhood is only possible to a very limited extent after the adoption has been concluded, cf, BGH FamRZ 2024, 1552.

grounds of mistake, deceit, or unlawful duress (§§ 119, 123 142 BGB): Since such consent has no effect whatsoever before the adoption decree is issued, parental custody has never been suspended, and thus no court order is necessary to revive parental custody. (89)

c) *Effect of adoption*

58 Adoption has a variety of effects on the law on names (see below para 186) and the law on contact, but not on proprietary law, because past claims and obligations are not affected (§ 1755(1)(2) BGB). The most important consequence, though, is that the relationship of the child to their previous relatives is extinguished and the child attains the legal position of a child of the adoptive parent(s) (§§ 1754, 1755 BGB). In fact, however, the family ties to the blood relatives are only suspended, so that they can be revived if the adoption should be cancelled (§ 1764(3) BGB). In addition, the family ties continue to exist for other provisions that have blood relationship as a prerequisite, eg, prohibition of marriage (§ 1307 BGB) or sexual intercourse between relatives (§ 173 Criminal Code – *Strafgesetzbuch*).

59 In principle, the full adoption establishes a legal parent-child relationship for life. This makes the adoption relationship stronger than legal parenthood because the latter can still be dissolved through adoption. A second adoption, on the other hand, is not possible (§ 1742 BGB). Adoptive parents also enjoy the protection of fundamental parental rights under Article 6(2) of the German Basic Law. This also applies to adoptions pronounced by an erroneous decision, especially if the adoption has resulted in a social and family relationship between the child and the adoptive parent(s). (90)

d) *Cancellation of adoption*

60 Basically, as adoption constitutes a life-long parent-child relationship, adoption cannot be cancelled. (91) This is all the more true because inherently ineffective adoptions do not occur due to the *res judicata* effect of the adoption decree. (92) However, there are a few exceptions: first, if a senior

(89) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 70(81).

(90) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 70(112).

(91) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 1045.

(92) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 70(115).

judicial officer instead of a judge pronounces the adoption, the adoption is – notwithstanding the existing adoption decree – ineffective (§§ 8(4)(1), 14(14) RPflG). Second, adoption can be cancelled by the family court for an indefinite period if the constitutionally guaranteed right to be heard (Article 103 German Basic Law) of a person who should have been involved in the proceedings (but was not) was violated; ([93]) on the other hand, in these cases, it can also be sufficient to only remove the *res judicata* and to subsequently hold the in-person hearing. The court may then decide whether the adoption decree is to be set aside or maintained. ([94]) Third, § 1760 BGB exhaustively stipulates exceptional grounds on which the family court may set aside an adoption including, *inter alia*, if the adoption application or consent was declared by a person incapable of contracting, if the applicant or consenting person did not know that the declaration was to adopt, if the person was unlawfully induced to make the declaration by a threat, or if parental consent was given when the child was less than eight weeks old and if the declarant did not make up for the missing application or consent or indicates in another way that the adoption relationship was to be sustained after the above-mentioned circumstances of ineffectiveness ceased to exist.

61 In order to start the cancellation proceedings, the person without whose application or consent the child has been adopted must file an application with the family court (§ 1762(1) BGB). This application can only be filed within one year of knowledge of the mistake and if less than three years have passed since the adoption (§ 1762(2) BGB). After that, the adoption can no longer be challenged due to the ineffective application or consent. The adoption relationship is not cancelled if the best interests of the child would be substantially endangered thereby (§ 1761(2) BGB). The family court may also cancel the adoption relationship of its own motion while the child is still a minor if this is necessary for grave reasons in the best interests of the child (§ 1763 BGB). The cancellation is only effective for the future. It extinguishes the relationship created by adoption with the adoptive family and revives the relationship with the child's blood relatives (§ 1764 BGB).

62 Finally, § 1766 BGB provides for an *ipso iure* cancellation of the adoption relationship if the adopter marries the adoptee. In this case, the marriage would be fully effective notwithstanding that it was concluded contrary to § 1308 BGB, which should prevent marriage between persons whose relationship was created by adoption. As a result, only the legal relationship created by the adoption between the spouses is terminated, while the relationship between the adoptee and the adopter's relatives remains intact. Furthermore,

([93]) BVerfG FamRZ 2014, 1609.
([94]) BVerfG FamRZ 1994, 493, 496.

the legal relationship with the adoptee's blood relatives is not revived. Therefore, if the adoptee marries their sole adoptive parent, they would legally be considered parentless. (95) Yet there is no need for a family court establishment that the adoption relationship has been cancelled due to the marriage because marriage is a highly transparent status-changing act declared before a civil registrar (§ 1310(1) BGB). (96)

2. *Adoption of adults*

63 The adoption of adults is governed accordingly by the provisions on the adoption of minors unless the law explicitly leads to a different conclusion (§ 1767(2)(1) BGB). An important deviation is that in the case of the adoption of adults, the best interests of the child naturally no longer play any role; instead, the adoption must be morally justified. The adoption is in particular morally justified if a parent-child relationship has already developed between the adoptee and the adopter. Regarding the adoption procedure, there are hardly any differences. One main difference is that both – the adopter and the adoptee – must file the application for adoption (§ 1768 BGB), which requires notarial recording. (97) However, this does not constitute a contract but serves as the basis for the subsequent court decree, (98) which is constitutive in nature. Consent from the adoptee's parents is not required, but they, along with any children of the adoptee and the adopter, have a right to be heard (see also § 1769 BGB). (99) Furthermore, if the adoptee is married, their spouse must consent to the adoption (§ 1767(2)(2) BGB).

64 The adoption of adults generally constitutes a simple adoption, meaning that it only establishes a relationship between the adopter and the adoptee. It does not create a relationship between the adoptee and the adopter's relatives. Likewise, the adoptee's existing relationship with their previous relatives is not extinguished (§ 1770 BGB). This can result in the adoptee having more than two legal parents. (100) In exceptional cases – when a very

(95) Hans-Ulrich Maurer in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2024) § 1766 BGB para 8.

(96) Hans-Ulrich Maurer in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2024) § 1766 BGB paras 14–15.

(97) §§ 1767(2)(1), 1752(2)(2) BGB. For the influence that the notary can exercise with this formal requirement, see above para 54.

(98) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 71(8).

(99) BVerfG 1988, 1247; BVerfG FamRZ 2008, 243.

(100) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 71(12).

close parent-child relationship has already developed (101) – the family court may, on the application of the adoptee and the adopter, rule that the effects of the adoption are based on the provisions on the adoption of a minor (full adoption), including the change of the relationship between the adoptee and their relatives.

65 Apart from cases of deficiencies in its conclusion (§§ 1771(2), 1760 BGB), an adoption of adults can also be cancelled upon joint application by the adopter and the adoptee if there is a compelling reason to do so (§ 1771(1) BGB). A compelling reason may exist, for example, if a parent-child relationship cannot be established as expected. However, it does not exist if purely economic considerations are frustrated. (102) It is somewhat surprising that the German legislator requires a mutual application for cancellation, whereas in divorce – which also dissolves a *per se* lifelong status relationship – the application of one spouse is sufficient, making it easier to obtain (as mentioned above, see para 25). Additionally, unlike divorce, the law does not rely on legal presumptions for the cancellation of an adoption but requires the court to thoroughly assess whether a significant reason exists. Thus, court involvement appears to be more sensible in this matter than in divorce proceedings. The law does not provide for an *ex officio* cancellation in the case of adult adoption (see § 1763 BGB for the adoption of minors). On the other hand, unlike in the case of the adoption of minors (§ 1742 BGB), there is no prohibition on a second adoption (§ 1768(1)(2) BGB).

E. *Parental responsibility*

66 Parental responsibility encompasses two key aspects under German law, which must always be strictly distinguished: first, parental custody (*Sorgerecht*) and second, the right of the child to have contact with their parents (*Umgangsrecht*). Even though parents enjoy the constitutionally guaranteed right for parental responsibility (Article 6(2) of the German Basic Law), the State is to 'watch over' it (Article 6(2)(2) Basic Law). In fact, parental responsibility is less a right of the parents, but rather a duty that is intended to serve the best interests of the child. (103)

---

(101) See the exhaustive list in § 1772(1) BGB.

(102) J Gernhuber and D Coester-Waltjen, *Familienrecht* (7th edn, Verlag C.H.BECK 2020), § 71(19).

(103) S Lettmaier, *Familienrecht* (Verlag Franz Vahlen 2022), § 8(1).

With regard to an upcoming comprehensive reform of parental responsibility law, the Federal Ministry of Justice has published some key points. (104) In view of the research question of this Project, it is particularly worth mentioning that parents should be able to conclude custody and contact agreements (*Vereinbarungen über das Sorge- und Umgangsrecht*) in the future. (105) In addition, the court's role is also restricted when establishing parental custody of the unmarried father. The exact scope of de-judicialisation is discussed in a separate subsection at the end of this section (paras 95–96). On the other hand, the accompanying substantive changes in parental responsibility law provided for in the key points (eg, restructuring of the entire corresponding section in the BGB, concretisation of the concepts of 'best interests of the child' [*Kindeswohl*] and 'care for the person' [*Personensorge*]) will not be discussed further below. Following to the change in the German government in May 2025, it is further questionable whether the new German government will pursue the reform. **67**

1. *Parental custody*

Parental custody is divided into the care for the person (§§ 1631ff BGB, *Personensorge*), on the one hand, and the care for the assets of the child (§§ 1638ff BGB, *Vermögenssorge*), on the other hand, and can in principle only be exercised by the legal parents. In this respect, the German legislator assumes that joint parental custody is in the best interests of the child: A child should live in the awareness that both parents are responsible for them, and they should experience that their parents make important decisions for their life as equals. (106) Therefore, German law follows the legal guiding principle of joint parental custody. (107) **68**

Since the best interests of the child play a vital role in matters regarding parental custody (108) there is a significant level of judicial review and **69**

(104) *Eckpunkte des Bundesministeriums der Justiz für eine Reform des Kindschaftsrechts: Modernisierung von Sorgerecht, Umgangsrecht und Adoptionsrecht* of 25 January 2024, <https://www.bmj.de/SharedDocs/Downloads/DE/Themen/Nav_Themen/240115_Eckpunkte_Kindschaftsrecht.html?nn=110490> accessed 28 May 2025. In the meantime, the Federal Ministry of Justice has apparently already drawn up draft bills but did not publish them before the editorial deadline.

(105) Critical of the key points is Stephan Hammer, 'Sofort vollstreckbare private Umgangsvereinbarungen im Eckpunktepapier des BMJ zur Reform des Kindschaftsrechts' (2024) FamRZ 582, 583 ff.

(106) BT-Drucks. 17/11048, 17.

(107) BGH FamRZ 2016, 1439, 1443.

(108) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 800.

involvement in these matters. Parental custody is thus neither subject to the discretion of the parents (109) nor is it sufficient that it is part of a court-approved settlement in the sense of § 156(2) FamFG. (110) The special importance of the best interests of the child is also reflected in the procedural rules. On the one hand, §§ 155ff FamFG set out principles of priority and expediting proceedings. Special actors, on the other hand, are to assist the family court in decision-making and thus contribute non-legal perspectives to the proceedings: First, the youth welfare office is to be heard (§ 162 FamFG). Second, the court may – in some cases this is obligatory – appoint a guardian *ad litem* (*Verfahrensbeistand*), who has knowledge of the law on parent and child matters, of child development psychology, and of child-friendly dialogue techniques, in order to represent the child's interests (§§ 158, 158a FamFG). Third, expert opinions on questions of the parents' parenting suitability and risks for the best interests of the child that the court may order are to be submitted by psychologically trained experts (§ 163 FamFG). Finally, the court must hear the child (§ 159 FamFG) and the parents (§ 160 FamFG) in person. The involvement of all these actors enables the family court to rely also on external non-legal expertise regarding the best interests of the child in its internal legal decision-making process. (111)

a) *Establishment of parental custody*

70 If the parents are married at the time of the child's birth, they automatically acquire joint parental custody at the time of the birth (*e contrario* § 1626a BGB), otherwise the mother has sole parental custody (§ 1626a(3) BGB). If this is the case, the law provides three possibilities for establishing joint parental custody of both parents: first, the parents can subsequently marry one another. The marriage establishes joint parental custody (§ 1626a(1)(2) BGB).

71 Second, the mother and the father can declare that they wish to take on joint parental custody (§ 1626a(1)(1) BGB). These declarations of parental custody (*Sorgerechtserklärungen*) may only be made if no court decision on parental custody has been made (§ 1626b(3) BGB). The parents can only make their declarations on parental custody (which, by the way, do not

(109) OLG Köln FamRZ 2013, 1591.
(110) OLG Jena FamRZ 2019, 821.
(111) M Oldenburger, *Kindeswohl im Recht* (V & R unipress 2018) 195.

constitute a contract) (112) without a representative, and these declarations cannot be subject to a condition (ie, only full custody can be declared) (113) or a stipulation as to time (§§ 1626b, 1626c BGB). The declarations of parental custody must be recorded publicly by a notary or the youth welfare office (§ 1626d BGB, § 20(1)(1) Federal Code for Notaries – *Bundesnotarordnung*, and § 59(1)(1)(8) SGB VIII). The requirements for effectiveness in §§ 1626b–1626d BGB are conclusive with the result that the rules of the general law of obligations do not apply to the declarations of parental custody (§ 1626e BGB). (114) Once joint parental custody has been established, it can only be terminated or amended by a judicial act (§ 1671 BGB). There is widespread consent in the German literature that registered declarations of parental custody or declarations of parental custody embodied in authentic instruments fall within the scope of Article 65(2) Brussels IIb Regulation and can therefore circulate freely within the European Union. (115)

72 Third, on application by one parent, the family court is to transfer parental custody or parts thereof to both parents jointly if the transfer is not inconsistent with the best interests of the child. The wording makes it clear that the transfer of parental custody does not necessarily have to be most conducive to the best interests of the child, but rather it is enough that joint parental custody is not inconsistent with the best interests of the child, which means that the court must apply a so-called 'negative child best interests test' (*negative Kindeswohlprüfung*). This negative child best interests test is flanked by the rebuttable presumption that the transfer of parental custody to both parents jointly is not inconsistent with the best interests of the child if the other parent fails to submit any reasons in this respect and if such reasons are not otherwise manifest (§ 1626a(2)(2) BGB) which restricts the principle of *ex officio* investigation. (116) In such a case, the court shall decide in accelerated and simplified proceedings conducted in writing without hearing the youth welfare office and without an in-person hearing with the

(112) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 770.

(113) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 769.

(114) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 772.

(115) R Hausmann, *Internationales und Europäisches Familienrecht* (3rd edn, Verlag C.H.BECK 2024), para N-317ff with further references. The fact that Germany has not communicated any court or authority that is competent to issue such certificates to the European Commission pursuant to Article 103(1)(b) Brussels IIb Regulation is irrelevant since these notifications are only declaratory.

(116) Peter Huber in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2024) § 1626a BGB para 54.

parents (§ 155a(3) FamFG); however, the in-person hearing of the child is still required (§ 159 FamFG). These procedural provisions correspond to the above-mentioned legal guiding principle that joint parental custody is generally in the best interests of the child.

b) *Amendment of parental custody*

73 Whereas the court has hardly any duty to review when joint parental custody is established, the situation is clearly different when parental custody that has already been established is amended. In general, established parental custody can be amended by declaration, by law, or by court decision. A declaration of parental custody is only possible if the mother was previously entitled to sole custody and now both parents want to take on joint parental custody (see above for the establishment of joint parental custody, para 71). If the parental custody was held by the parents jointly, parental custody is held *ipso iure* by the other parent if one parent dies or is deprived of parental custody (§ 1680(1) and (3) BGB). Finally, parental custody may be amended by court order. In doing so, the court has to apply different standards of review with regard to the best interests of the child depending on the reason for the amendment. If the parent who had sole custody has died or has been deprived of parental custody, the family court is to transfer parental custody to the other parent, provided that they have not been previously deprived of parental custody and that the transfer of parental custody is not inconsistent with the best interests of the child (§ 1680(2) and (3) BGB); in this case, the 'negative child best interests test' is conducted. Different rules apply when one parent aims to have sole custody because the parents are permanently living apart. If both parents had joint parental custody, the family court, upon application, has to transfer parental custody to one parent alone if the other parent consents and the child – if over the age of 14 – does not object to the transfer. Otherwise, the family court has to conduct a so-called 'dual child best interests test' (*doppelte Kindeswohlprüfung*) by examining whether it is to be expected that both the termination of the joint parental custody as well as the transfer of sole custody to the applicant are most conducive to the best interests of the child (§ 1671(1) BGB). This already represents a very strict standard of review. However, it becomes even stricter when the mother has sole custody in the case of unmarried couples and the father now applies for sole custody due to the couple permanently living apart. In this case, the family court transfers sole custody to the father if the mother consents, the child – if over the age of 14 – does not object, and the transfer of custody is not contrary to the best interests of the child ('negative child best interests test'). Alternatively, the court has also to grant sole custody to the father if

joint custody is not an available option (this constitutes a high threshold as transferring sole custody to the father represents a significant infringement of the mother's fundamental parental rights (117)) and it is to be expected that the transfer to the father is most conducive to the best interests of the child ('positive child best interests test', ie, the father must be more suitable for parenting than the mother (118)) (§ 1671(2) BGB).

74 The circumstances relevant to a positive child development are subject to ongoing changes. (119) Since ensuring the best interests of the child is the paramount principle in matters of custody, it is only logical that courts must also have the power to amend their previous decisions. Therefore, decisions regarding the right of custody cannot become substantive *res judicata* but can be amended upon application or – when certain prerequisites are met – *ex officio*. (120) However, in order to maintain a stable living situation with continuity in upbringing for the child and to prevent courts from arbitrary interference with fundamental parental rights, (121) § 1696 BGB sets a reasonably high threshold for such amendments. (122) Accordingly, amending a court decision is only appropriate for sound reasons that affect the best interests of the child in the long term. (123) This requires a 'qualified positive child best interests test', which is even stricter than the aforementioned 'simple positive child best interests test'. (124) Hence, the reason for the amendment must be of such importance that it clearly outweighs the principle of continuity in upbringing and the disadvantages associated with the amendment for the child's development. (125)

---

(117) BT-Drucks. 17/11048, 20.

(118) Heike Hennemann in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2024) § 1671 BGB para 155.

(119) Katharina Lugani in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2024) § 1696 BGB para 1.

(120) BVerfG FamRZ 2005, 783, 784; FamRZ 2015, 210, 211.

(121) KG FamRZ 2019, 363; OLG Frankfurt aM FamRZ 2019, 206; Peter Huber, 'Die elterliche Sorge zwischen Veränderung und Kontinuität' (1999) FamRZ 1625ff; Katharina Lugani in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2024) § 1696 BGB para 28.

(122) § 1696 BGB is also compliant with the Basic Law, BVerfG FamRZ 2015, 210, 211.

(123) Before this formula became law, it was developed by jurisprudence, *inter alia* BGH FamRZ 2013, 314, 315; BGH NJW-RR 1986, 1130, 1131; BayObLG FamRZ 1976, 38; KG FamRZ 1967, 411.

(124) OLG Karlsruhe FamRZ 2000, 1595, 1596; Katharina Lugani in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2024) § 1696 BGB para 29.

(125) *Inter alia* OLG Nürnberg BeckRS 2016, 112546 para 40; OLG Karlsruhe FamRZ 2014, 1124; OLG Jena FamRZ 2014, 953, 953; OLG Frankfurt FamRZ 2014, 317, 319; OLG Köln FamRZ 2006, 1276.

75 The different levels of how the courts have to take the best interests of the child into consideration when amending parental custody are summarised in the following table:

Death of parent with sole custody (§ 1680 (2) and (3) BGB)	**Transfer of sole custody where parents live apart and where they had joint parental custody (§ 1671(1) BGB)**	**Transfer of sole custody where parents live apart and where mother had sole custody (§ 1671(1) BGB)**	**Amendment of judgments in matters regarding parental custody (§ 1696 BGB)**
'Negative child best interests test'	– Consent of the other parent – No objection of the child OR – Dual child best interests test, ie, both prerequisites must be most conducive to the best interests of the child: • Termination of the joint parental custody • Transfer to the applicant	– Consent of the mother – No objection of the child – Negative child best interests test OR – Joint parental custody is not an available option – Transfer to the father must be most conducive to the best interests of the child ('positive child best interests test')	'Qualified positive child best interests test'

c) *Suspension of parental custody*

76 Parental custody may be suspended in cases of legal or factual impediments. As long as the parental custody is suspended, a parent is not entitled to exercise it (§ 1675 BGB). In the event of a legal impediment, parental custody is *ipso iure* suspended. Such an impediment exists if a parent has consented to an adoption (§ 1751 BGB, see above para 57), is incapable of contracting, or has limited capacity to contract. In the latter case, however, the parent still has the care for the person of the child together with the legal representative of the child (§ 1673 BGB). The parental custody revives if the parent concerned becomes fully capable of contracting. (126) In the event of an actual impediment (eg, prolonged imprisonment, (127) unknown residence, (128) severe illnesses such as alcoholism (129)), parental custody of a

(126) Janett Theile in *beck-online.GROSSKOMMENTAR* (Verlag C.H.BECK 1 September 2021) § 1675 BGB para 24.1.

(127) BayObLG NJW 1975, 1082, 1083; OLG Dresden FamRZ 2003, 1038; OLG Brandenburg FamRZ 2009, 1683.

(128) OLG Naumburg FamRZ 2002, 258

parent is suspended if the family court establishes that that parent cannot in fact exercise their parental custody for a long period of time. The parental custody revives if the family court establishes *ex officio* (130) that the reason for the suspension no longer applies (§ 1674 BGB). During the period of suspension, the other parent exercises sole parental custody if the parents have joint parental custody (§ 1678(1) BGB). If the parent whose parental custody is now suspended had sole custody, the family court is to transfer parental custody to the other parent if this is not inconsistent with the best interests of the child ('negative child best interests test') (§ 1678(2) BGB). In this case, the parental custody of the parent whose custody is suspended does not automatically revive again after the reason for the suspension no longer applies but must be transferred back by the family court (§ 1696(1)(3) BGB), (131) whereby the principles for the amendment of decisions regarding custody matters apply *mutatis mutandis* (see above paras 73–75). Except in cases where the transfer of parental custody under § 1678(2) BGB is likely, (132) the senior judicial officer and not the judge is competent in the first instance for the establishment of the suspension of the parental custody and its revival (§§ 3(2)(a), 14(1)(3) RPflG).

d) *Dissolution of parental custody*

77 Parental custody ends *ipso iure* when the child reaches the age of majority (ie, age of 18) (*e contrario* § 1626(1)(1) BGB). With the conclusion of an adoption, parental custody is *ipso iure* transferred to the adoptive parents, whereby the parental custody of the previous legal parents ends; except in the case of the adoption of stepchildren (§§ 1754, 1755 BGB). (133) The custody of one parent also ends with their death (cf, § 1680 BGB). Finally, the family court may remove parental custody in whole or in part if the physical, mental, or psychological best interests of the child or the child's assets are endangered and the parents do not wish, or are not able, to avert the danger (§ 1666(1) and (3)(6) BGB, see below para 83).

---

(129) OLG Frankfurt FamRZ 2015, 1521; Isabell Götz in *Grüneberg. Bürgerliches Gesetzbuch* (83th ed, Verlag C.H.BECK 2024) § 1674 BGB para 1.

(130) Heike Hennemann in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2024) § 1674 BGB para 19.

(131) Janett Theile in *beck-online.GROSSKOMMENTAR* (Verlag C.H.BECK 1 September 2021) § 1675 BGB para 24.

(132) If the senior judicial officer nevertheless decides in these cases, the decision is void, OLG Dresden FamRZ 2012, 1882.

(133) BVerfG FamRZ 2019 1061, 1072.

e) *Custody register*

78 The youth welfare office in whose area of jurisdiction the child's place of birth is located keeps a custody register (§§ 58, 87c(6)(2) SGB VIII). If the child was born abroad, the youth welfare office of the State Berlin maintains the custody register (§§ 87c(6)(2)(2), 88(1)(2) SGB VIII). The entry is made on the basis of the notification by the youth welfare offices, courts, or notaries on declarations of parental custody and decisions in proceedings regarding parental custody to which they are obliged by law according to § 1626d(2) BGB, § 155a(3) FamFG, § 50(3) SGB VIII. The youth welfare office does not have to assess the effectiveness of the declarations of parental custody but may not register declarations that are clearly ineffective. (134)

79 The custody register has a purely declaratory effect. However, the evidentiary value is also limited. (135) Firstly, the custody register is not a public register that enjoys public faith; ie, there is no presumption that the content of the custody register is correct. (136) Secondly, the custody register is only a snapshot; the contents can therefore quickly become outdated if the parents declare in the meantime that they wish to take on parental custody jointly, marry one another, or a new court decision is rendered. (137) Thirdly, the register only contains court decisions that establish parental custody, but not those that suspend, remove, or amend parental custody according to §§ 1678(2), 1680(2), 1696 BGB. (138) Last but not least, the custody register solely contains entries according to German law; it therefore does not contain any information on custody established abroad. (139) The last point could indeed violate Germany's international law obligations under Article 16(2) and (3) of the Hague Convention on the Protection of Children

---

(134) DIJuF, 'Rechtsgutachten 17.12.2013, ES 2.220 Lh' (2014) JAmt 27, 28; Anja Uhl in *beck-online.GROSSKOMMENTAR* (Verlag C.H.BECK 1 August 2023) § 58 SGB VIII para 9.

(135) Anja Uhl in *beck-online.GROSSKOMMENTAR* (Verlag C.H.BECK 1 August 2023) § 58 SGB VIII para 15.

(136) Bernhard Knittel, 'Sorgeregister und Auskunft gem. § 58a SGB VIII – Neuerungen durch das KJSG' (2021) JAmt 376, 377; Guy Walther in Reinhard Wiesner and Friederike Wapler (eds), *SGB VIII. Kinder- und Jugendhilfe* (6th edn, Verlag C.H.BECK 2022) § 58a SGB VIII para 18.

(137) Anja Uhl in *beck-online.GROSSKOMMENTAR* (Verlag C.H.BECK 1 August 2023) § 58 SGB VIII para 15; Guy Walther in Reinhard Wiesner and Friederike Wapler (eds), *SGB VIII. Kinder- und Jugendhilfe* (6th edn, Verlag C.H.BECK 2022) § 58a SGB VIII para 18.

(138) Guy Walther in Reinhard Wiesner and Friederike Wapler (eds), *SGB VIII. Kinder- und Jugendhilfe* (6th edn, Verlag C.H.BECK 2022) § 58a SGB VIII para 19.

(139) DIJuF, 'Rechtsgutachten vom 15.01.2007, ES 2.220 Ht' (2007) JAmt 137; Guy Walther in Reinhard Wiesner and Friederike Wapler (eds), *SGB VIII. Kinder- und Jugendhilfe* (6th edn, Verlag C.H.BECK 2022) § 58a SGB VIII para 20.

because the custody register could possibly inaccurately create the impression that the mother has sole parental custody although joint custody was duly established under foreign law. (140) Even though all these weaknesses of the custody register are well known, the German legislator is holding on to this concept due to a lack of alternative solutions (141) and considers the current law regarding the custody register to be compatible with international treaties to which Germany is a party. (142)

f) *Judicial or official intervention in the exercise of parental custody*

80 If the parents have joint parental custody, they exercise it on their own responsibility but in mutual agreement (§ 1627 BGB). Where they are unable to achieve agreement in a matter for which the arrangements are of substantial importance for the child, the family court, on the application of one parent, may transfer the decision to one parent (§ 1628 BGB). In doing so, the court does not settle the matter as such – and chooses, for instance, the first name of the child on its own – but merely decides which parent is authorised to have sole custody in this matter (only) and may therefore make the decision. (143)

81 Parental custody does not establish unlimited authority over the child. Subsequently, German laws define certain boundaries. This report focuses on exemplary boundaries that require the actions and decisions of parents – even though they have full custody rights – to be reviewed by the courts. (144) First, the parents need ratification of the family court in matters of particular significance for the child, such as placement of the child that is associated with deprivation of liberty (§ 1631b(1)(1) BGB), or for particularly risky legal transactions involving assumptions of duty and disposals, for instance, of a plot of land, a right in a plot of land, or shares in a company that operates

(140) DIJuF, 'Virulenter gesetzlicher Regelungsbedarf wegen der Auswirkungen des KSÜ auf die sog. Negativbescheinigung nach § 58a SGB VIII' (23 November 2012) <https://dev1.dijuf.de/files/downloads/2011/2012/DIJuF-Hinweise_Â§_58a_SGB_VIII_und_KSUE_23.11.2012%20End.pdf> accessed 28 May 2025; Guy Walther in Reinhard Wiesner and Friederike Wapler (eds), *SGB VIII. Kinder- und Jugendhilfe* (6th edn, Verlag C.H.BECK 2022) § 58a SGB VIII para 20;

(141) BT-Drucks. 13/4899, 173; Guy Walther in Reinhard Wiesner and Friederike Wapler (eds), *SGB VIII. Kinder- und Jugendhilfe* (6th edn, Verlag C.H.BECK 2022) § 58a SGB VIII para 18.

(142) BT-Drucks. 17/11048, 11.

(143) S Lettmaier, *Familienrecht* (Verlag Franz Vahlen 2022), § 8(43); D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 841.

(144) See in more detail: D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), paras 820–836.

a trade or business (§§ 1643, 1850–1854 BGB). Second, the parents cannot represent the child *ipso iure* if there might be an abstract conflict of interests (eg, because a legal transaction should be concluded between a lineal relative of that parent and the child, §§ 1629(2)(1), 1824 BGB). Third, the family court may revoke the parent's power of representation for an individual matter *ex officio* if the interest of the child is to a substantial degree contrary to the interest of the parent in the specific case (§§ 1626(2)(3), 1789(2)(3) and (4) BGB). If in the second and third cases the other parent cannot have sole custody, [145] the family court appoints a supplementary curator (*Ergänzungspfleger*), who has to take care of this matter in the interests of the child and represents them in this matter (§§ 1693, 1809(1) BGB). [146]

82 Upon application, the family court is to support the parents in exercising care for the person of the child in suitable cases (§ 1631(3) BGB). This may include, for example, warnings or admonitions to the child, who may be more impressed by the sovereign character than if these were issued by the parents. Furthermore, coercive measures can also be considered, such as the return of a child who has run away from the parental home. [147]

83 The family court must intervene in the exercise of parental custody rights if the physical, mental, or psychological best interests of the child or the child's assets are endangered, and the parents do not wish, or are not able, to avert the danger (§ 1666 BGB). Paragraph 3 of this provision contains a non-exhaustive catalogue of measures that the family court can take. These range from the instruction to seek public assistance, to the prohibition to establish contact with the child, all the way to the removal of parental custody. However, the principle of proportionality must always be adhered to. Hence, the complete care for the person of the child may be revoked only if other measures have failed to obtain a result or if they do not suffice to avert the danger (*ultima ratio*, § 1666a(2) BGB). In this context, the family court may also undertake measures with effect in relation to a private third party (§ 1666(4) BGB). Yet the family court cannot undertake measures with effect in relation to public third parties (eg, schools) as the administrative courts are competent in this regard. [148] The family court must take measures according to §§ 1666, 1667 BGB *ex officio*. In doing so, it is dependent on information from third parties. Therefore, the youth welfare office must apply to the family court if it learns of a risk to the best interests of a child

---

[145] Eg, because the conflict of interests also exists in relation to the other parent or because the parents are married, BGH FamRZ 2021, 1127, 1129.

[146] D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 872.

[147] D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 893.

[148] OVG Jena FamRZ 2021, 1043, 1047.

and considers a judicial measure necessary (§ 8a(2)(1) SGB VIII). The child itself or third parties such as teachers, relatives, or neighbours can also suggest the initiation of proceedings to the family court. (149) A measure under §§ 1666, 1667 BGB is to be repealed if there is no longer a danger to the best interests of the child (§ 1696(2) BGB).

84 On the other hand, there are the services of the youth welfare office, which, however, can primarily be used voluntarily by the parents and are part of public social law. (150) Nevertheless, as the youth welfare office also exercises a watchdog function (§ 8a(1) SGB VIII), (151) it may – in very exceptional cases – take interim measures without court involvement and against the will of the parents. This includes the immediate taking into care of the child (*Inobhutnahme*, § 42 SGB VIII) if the child so requests or if the best interests of the child are endangered and a family court decision cannot be obtained in time. However, the measures taken by the youth welfare office are only provisional in nature, meaning that after taking the child into care, the youth welfare office must, without undue delay, obtain a family court decision on the necessary measures for the best interests of the child in accordance with § 1666 BGB. Only those measures – in contrast to § 42 SGB VIII – legitimise permanent measures against the will of the parents, (152) which infringes the fundamental parental rights protected by the German Basic Law. (153) Due to the provisional nature of the taking into care of the child, recognition of the underlying administrative act (*Verwaltungsakt*), which is immediately enforced by the youth welfare office, is practically irrelevant under the Brussels IIb Regulation – only the subsequent court decision to prolong the measure may need to be recognised in other Member States.

g) *Power of attorney for custody – a way of party autonomy?*

85 Even though parental custody is indispensable and subject to strong judicial control, parents have the possibility to grant a power of attorney for custody

(149) Katharina Lugani in *Münchener Kommentar zum BGB* (8th edn, Verlag C.H.BECK 2020) § 1666 BGB para 223.

(150) Katharina Lugani in *Münchener Kommentar zum BGB* (8th edn, Verlag C.H.BECK 2020) § 1666 BGB para 24.

(151) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), paras 926–927.

(152) OLG Köln FamRZ 2001, 1087, 1088; Werner Dürbeck in Reinhard Wiesner and Friederike Wapler (eds), *SGB VIII. Kinder- und Jugendhilfe* (6th edn, Verlag C.H.BECK 2022) § 42 SGB VIII para 1, 46; Katharina Lugani in *Münchener Kommentar zum BGB* (8th edn, Verlag C.H.BECK 2020) § 1666 BGB para 25.

(153) Peri Akman and Jan Keesen, 'Die Schutzvereinbarung mit dem Jugendamt' (2023) NZFam 884, 887.

(*Sorgevollmacht*). Since these powers of attorney for custody are granted formless without any official control, and are not subsequently entered in any register, they do not constitute authentic instruments and therefore do not fall within the scope of the Brussels IIb Regulation. Yet with this agreement, under German law, parents can not only transfer parts of their legal custody and powers of representation to third parties (such as teachers or educators) (154) but also authorise each other. Irrespective of the question disputed in the literature as to whether a general power of attorney for custody may be granted, (155) parental responsibility cannot, in any case, be completely relinquished through the power of attorney for custody since this would represent a circumvention of the indispensability of parental custody rights. Therefore, the power of attorney for custody must – even if it is generally granted for an indefinite period of time – be freely revocable at any time so that the granting parent can continue to exercise their control duties arising from parental custody. (156) The ability to revoke the power of attorney for custody at any time is the reason why a power of attorney for custody cannot permanently end a custody dispute. After revocation, the original dispute revives just in the same way as it was before the power of attorney was granted. (157) Nevertheless, family courts regularly encourage the granting of a power of attorney for custody to amicably resolve the legal dispute. (158) This is because if a power of attorney for custody is granted in favour of one parent, it will typically no longer be necessary to transfer sole custody to that parent by a court decision. (159)

---

(154) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 859.

(155) Anja Amend-Traut, 'Sorgerechtsvollmachten' (2020) FamRZ 805, 807 fns 20, 21; Birgit Hoffmann, 'Sorgerechtsvollmachten zwischen Eltern im familiengerichtlichen Verfahren nach der Entscheidung des BGH v. 29.4.2020 – XII ZB 112/19' (2023) FamRZ 1921, 1922–1923 with further references; Katrin Lack, 'Sorgerechtsvollmachten – Voraussetzungen, Rechtsfolgen und Anwendungsbereiche' (2024) NJW 805 para 6.

(156) BGH FamRZ 2020, 1171, 1175; Anja Amend-Traut, 'Sorgerechtsvollmachten' (2020) FamRZ 805, 807; Gunnar Geiger and Sebastian Kirsch, 'Gestaltung der Sorgerechtsausübung durch Vollmacht' (2009) FamRZ 1879, 1881; Birgit Hoffmann, 'Sorgerechtsvollmachten zwischen Eltern im familiengerichtlichen Verfahren nach der Entscheidung des BGH v. 29.4.2020 – XII ZB 112/19' (2023) FamRZ 1921, 1924–1925; Katrin Lack, 'Sorgerechtsvollmachten – Voraussetzungen, Rechtsfolgen und Anwendungsbereiche' (2024) NJW 805 para 10; D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 963.

(157) M Oldenburger, *Kindeswohl im Recht* (V & R unipress 2018) 44.

(158) M Oldenburger, *Kindeswohl im Recht* (V & R unipress 2018) 43.

(159) BGH FamRZ 2020, 1171, 1173; OLG Bremen FamRZ 2023, 1973, 1976; D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 962.

h) *Third persons in parental custody*

86 As already mentioned several times, parental custody is an inherent duty of parenthood. Nevertheless, there are ways in which parents can transfer (at least parts of) their parental custody rights to third persons. On the one hand, § 1671 BGB, which has already been presented above (cf, para 73), provides that parents can consent to the judicial transfer of custody to the other parent; in this case, the court will no longer review the best interests of the child. Parents can also transfer their parental custody by consenting to adoption *qua* private autonomy (§ 1754 BGB), however, in this case, a judicial act of sovereignty is necessary for an effective transfer, too. On the other hand, parents can transfer parts of their parental responsibility to third persons with a power of attorney for custody (see above para 85).

87 Moreover, German law grants step- and foster parents limited *ipso iure* custody rights over matters of everyday life of the child (§§ 1687b, 1688 BGB). Foster care may be initiated by parents who are overwhelmed with parenting responsibilities. Those parents may even have a corresponding legal claim under social welfare law (§§ 27, 33 SGB VIII). (160)

2. *Right to have contact*

88 The second major pillar of parental responsibility under German law is the right of the child to have contact with their parents (§ 1684(1)(1) BGB). This too constitutes an indispensable parental right and duty – notwithstanding whether the respective parent has parental custody – enforceable through legal means. Proceedings concerning the right of contact have priority and the proceedings are handled in an expedited manner (§ 155(1) FamFG).

89 The parents can mutually conclude a binding agreement on the exercise of the right of contact (*Umgangsvereinbarung*) without court involvement, provided they do not waive their right to have contact in the agreement in full, (161) or make payment of the equalisation of matrimonial property rights dependent on the fulfilment of the right to have contact. (162) A parent can no longer unilaterally withdraw this agreement. If they wish to do so, they must initiate a corresponding family court decision. (163) The family court may decide – even without an agreement – on the scope of the right of contact and make more detailed provisions on its exercise (§ 1684(3)(1)

(160) See in more detail: D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), paras 860–866.

(161) BGH FamRZ 1984, 778.

(162) BGH FamRZ 2024, 603.

(163) S Lettmaier, *Familienrecht* (Verlag Franz Vahlen 2022), § 9(25).

BGB). In such proceedings, it can also approve a private contact agreement and record such an agreement as a settlement (court-approved settlement – *gerichtlich gebilligter Vergleich*). It does so if the contact agreement is not contrary to the best interests of the child (§ 156 FamFG). If the court approves a contact agreement, the agreement becomes enforceable (§ 86(1)(2) FamFG) and can only be amended according to the threshold laid out in § 1696 BGB that requires sound reasons which affect the interests of the child in the long term (see above para 74). A complaint on appeal may be lodged against the court-approved settlement even by the parent who consented to the settlement (§ 58(1) FamFG). [164]

90 If one parent permanently renders the relationship of the child to the other parent difficult, the court can order an access custodianship (*Umgangspflegschaft*) to supervise the implementation of the right of contact (§ 1684(3)(3) and (4) BGB). [165] However, the access custodian cannot use direct coercion; only the court may order that (§§ 89, 90 FamFG). Yet the use of direct coercion against the child is not permitted (§ 90(2) FamFG) and the use of coercion against the parent who is unwilling to have contact with the child will most often not be in the best interests of the child as the child will in these cases be met with rejection. [166]

91 Finally, German law also grants other close persons (eg grandparents, siblings, biological but not legal fathers) a right of contact with the child if it serves the best interests of the child (§§ 1685, 1686a(1)(1) BGB). The court has the same control, regulation, and enforcement options as for the parents' right of contact. However, to order an access custodianship, the higher threshold of § 1666 BGB would have to be met; ie, the best interests of the child must be endangered if it did not have contact with the person in question (see above para 83). [167]

3. *Guardianship*

92 The family court appoints a guardian for a minor (*Vormund*) *ex officio* if the minor is not subject to parental custody, if the parents are not entitled to represent the minor either in matters affecting the person or in matters

---

[164] BGH FamRZ 2019, 1616, 1618; D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 995.

[165] See in more detail about access custodianship: Harald Vogel, 'Umgangspflegschaft, Umgangsbestimmungspflegschaft und Umgangsbegleitung im Kontext des BGB und des SGB VIII – Teil 1' (2023) FamRB 510ff.

[166] BVerfG FamRZ 2008, 845, 851.

[167] D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 1004.

relating to the minor's assets, or if the minor's personal status cannot be determined (eg, foundling or baby hatch [*Babyklappe*]), § 1773(1) BGB. In order to act *ex officio*, the family court is dependent on information from other authorities about children for whom a guardian must be appointed. Therefore, the youth welfare office (§ 57 SGB VIII), the registry offices (§ 168g FamFG) as well as other courts (§ 22a FamFG) are obliged to inform the family court as soon as they have knowledge of a corresponding issue. As guardians can be appointed voluntary natural persons, natural persons acting as professional guardians, association guardians, or the youth welfare office (§ 1774 BGB). The family court appoints as guardian the person whom the deceased parents of the ward (*Mündel*) have named by disposition *mortis causa*. If the parents have not named anyone, the family court must appoint the most suitable guardian (§§ 1778, 1782 BGB). The selected person is obliged to assume guardianship (§ 1785(1) BGB). However, if the person refuses to agree to assume guardianship, the family court has *de facto* no means of forcing this person to do so; giving the selected person ultimately a right of veto. [168] If it is foreseeable that a child whose parents are not married to each other will require a guardian at birth, the youth welfare office *ipso iure* becomes the guardian, unless the family court appoints another person as guardian even before the birth of the child (§ 1786 BGB).

93 With the appointment of the guardian, the care for the person and the assets of the ward are transferred to the guardian (§ 1789 BGB). If the ward lives with a foster family or in a home, the guardian must visit them regularly. [169] Custody rights over matters of everyday life of the child are transferred *ipso iure* to the foster carer (*Pflegeperson*, § 1797(1) BGB); the family court may – on application – transfer more custody rights to the foster carer (§ 1777 BGB). In general, the guardian should cooperate with the foster carer (§ 1796 BGB). The family court supervises the exercise of guardianship. Like parents (see above para 81), the guardian also requires ratification of the family court in matters of particular significance for the ward (§§ 1795ff BGB).

94 Guardianship ends *ipso iure* when its prerequisites cease to be met, eg, the ward becomes of full legal age (§ 1806 BGB). It also ends if the family court removes the guardian *ex officio*, for instance, if the continuation of the office would endanger the interests of the ward. The family court is to remove the guardian on application, among other reasons, if the continuation is no

---

[168] Clemens Bartels, 'Die große Reform: Vom Recht des Vormunds zu den Rechten des Mündels – die neuen Vorschriften des Vormundschafts- und Pflegschaftsrechts' (2021) FamRB 113, 116.

[169] As a rule, once per month, §§ 1788(3), 1790(3) BGB.

longer reasonable for the guardian. The application can be made by the current guardian, the prospective guardian, or the ward who is at least 14 years old (§ 1804 BGB). When the guardian is removed, the family court must appoint a new guardian without undue delay (§ 1805 BGB).

4. *De-judicialisation with the planned reform regarding parental responsibility*

95 As indicated at the beginning of this section, the Federal Ministry of Justice has published key points that are to be taken into account in a possible reform of the law on parental responsibility. (170) These key points provide for a considerable de-judicialisation. This follows the general trend that while status relationships (eg, parenthood) are still subject to strong judicial control in Germany, rights arising from status relationships (eg, parental responsibility) are open to de-judicialisation. However, this law is neither in force nor has it passed the parliamentary proceedings yet. In the meantime, the federal government has also been replaced following new elections, so it is questionable whether this reform will be pursued further. Therefore, the following information contains only plans of the former government, whereby it is not certain whether and – if so – when they will ever become law.

96 Specifically, the key points envisage the following:

- Parenthood agreements (see above para 51) that were concluded for the legally secure establishment of parenthood before the child was conceived should automatically also apply to custody rights.
- Parents will in future be able to agree on the sole custody of one parent, (re-)establish joint parental custody and transfer custody from one parent to the other, with the involvement of the youth welfare office (however, the key points are silent on the exact scope of the involvement of the youth welfare office). The family court can only intervene in these circumstances if the child's best interests are jeopardised. Hence, if the parents are in agreement, the complex (negative or dual) child best interests tests are no longer necessary to amend parental custody rights and will not be conducted by the family court anymore.
- A limited right of custody (*kleines Sorgerecht*) over matters of daily life should also be contractually transferable to up to two other people who

(170) *Eckpunkte des Bundesministeriums der Justiz für eine Reform des Kindschaftsrechts: Modernisierung von Sorgerecht, Umgangsrecht und Adoptionsrecht* of 25 January 2024, <https://www.bmj.de/SharedDocs/Downloads/DE/Themen/Nav_Themen/240115_Eckpunkte_Kindschaftsrecht.html?nn=110490> accessed 25 May 2025. In the meantime, the Federal Ministry of Justice has apparently already drawn up draft bills but did not publish them before the editorial deadline.

are not the child's legal parents. The key points do not require any official or judicial involvement for this. However, the written form is mandatory.

- Third parties can be granted a right to have contact by contract. However, this agreement is not enforceable and can be unilaterally revoked by the legal parents at any time if they think that the contact is no longer in the best interests of the child. At least, the revocation does not affect the third party's statutory right to have contact. In the contrary, the former contact agreement (*Umgangsvereinbarung*) must be taken into account in the judicial review of the statutory right of contact and will create a presumption in favour of the third party. As a result, private autonomous agreements might be able to influence judicial reviews in the future.
- The right to have contact can also be legally waived if this is publicly recorded.
- In addition to the contractual changes to custody rights, in the future it will be easier to establish the unmarried father's right to custody. If the father lives together with the mother, it will be sufficient for him to make a unilateral, publicly recorded declaration that he wishes to obtain joint custody. The mother retains sole custody only if she objects to this. If the father wishes to obtain joint custody after the mother's objection, he must – as before – appeal to the family court. The same rule will also apply to the co-mother in the future.
- The child should be more involved in decisions about custody and contact in the future. From the age of 14, they should have the opportunity to request a review of decisions made in matters of contact and to object to joint custody of unmarried parents. If new agreements are concluded after the child is 14 years old, the child must agree to them.

F. *Matrimonial property regimes*

97 German law grants married couples considerable autonomy with little judicial intervention regarding matrimonial property regimes (*eheliches Güterrecht*). While there is a default statutory property regime (*gesetzlicher Güterstand*), spouses can completely derogate from it and may in this case choose from three other sets of contractual property regimes (*Wahlgüterstand*) provided by the BGB. Furthermore, spouses can also deviate from these contractual property regimes by contract, and the courts can only perform a limited review of the effectiveness of such contracts. In contrast, non-marital cohabitants (*nichteheliche Lebensgemeinschaft*) do not have access to a specific property regime. Property-related claims in non-marital cohabitation relationships must be settled more intricately with the principles of general contract law or partnership law.

1. *Property regimes between spouses*

a) *Statutory property regimes*

98 As the default model, §§ 1363ff BGB establish the statutory matrimonial property regime known as 'community of accrued gains' (*Zugewinngemeinschaft*). According to this regime, each spouse remains the owner of their own assets and manages them independently. However, there are certain limitations, such as the restriction on one spouse disposing over their assets as a whole or household objects or agreeing to such a disposition without approval of the other spouse (§§ 1365–1369 BGB). The accrued gains are equalised when the property regime ends; either because the marriage ends or because the spouses agree on another property regime. If the marriage ends by reason of one spouse's death, the surviving spouse's intestate portion is increased by one quarter of the inheritance (§ 1371 BGB); ie, the spouse receives an additional one-quarter of the deceased spouse's assets in addition to the intestate portion of the inheritance (*güterrechtliches Viertel*). A more sophisticated system than this lump-sum equalisation applies if the property regime ends in another way: The spouse with fewer gains accrued during the period of the property regime is entitled to half of the surplus of which the accrued gains of the other spouse exceed their own accrued gains (§§ 1372–1390 BGB).

b) *Contractual property regimes*

99 In addition to the community of accrued gains, German law provides married couples with three other types of property regimes: First, under the 'separation of property' (*Gütertrennung*), each spouse owns and manages their assets by themselves, and no property equalisation of assets takes place when this property regime ends (§ 1414 BGB). In contrast to this, the 'community of property' (*Gütergemeinschaft*) binds the assets owned by each spouse into a shared pool and lets them become assets jointly owned by both spouses (so-called 'common matrimonial property' – *Gesamtgut*) (§§ 1415ff BGB). As a result, one spouse cannot dispose over the common matrimonial property. However, some assets may be classified as 'separate property' (*Sondergut*, § 1417 BGB) or 'reserved property' (*Vorbehaltsgut*, § 1418 BGB) which are subject to a different set of rules. Finally, the 'German-French optional matrimonial property regime of the community of accrued gains' (*deutsch-französische Wahl-Zugewinngemeinschaft*) corresponds roughly to the statutory property regime of the community of accrued gains but, for

example, does not include the lump-sum equalisation of one-quarter after the death of one spouse (§ 1519 BGB). (171)

100 In order to choose one of these contractual property regimes – either as the law sets it out or with agreed deviations – the spouses must conclude a marriage contract. The spouses can conclude such a marriage contract at any time (before, at, or after the marriage) by having it recorded by a notary with both parties being present at the same time (§ 1410 BGB). (172) In the marriage contract, they can not only determine the matrimonial property regime but also regulate the maintenance or equalisation of pension rights. Moreover, the spouses can alter or terminate their marriage contract at any time by mutual agreement if they comply with the formal requirements (§ 1408(1) BGB).

101 The contents of these marriage contracts are only open to judicial review to a limited extent if a spouse sues for a claim under the marriage contract since the law basically guarantees private autonomy. For this purpose, case-law has established a two-step test. (173) In the first step, a review of effectiveness (*Wirksamkeitskontrolle*) is carried out to determine whether a manifestly unilateral distribution of burdens at the time of the divorce was foreseeable at the time the marriage contract was concluded (meaning: the contract was unfair from the beginning). In this case, the marriage contract would offend common decency (§ 138 BGB), is void, and statutory provisions determine the contract. If this is not the case, the court conducts, in the second step, an exercise control (*Ausübungskontrolle*): In doing so, it assesses whether one spouse is abusing their contractual position leading to an unreasonable distribution of burdens for the other spouse at the time of the divorce which was not foreseeable at the time of conclusion of the marriage contract (meaning: the contract has become unfair). This occurs, for instance, if the marital life and the development of assets has turned out differently than was foreseeable when the contract was concluded. (174) In this case, invoking the

---

(171) The German-French optional matrimonial property regime of the community of accrued gains is regulated in the 'Abkommen zwischen der Bundesrepublik Deutschland und der Französischen Republik über den Güterstand der Wahl-Zugewinngemeinschaft – Accord entre la République fédérale d'Allemagne et la République Française instituant un régime matrimonial optionnel de la participation aux acquêts' of 4 February 2010, BGBl. 2012 II, p 178.

(172) The spouses may nevertheless also be represented, cf, Wofgang Reetz in *beck-online.GROSSKOMMENTAR* (Verlag C.H.BECK 1 November 2022) § 1410 BGB para 10.

(173) This two-step test was initiated by BVerfG FamRZ 2001, 985 and specified by BGH FamRZ 2004, 601, 610–611; D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), paras 241–244.

(174) S Lettmaier, *Familienrecht* (Verlag Franz Vahlen 2022), § 4(36).

marriage contract would be against good faith (§ 242 BGB), which is why the judge must adjust the contract according to the changed living conditions; (175) however, the contract is not void. Yet, in matrimonial property law, it is unlikely that the marriage contract will fail the two-step test as even the agreement of separation of property – which the law provides for as a possible contractual property regime (see above para 99) – does not usually constitute a violation of §§ 138, 242 BGB since the matrimonial property regimes do not have the function of securing a livelihood or compensating for disadvantages (that is the task of maintenance rights) but rather they are intended to enable one spouse to benefit from the increase in assets of the other spouse; the latter, however, is not part of the inalienable core of marriage law. (176)

c) *Matrimonial property register and property regime objections against third parties*

102 Until 31 December 2022, the district courts maintained matrimonial property registers (*Güterrechtsregister*) where married couples could register their contractual property regimes in a declaratory nature (cf, old version of §§ 1558ff BGB). If they did not do so, married couples could not rely on restrictions on disposal arising from the matrimonial property regime (*negative Publizitätswirkung*) (177); eg, if one spouse living in a community of property that was not registered disposed over common matrimonial property alone, the spouses could not invoke the objection arising from the community of property against a third party (old version of § 1412 BGB; this provision may in some circumstances remain effective until the end of the transitional period until 31 December 2027, Article 229 § 64(1) Introductory Act to the Civil Code – *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (178)).

103 However, the matrimonial property register, which was costly to administer, has now been abolished as, in practice, married couples rarely registered their matrimonial property regime there and third parties rarely had access to

(175) BGH FamRZ 2014, 1978 para 25.

(176) BGH NJW 2024, 827 paras 17–24; S Lettmaier, *Familienrecht* (Verlag Franz Vahlen 2022), § 4(37); D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), para 243.

(177) D Schwab and A Dutta, *Familienrecht* (32nd edn, Verlag C.H.BECK 2024), paras 248–250.

(178) See in more detail, Peter Becker, 'Die Abschaffung des Güterrechtsregisters und die Folgen für die Praxis' (2024) FamRZ 8, 11.

the paper-based, decentralised register. (179) Instead, § 1412 BGB now introduces a good faith provision, following the example of Article 28 of the European Matrimonial Property Regulation. According to this provision, for married couples to invoke limitations on disposal arising from the contractual property regime against third parties, the third party must either be aware, or must not be unaware as a result of gross negligence, of the existence of a marriage contract. Furthermore, § 1412(2) BGB extends the *res judicata* effect of judgments to also include the other spouse who was not involved in the proceedings if it was determined in the proceedings that the third party had good faith in a different matrimonial property regime than the one the spouses had agreed upon. (180)

d) *Equalisation of pension rights*

104 The matrimonial property regime is to be distinguished from the equalisation of pension rights (*Versorgungsausgleich*), which provides for equalisation of old-age and invalidity pension rights acquired by the other spouse during the marriage (§ 1587 in conjunction with the Equalisation of Pension Rights Act – *Versorgungsausgleichsgesetz*). The court must initiate the equalisation of pension rights in the divorce proceedings *ex officio* as an ancillary matter (§ 137(2)(2) FamFG). Nevertheless, the spouses can exclude or limit the equalisation of pension rights by contractual agreement, which needs to be recorded by a notary. This agreement, like every marriage contract (see above para 101), is subject to the subsequent limited judicial review of effectiveness and exercise during the divorce proceedings (§§ 68 Equalisation of Pension Rights Act). Compared to the legal status before 2009, this represents a strengthening of private autonomy. Until then, the equalisation of pension rights could only be excluded after judicial approval (§ 1587o(2)(3) BGB old version). Thus, the new Law (181) reduced the influence of the courts in this area only to an *ex post* control.

2. *Property regimes for registered life partnerships*

105 For registered life partners (*eingetragene Lebenspartner*), the matrimonial property law and the matrimonial equalisation of pension rights law pre-

(179) BT-Drucks. 20/2730, 10; BT-Drucks. 20/4087, 5; Christof Münch, 'Die Abschaffung des Güterrechtsregisters' (2022) FamRB 461, 462.

(180) Peter Becker, 'Die Abschaffung des Güterrechtsregisters und die Folgen für die Praxis' (2024) FamRZ 8ff gives an overview about the new § 1412 BGB with some examples.

(181) *Gesetz zur Strukturreform des Versorgungsausgleichs* of 3 April 2009, BGBl. 2009 I, p 700.

sented above apply accordingly (§§ 7, 20 Act on Registered Life Partnerships – *Lebenspartnerschaftsgesetz*). See for general remarks on the German concept of registered life partnerships above, para 16.

3. *Cohabitation property regimes*

106 The matrimonial property regime does not apply to non-marital cohabitation. In these relationships, there is generally no claim to compensation under property law because, in the opinion of the German Federal Court of Justice, personal relationships are so important that they also determine the property actions of the cohabitants ([182]) (so-called 'unlabelled or community-based contributions' – *unbenannte oder gemeinschaftsbezogene Zuwendungen*). Exceptions to this principle may apply, however, in the case of substantial contributions that clearly exceed the scope of what was necessary to maintain the cohabitation, and which have still left the other cohabitant with pecuniary benefits. Yet even in this case, there is no claim under marital property law or another special property regime; instead, the claim must arise from contract law (in particular, the law of donations, §§ 516ff BGB), partnership law (§§ 705ff BGB), or the general law of obligations (eg, *negotiorum gestio*, §§ 677ff BGB [*Geschäftsführung ohne Auftrag*], joint and several debtors' duty to adjust advancements, § 426 BGB [*gesamtschuldnerischer Innenausgleich*], interference with the basis of the transaction, § 313 BGB [*Störung der Geschäftsgrundlage*], or unjust enrichment, § 812 BGB [*ungerechtfertigte Bereicherung*]). ([183])

107 For the planned community of responsibility (*Verantwortungsgemeinschaft*, see in general above, para 17), the Federal Ministry of Justice wants to provide a module with which two contracting parties can agree on a community of accrued gains. Yet the equalisation of accrued gains between the parties of the community of responsibility should not be subject to the tax relief that applies to the corresponding equalisation between spouses. ([184])

([182]) 'The idea that consideration, compensation, equalisation, reimbursement or the like can be demanded for contributions in the common interest without a specific agreement is alien to cohabitations of this kind', BGH FamRZ 2008, 1822 para 17 (own translation); see also BGH FamRZ 2008, 1404 para 16.

([183]) In detail about the compensation options after dissolution of a cohabitation: Marina Wellenhofer, 'Rechtsprobleme bei Auflösung der nichtehelichen Lebensgemeinschaft – unter Lebenden und im Todesfall' in Jens M. Scherpe and Nadjma Yassari (eds), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften. The Legal Status of Cohabitants* (Mohr Siebeck 2005) 101–136.

([184]) *Eckpunkte des Bundesministeriums der Justiz für die Verantwortungsgemeinschaft* of 2 February 2024 p 5 <https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/

G. *Arbitration in family law matters*

108 To conclude the chapter on family law, a brief look will be taken at whether State jurisdiction of family matters can be waived in favour of arbitration courts (*Schiedsgerichte*): arbitration proceedings are governed by §§ 1025–1066 ZPO, whereas family law proceedings are governed by the FamFG. However, according to § 113(1) FamFG, the provisions of the ZPO (including the provisions on arbitration) apply *mutatis mutandis* to marital matters and family dispute matters. Yet this extensive reference is limited by § 1030(1) ZPO because only claims involving proprietary rights (*vermögensrechtliche Ansprüche*) are arbitrable. In the area of family law, this therefore primarily means claims involving maintenance and matrimonial property rights (§ 112 FamFG). Consequently, marital matters and other status matters are not arbitrable under German law and thus remain subject to the monopoly of State courts described above. (185)

H. *Conclusion to family law*

109 German family law encompasses various approaches to legal relationships within family matters. While some relationships can be established through consent or declaration, dissolution usually requires a two-part process: an application and a judicial act. An exception can be found in matrimonial property law, which is likely because this does not establish a legal status but rather is a consequence of the marital status. Another exception could be found in the future if the law on parental responsibility is actually reformed as proposed in the Federal Ministry of Justice's key points. Non-judicial bodies are rarely involved in the establishment process and are not at all (or only in an advising capacity) involved in the dissolution process. By contrast, judicial acts in family matters are typically constitutive in nature, become a *res judicata*, and hence defects in the application process are generally not relevant after a certain period of time. A simplified summary can be found in the following table where all judicial involvements are in *italics*:

Legal relationship	**Establishment**	**Dissolution**
Marriage	Contractual	By application and *judicial act* (annulment or divorce)

Eckpunkte/Eckpunkte_Verantwortungsgemeinschaft.pdf?__blob=publicationFile&v=2> accessed 28 May 2025. However, it is unclear whether the new German government, which has been in office since May 2025, intends to pursue the project.

(185) Peter Gerhardt, 'Die Schiedsgerichtsbarkeit im Familienrecht' in Anatol Dutta, Hartmut Guhling, and Frank Klinkhammer (eds), *Festschrift für Hans-Joachim Dose* (Verlag Ernst und Werner Gieseking 2022) 146–147.

Motherhood	*Ipso iure*: woman who gave birth	Not possible (except by adoption)
Fatherhood	1) *Ipso iure*: marriage to the mother 2) By acknowledgement 3) By application and *judicial act*	1) In the case of *ipso iure* fatherhood or acknowledgement: contestation and *judicial act* 2) In the case of *ipso iure* fatherhood: by acknowledgement and consent while pending divorce proceeding 3) In the case of judicially established fatherhood: only by *reopening the proceedings*
Adoption of minors	By application, parental consent, and *judicial a*ct	1) General rule: not possible 2) *Ex officio judicial act*: best interests of the child 3) By application and *judicial act*: deficiencies in the original application or parental consent – time limit: three years after the adoption
Adoption of adults	By joint application of adopter and adoptee and *judicial act*	By joint application of adopter and adoptee and *judicial act*
Parental responsibility	1) *Ipso iure*: mother or married parents 2) By declaration of both parents 3) By application and *judicial act* No *res judicata* (reason: best interests of child)	1) *Ipso iure*: child becomes of full age 2) By application and *judicial act* 3) By *ex officio judicial act* No *res judicata* (reason: best interests of child)
Guardianship	By *ex officio judicial act* Communication duties for youth welfare offices, registry offices and courts	1) *Ipso iure*: cessation of the prerequisites 2) By *ex officio judicial act* 3) By application and *judicial act*
Marital property rights	1) Default: community of accrued gains 2) By marriage contract	1) By divorce or death of one spouse 2) Modifications possible by contract

110 In addition to the judicial role in establishing or dissolving status relationships, other tasks are also assigned to the courts, such as supervising the exercise of parental custody and the right to have contact, both in the case of legal parenthood and adoption. Depending on the degree of endangerment of the best interests of the child, the court must take measures up to and including the dissolution of the adoption or revocation of the care for the person of the child *ex officio*.

III. Succession law

111 Succession law regulates the transfer of private property rights and obligations upon the death of a person. Materially, it is regulated in the fifth (which is also the last) book of the BGB (§§ 1922–2385 BGB). However, this book has unfortunately a quite confusing structure; not only because some provisions related to the death of a person can also be found in other books (eg, equalisation of accrued gains after the death of a spouse in § 1371 BGB [fourth book], see above para 98). It is not the task of this report to shed complete light on the structure of the fifth book. In fact, succession law is not presented in full. Some substantive law provisions that are quite important in practice (eg, intestate succession [*gesetzliches Erbrecht*], provisional and revisionary heirs [*Vor- und Nacherben*], legacies [*Vermächtnisse*], testamentary burdens [*Auflagen*], contracts of inheritance [*Erbverträge*], compulsory share [*Pflichtteil*], interpretation of dispositions *mortis causa* [*Testamentsauslegung*]) are omitted completely because they do not serve to answer the Project's research question.

112 The focus is, therefore, mainly on procedural law. In many places, the BGB assigns competences to the probate courts (*Nachlassgerichte*), whose proceedings are largely regulated by the FamFG (especially §§ 342ff FamFG). The probate court falls within the jurisdiction of the district courts where some judicial administration tasks are assigned to senior judicial officers (§ 3(2)(c), § 16 RPflG). In order to reduce the workload of the probate courts, the legislator has also outsourced some tasks to notaries with effect from 1 September 2013 through the Act on the Transfer of Tasks in the Area of Non-contentious Jurisdiction to Notaries. ([186]) State law may also assign tasks for which the probate courts are responsible to other authorities (Article 147 Introductory Act to the Civil Code – *Einführungsgesetz zum Bürgerlichen Gesetzbuch*). In Baden-Württemberg, for example, special State-employed, civil servant notaries (*verbeamtete Notare*) were responsible for some tasks of the probate court until 31 December 2017 (see below para 142). Currently, however, legislators at State level do not use this option.

113 Since the main task of the probate courts is to ensure the proper administration and partitioning of the estate, their decisions – if they decide formally at all – do not become *res judicata*. Nevertheless, they may have far-reaching consequences due to public faith (*öffentlicher Glaube*), as can be seen by the certificate of inheritance (*Erbschein*, see below para 160). Yet, if a decision with the force of *res judicata* is needed, the contentious courts must be seized. To these courts, the procedural rules of the ZPO apply, which also contain

([186]) *Gesetz zur Übertragung von Aufgaben im Bereich der freiwilligen Gerichtsbarkeit auf Notare* of 26 June 2013, BGBl. 2013 I, p 1800.

some special provisions relating to succession law (eg, § 327 ZPO concerning *res judicata* in the event of a will being executed, see below para 174).

A. *Devolution of the estate*

114 In German succession law, all pecuniary private rights – both assets and liabilities – devolve *ipso iure* to the heir or heirs jointly upon the death of a person (§ 1922 BGB, known as 'universal succession' – *Gesamtrechtsnachfolge* or *Universalsukzession*). This requires neither knowledge of the inheritance nor any specific action by the heir, public authority, or court. The universal succession is intended to ensure that the rights belonging to the estate do not become ownerless and – in the interest of estate creditors (*Nachlassgläubiger*) – to quickly establish clarity regarding the status of the heirs. (187)

1. *Acceptance and disclaimer of the inheritance*

115 Despite the principle of universal succession, the heir has the option to disclaim the inheritance (*Ausschlagung der Erbschaft*) with *ex tunc* effect: the inheritance is deemed to not have devolved to those disclaiming; it now devolves to the person who would be entitled if the person disclaiming had not been alive at the time of the devolution of the inheritance (§ 1953 BGB). The heir has only six weeks from the time of obtaining knowledge of the devolution and of the reason for their entitlement to disclaim the inheritance (§ 1944 BGB). Except in the case where the heir is entitled by a disposition *mortis causa*, no notification by the probate court or any other authority is required to initiate the period (§ 1944(2)(2) BGB, see below para 140). If the deceased had their last residence only abroad or if the heir is resident abroad at the beginning of the period, the period for disclaimer is extended to six months (§ 1944(3) BGB) due to increased difficulty in determining the estate's value. The disclaimer is a declaration of intent, which must be received by the probate court at the last place of usual residence (*gewöhnlicher Aufenthalt*) (188) of the deceased or at the place of usual residence of

(187) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), paras 601, 603.

(188) The quasi-official translation, which the German Federal Ministry of Justice provides, uses the term 'usual residence', <https://www.gesetze-im-internet.de/englisch_famfg/englisch_famfg.html>, accessed 28 May 2025. However, the German version uses the term *'gewöhnlicher Aufenthalt'* that is usually (especially in European private international law provisions) translated with 'habitual residence'. For the sake of standardisation, this report nevertheless uses the term 'usual residence' when this is also used in the quasi-official translation.

the person disclaiming (§§ 343(1), 344(7)(1) FamFG). The declaration is to be made in the presence of, and recorded by, the probate court or in a publicly certified form (189) (§ 1945 BGB) and may not be subject to a condition or a stipulation as to time (§ 1947 BGB). General rules on declarations of intent apply to the capacity to contract (§§ 104ff BGB). Therefore, legal representatives of persons incapable of contracting (eg, the parents) typically require a ratification by the family court to disclaim an inheritance for the person represented (eg, the child) (§§ 1643(1), 1851(1) BGB, see above para 81).

116 Instead of disclaiming the inheritance, the heir can also accept it (*Annahme der Erbschaft*), which transforms the provisional heir status into a final and binding one before the expiry of the period for disclaimer. For this, no formal requirements are set out and the corresponding declaration does not require receipt. Thus, the heir has the option to accept the inheritance in three ways. (190) Firstly, acceptance can be explicitly declared to the probate court, a creditor of the estate, or a co-heir (*Miterbe*). Secondly, the heir can accept the inheritance tacitly by implicit conduct, such as application for a certificate of inheritance (191) or disposition of estate assets. Thirdly, the inheritance is deemed accepted when the period for disclaimer has expired (§ 1943 BGB).

117 Acceptance is *ipso iure* deemed not to have been made if the heir was mistaken as to the ground of entitlement (§ 1949(1) BGB). If the heir was mistaken for another reason or was induced to make the acceptance or disclaimer by deceit or unlawfully by duress, they may avoid the declaration. The general rules apply to the grounds for avoidance (§§ 119, 123 BGB – *Anfechtungsgrund*); however, there are special rules set in place for the period, recipient, and form of avoidance: the declarations are voidable for instance because the heir did not know that a certain conduct (eg, application for a certificate of inheritance) is objectively to be regarded as an acceptance (error as to the content of the declaration – *Inhaltsirrtum*, § 119(1)(1) BGB). The acceptance is further voidable if the heir does not know that they were deemed to have accepted the inheritance on expiry of the period for disclaimer (§ 1956 BGB) (192) (no intention whatsoever of making a declaration with this content – *Erklärungsirrtum*, § 119(1)(2) BGB), or if they are mistaken as to the composition of the estate (193) (mistake about the

(189) This requires the certification by a notary (§ 129 BGB).
(190) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), paras 608–611.
(191) BayObLG FamRZ 1999, 1172, 1173.
(192) BayObLG FamRZ 1994, 589, 590.
(193) BayObLG FamRZ 1996, 59, 61.

characteristics of a thing – *Motivirrtum*, § 119(2) BGB). (194) The avoidance must be effected by declaration received by the probate court at the last place of usual residence of the deceased or at the place of usual residence of the person disclaiming (§ 1955(1) BGB, §§ 343(1), 344(7)(1) FamFG) within six weeks from the date the person entitled to avoid obtains knowledge of the ground for avoidance or after the duress ends (§ 1954 BGB). The declaration is to be made in the presence of, and recorded by, the probate court or in publicly certified form (§§ 1955(2), 1945 BGB). If the acceptance or the disclaimer is avoided, it is to be regarded as having been void from the outset (§ 142(1) BGB). Furthermore, the avoidance of the acceptance is deemed to be a disclaimer; the avoidance of the disclaimer is deemed to be an acceptance (§ 1957 BGB). In layman's terms, this means that the avoidance immediately clarifies the status of the heir without giving them another choice as to whether to accept or disclaim the inheritance. (195)

118 It can therefore be summarised that the probate court has a kind of a letterbox function concerning declarations of intent to accept or disclaim the inheritance and declarations on avoidance of the aforementioned declarations since it only has to receive these declarations but does not legally review them.

2. *Community of heirs and partitioning of the estate*

119 If several persons become heirs, they form a community of heirs (*Erbengemeinschaft*) following §§ 2032ff BGB. Accordingly, the estate passes undivided to the community of heirs upon the death of the deceased and thus becomes the joint assets of the heirs (§ 2032(1) BGB). The community of heirs forms a community of joint owners (*Gesamthandsgemeinschaft*) without legal capacity. (196) The estate hence constitutes a special asset that is to be separated from the heirs' own assets, and that the co-heirs jointly manage and dispose of (§ 2038, see below para 168). Accordingly, the heirs do not become co-owners of individual objects of the estate (*Nachlassgegenstände*), so they cannot dispose of these shares individually (§ 2033(2) BGB), but only have a share in the estate as a whole. (197)

120 However, a co-heir may dispose of their share in the estate as a whole. The corresponding contract is to be recorded by a notary (§ 2033(1) BGB). If they sell their share, the regulations on the purchase of inheritance (*Erb-*

(194) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), paras 613–616.
(195) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 618.
(196) BGH FamRZ 2007, 41, 42; BGH FamRZ 2017, 1966 para 8.
(197) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 723.

schaftskauf) according to §§ 2371ff BGB apply. Anyway, in this case, the co-heirs have a right of pre-emption (*Vorkaufsrecht*) under § 2034 BGB to prevent a third party from entering the community of heirs. If they exercise their right of pre-emption by making a declaration to the selling co-heir (§ 464(1) BGB), or – after the share sold has been transferred – by making a declaration to the buyer (§ 2035(1) BGB), the purchase of inheritance comes into existence between the co-heirs and the owner of the share in the estate (either the selling co-heir or the buyer). Thus, a claim to transfer the share in the estate to the co-heirs against payment of the agreed purchase price arises. If the share in the estate is finally transferred to the co-heirs, the share of each co-heir accrues to the other heirs in proportion to their shares of the inheritance (*Anwachsung*) in accordance with § 2094 BGB. (198)

121 The community of heirs is designed to be wound up rather than permanent. Therefore, every co-heir may at any time request the partitioning of the estate (*Erbauseinandersetzung*, § 2042(1) BGB). Yet the co-heirs can continue the community of heirs without partitioning by mutual agreement, for instance to continue a commercial business. (199) The testator may, by testamentary disposition, give directions for the partitioning, which must be followed. In accordance with these directions or if the deceased has not made any directions, the co-heirs may contractually regulate the partitioning among themselves not requiring any specific form (exceptions apply, see below para 128). Only if this is not done either, do the statutory provisions apply. In any case, the co-heirs must finally effect the partitioning. The partitioning procedure is described in the following; due to the scope of the Research Project, however, the substantive provisions are not presented in full.

a) *Partitioning in accordance with statutory provisions*

122 In the absence of deviating directions of the testator or contractual agreements of the co-heirs, the statutory provisions of §§ 2045ff BGB apply. According to these provisions, the obligations of the estate are first to be discharged from the estate (§ 2046 BGB) before the co-heirs distribute the remaining surplus among themselves in the proportion of their shares of the inheritance (§ 2047 BGB). This is to be done primarily by division in kind (§§ 2042(2), 752 BGB). Each co-heir, therefore, has a judicially enforceable claim against the other co-heirs to the transfer of their part of the remaining surplus. The respective disposition is subject to the formal requirements to which the object of the estate is subject, meaning a plot of land must be

(198) BayObLG NJW 1981, 830.

(199) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 744.

transferred by declaration of conveyance (*Auflassung*) and registration in the land register (§§ 873, 925 BGB), claims must be assigned (§ 398 BGB) and movable property is to be transferred by agreement and delivery (§ 929 BGB). (200)

123 If the objects of the estate cannot be divided into parts corresponding to the co-heirs' shares of the inheritance, the partitioning is carried out by selling the estate and dividing the proceeds (§§ 2042(2), 753 BGB). The sale of the estate – if the co-heirs cannot agree otherwise – is to be made by public auction on application of one co-heir to the court responsible for execution (§§ 1233ff BGB, §§ 1, 180ff Act on Enforced Auction and Receivership – *Gesetz über die Zwangsversteigerung und die Zwangsverwaltung*). The proceeds then substitute the sold objects of the estate and become part of the estate (§ 2041 BGB). Therefore, they must be distributed among and by the co-heirs to fully effect the partitioning of the estate. (201)

b) *Partitioning in accordance with testamentary disposition*

124 The testator has a wide scope for influencing the partitioning of the estate by testamentary disposition. For example, they may exclude the partitioning of the estate in whole or in part for a period of up to thirty years (§ 2044 BGB) or give directions about certain objects of the estate (§ 2048(1) BGB). In particular, the testator may further direct that the partitioning is to be carried out by a third party exercising equitable discretion (*billiges Ermessen*, § 2048(2) BGB). The third party, who could also be a co-heir, (202) decides on partitioning without being bound by the statutory partitioning provisions. By declaring – without requiring any form – their decisions on partitioning to the co-heirs, the decision becomes binding under the law of obligations among the co-heirs, who must subsequently implement it and thus effect the partitioning of the estate accordingly. (203)

125 If, however, the decision made by the third party is evidently inequitable (*offenbar unbillig*), it is not binding on the co-heirs (§ 2048(3) BGB). In this case, the co-heirs can contractually agree on partitioning, or the decision on partitioning is made by judicial decision of a court that is in this instance not bound by the statutory partitioning provisions but can make the decision with equitable discretion. (204) Yet the co-heirs still have to implement the court decision themselves.

---

(200) K W Lange, *Erbrecht* (3rd edn, Verlag C.H.BECK 2022), § 60(109).
(201) BGH NJW 1969, 1347.
(202) RGZ 110, 270, 274.
(203) K W Lange, *Erbrecht* (3rd edn, Verlag C.H.BECK 2022), § 60(120).
(204) K W Lange, *Erbrecht* (3rd edn, Verlag C.H.BECK 2022), § 60(121).

Finally, the testator can also assign the execution of partitioning to an executor (§ 2204 BGB, see below para 173). The executor, however, is bound by the testator's directions or the statutory provisions when effecting a partitioning of the estate. **126**

c) *Partitioning by the co-heirs*

Instead of partitioning the entire estate, the co-heirs may initially partition only a part of the estate, eg, by partitioning only one or several objects of the estate (objective partial partitioning). Likewise, they can also agree on the exclusion of a co-heir from the community of heirs (personal partial partitioning). (205) On the one hand, this can be effected by the excluded co-heir transferring their share of the estate to the other co-heirs, whereby the corresponding agreement must be recorded by a notary (§ 2033(1) BGB). On the other hand, the co-heir can also leave the community of heirs (usually against compensation) on the basis of a form-free agreement without transferring their share of the estate to someone else. (206) In this case, the entire estate remains with the other co-heirs, and the share of the leaving co-heir accrues to the other co-heirs in proportion to their previous shares of the inheritance (§§ 1935, 2094, 2095 BGB). (207) This so-called '*Abschichtung*' also does not require any form if the estate includes a plot of land, even though contracts on plots of land generally must be recorded by a notary (§ 311b(1) BGB). (208) **127**

If all co-heirs agree, they can decide on partitioning by contract (*Auseinandersetzungsvertrag*). In doing so, they can deviate from the statutory provisions presented above and even from the testator's directions. (209) This contract only requires a specific form if the obligation concerning certain objects of the estate requires a form (eg, the obligation to transfer ownership of a plot of land [§ 311b(1) BGB] or shares in a limited liability company [*GmbH*] [§ 15(4) Act on Limited Liability Companies – *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*] must be recorded by a notary). (210) The binding contract on the partitioning of the estate concluded in this way must finally be executed by the co-heirs by transferring the objects of the **128**

(205) K W Lange, *Erbrecht* (3rd edn, Verlag C.H.BECK 2022), § 60(129).
(206) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 745.
(207) BGH FamRZ 1998, 673, 674.
(208) BGH FamRZ 1998, 673, 674.
(209) K W Lange, *Erbrecht* (3rd edn, Verlag C.H.BECK 2022), § 60(115).
(210) Christiane von Bary, 'Auseinandersetzung einer Erben- oder Gütergemeinschaft nach ausländischem Recht in Deutschland' (2021) DNotZ 323, 331; K W Lange, *Erbrecht* (3rd edn, Verlag C.H.BECK 2022), § 60(122).

estate to the intended co-heirs accordingly. The partitioning is concluded only after this is done.

d) *Notarial property distribution proceedings – a non-judicial authority acting as a court?*

129 If the co-heirs cannot reach an agreement on the partitioning, they have the option of using the notarial procedure to mediate the partitioning of the estate (*notarielles Verfahren zur Vermittlung der Erbauseinandersetzung*) according to §§ 363ff FamFG. This procedure – which is rarely used in practice – only became the responsibility of notaries (§ 363 FamFG, § 20(1)(2) Federal Code for Notaries – *Bundesnotarordnung*, § 23a(3) GVG) on 1 September 2013 to reduce the workload of the probate court (211) where the proceedings were previously conducted. (212) According to German scholars, the notary acts in this procedure as a court in the sense of Article 3(2) of the European Succession Regulation, (213) irrespective of the fact that Germany has not notified the European Commission in accordance with Article 79 of this Regulation since these notifications are only of a declaratory nature. (214)

130 How does the procedure work in detail? (215) At the request of a co-heir, the notary, who has their official seat in the district of the district court in which the testator had their last place of usual residence (§ 344(4a) FamFG), summons the applicant and the other participants to a hearing for oral argument (§ 365 FamFG). At this hearing, the participants should reach an agreement on the distribution of the estate. If all parties appear and agree, the notary records the agreed property distribution plan (*Auseinandersetzungsplan*) and confirms it with a confirmation order (*Bestätigungsbe-*

---

(211) BT-Drucks. 17/1469, 1; Nicola Preuß, 'Das Gesetz zur Übertragung von Aufgaben im Bereich der freiwilligen Gerichtsbarkeit auf Notare' (2013) DNotZ 740, 741.

(212) *Gesetz zur Übertragung von Aufgaben im Bereich der freiwilligen Gerichtsbarkeit auf Notare* of 26 June 2013, BGBl. 2013 I, p 1800.

(213) Christiane von Bary, 'Auseinandersetzung einer Erben- oder Gütergemeinschaft nach ausländischem Recht in Deutschland' (2021) DNotZ 323, 338; Anatol Dutta in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2024) Art. 3 EuErbVO para 20; Florian Eichel in *juris PraxisKommentar BGB* (10th edn, juris GmbH 2023) Art. 3 EuErbVO para 15. See also Jan Peter Schmidt in Anatol Dutta and Johannes Weber (eds), *Internationales Erbrecht* (2nd edn, Verlag C.H.BECK 2021) Art. 3 EuErbVO para 18 who, however, makes more distinctions.

(214) Christiane von Bary, 'Auseinandersetzung einer Erben- oder Gütergemeinschaft nach ausländischem Recht in Deutschland'(2021) DNotZ 323, 338 fn 89.

(215) See also Sebastian Stritter, 'Das notarielle Verfahren zur Vermittlung der Erbauseinandersetzung nach den §§ 363 ff FamFG' (2016) ZErb 57–59.

schluss, § 368(1) FamFG). The notary, however, has little room for their own free decision but is bound by the agreed property distribution plan: their right to review is essentially limited to formalities. Therefore, they must also confirm a property distribution plan whose content seems inequitable or against the will of the testator up to the limit of an offence of common decency, a statutory prohibition, or an agreement for dishonest purposes (cf, § 4 Notarisation Act – *Beurkundungsgesetz*). (216) If a co-heir objects to the proposed property distribution plan, the notary has no means of confirming the plan against the will of the participants, and the proceedings must be suspended (§ 370(1) FamFG). On the other hand, if a participant does not appear, their consent is deemed to have been given and the notary confirms the agreement unless the participant who was not present makes a timely application for the scheduling of a new hearing and appears at the new hearing (§§ 368(2), 366(3) and (4) FamFG). The confirmation order may be challenged by a complaint to the Higher Regional Court within one month (§§ 372(2), 63 FamFG, § 119(1)(1)(b) GVG). However, the complaint may only be based upon the grounds that provisions regarding the proceedings were not complied with. (217) A review on the merits does not take place. When the confirmation decision becomes final and binding, the agreed property distribution plan becomes effective and can be enforced (§ 371 FamFG). The plan must finally be executed by the co-heirs.

e) *Judicial enforcement of the partitioning*

131 After, or instead of, the notarial procedure to mediate the partitioning of the estate, a co-heir may petition the contentious court (*Prozessgericht*) (218) if the co-heirs cannot reach an agreement on the partitioning. However, the court is only authorised to order that co-heirs who do not agree with the proposed property distribution plan have to accept it; (219) in particular, the court is not authorised to reject the petition and propose its own plan, § 308 ZPO. Therefore, the petition must be sufficiently specified. This is the case when the estate is ready for distribution (meaning obligations of the estate have been discharged, § 2046 BGB), and the applicant submits a complete property distribution plan that complies with the statutory provisions, the directions of the testator, and any partitioning contracts among the co-

(216) Jürgen Schlögel in *Beck'scher Online-Kommentar FamFG* (47th edn, Verlag C.H.BECK 1 August 2023) § 366 FamFG paras 14, 22.

(217) OLG Zweibrücken ZErb 2016, 76.

(218) The probate court is not competent (*e contrario* § 342 FamFG).

(219) Christiane von Bary, 'Auseinandersetzung einer Erben- oder Gütergemeinschaft nach ausländischem Recht in Deutschland' (2021) DNotZ 323, 334.

heirs. ([220]) When the court decision ordering the defending co-heir to accept the proposed property distribution plan is binding and final, it is deemed that the acceptance has been made (§ 894 ZPO, *Fiktion der Abgabe einer Willenserklärung*). Yet the partitioning is still to be carried out by the co-heirs themselves – not by the court – based on the petitioned property distribution plan. To prevent any further delays, the petitioning co-heir can simultaneously request to order the defending co-heir to accept any necessary contract *in rem* (*dinglicher Vertrag*) ([221]) and to perform the actions necessary to execute the property distribution plan. ([222])

f) *Summary of the role of courts regarding the partitioning of the estate*

132 The co-heirs have the say concerning the partitioning of the estate. Courts and notaries only play a role in this matter if the co-heirs cannot reach an agreement. However, even in this case, the courts or notaries have little freedom of decision but primarily act as mediators, confirm decisions made by the co-heirs, or evaluate proposed property distribution plans.

3. *Liability of the heir(s)*

133 In principle, the deceased's assets devolve as a whole to the heir who is therefore also liable for the deceased's obligations, which become obligations of the estate (§ 1967(1) BGB). This liability is initially unlimited. However, the heir has the option to restrict liability to the estate through the administration of the estate (*Nachlassverwaltung*) ([223]) or estate insolvency (*Nachlassinsolvenz*). By these two procedures, the heir's personal assets are strictly separated from the estate's assets. Another possibility to restrict the heir's liability – at least partly – is the judicial call procedure (*Aufgebotsverfahren*). Moreover, the heir may refuse satisfaction of a creditor of the estate who asserts their claim against the heir more than five years after the devolution of the inheritance if the estate has been completely exhausted (defence of withheld information – *Verschweigungseinrede*, § 1974 BGB).

([220]) K W Lange, *Erbrecht* (3rd edn, Verlag C.H.BECK 2022), § 60 (131–133).

([221]) Under German law, the fulfillment of a contractual obligation often requires a separate second contract *in rem* which, for example, transfers ownership (principle of separation – *Trennungsprinzip*).

([222]) K W Lange, *Erbrecht* (3rd edn, Verlag C.H.BECK 2022), § 60(135).

([223]) In this context, 'administration of the estate' means an official procedure to reduce the liability of the heir(s) and is not to be equated with the management of the estate by the heir(s), which is described below in paras 166ff also with the term 'administration of estates' for reasons of uniformity with the other country reports.

Finally, the heir has a defence as to insufficiency of assets (*Dürftigkeitseinrede*), which entitles them to refuse to satisfy the creditors of the estate without a court order to the extent that the estate is insufficient if the estate's assets are not even sufficient to pay the costs of an administration of the estate or estate insolvency proceedings (§ 1990 BGB).

a) *Administration of the estate*

134 The purpose of the administration of the estate is – even if the estate does not appear to be over-indebted – either that the heir wants to avoid the risk of being held personally liable for the estate's debts, or that a creditor of the estate wants to protect the satisfaction of their claims. (224) The probate court has to order the administration of the estate upon the heir's application without further examination. If a creditor of the estate applies, the probate court examines whether there are reasons to assume that satisfaction from the estate is endangered by the conduct or the financial situation of the heir (§ 1981 BGB). In the case in which the administration of the estate is ordered, the heir's liability for the obligations of the estate is restricted to the estate, and the heir's personal assets are strictly separated from the estate's assets (§ 1975 BGB). Thus, private creditors of the heir can no longer enforce their claims against the estate (§ 1984(2) BGB) and creditors of the estate can no longer enforce their claims against the heir's private assets. However, the heir loses the authority to manage the estate and alienate it; these rights are transferred to an administrator of the estate appointed by the court (§§ 1984, 1985 BGB). Once all known obligations of the estate have been discharged, the remaining estate belongs to the heir, and the probate court removes the administrator of the estate to end the administration of the estate as it has achieved its purpose. (225)

b) *Estate insolvency*

135 The estate insolvency proceedings ensure equal (*pro rata*) satisfaction of the creditors of the estate. (226) The details are regulated in the Insolvency Code (*Insolvenzordnung*); particularly §§ 315ff Insolvency Code. The insolvency court (*Insolvenzgericht*), which is a district court in whose district a regional court is located (§ 2 Insolvency Code), opens the estate insolvency proceed-

(224) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 706.

(225) It is unsettled whether the administration of the estate can only be terminated upon application or also *ex officio*, cf, OLG Düsseldorf FamRZ 2017, 401; BGH FamRZ 2017, 1619; D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 710.

(226) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 711.

ings at the request of the heir, the administrator of the estate, a creditor of the estate, or the executor if the estate is over-indebted or (imminently) insolvent (§§ 317, 320 Insolvency Code). When opening the insolvency proceedings, the court appoints an insolvency administrator to whom the right to manage and transfer the insolvency estate is vested (§ 80(1) Insolvency Code). The opening of the insolvency proceedings also separates the estate assets, on the one hand, and the heir's own assets, on the other. A certain rank order is provided for the satisfaction of the different creditors of the estate (§§ 47ff, 324ff InsO). Claims of equal rank are to be satisfied *pro rata* if the estate is not sufficient to satisfy them in full. The insolvency proceedings end by order of the insolvency court with the final distribution of the assets, or by an insolvency plan. However, even after this, the heir's liability is restricted as they may now raise the defence of exhaustion of assets (*Erschöpfungseinrede*) in the same way as after the judicial call procedure has been conducted (§§ 1989, 1973 BGB, see below para 136).

c) *Judicial call procedure*

136 In order to find out which creditors of the estate have claims against the estate, the heir can initiate a judicial call procedure (*Aufgebotsverfahren*) which is regulated in §§ 1970ff BGB and §§ 455ff FamFG. [227] On application of the heir, the district court issues a public notice inviting the creditors of the estate to register their claims within a certain period. After the expiry of the deadline, an exclusion order (*Ausschließungsbeschluss*) is issued. For the claims registered before the issuance of the exclusion order, the liability of the heir is not restricted. However, the heir may refuse the satisfaction of a creditor of the estate who only claims after the exclusion order has been issued to the extent that the estate is completely exhausted in the satisfaction of the creditors who are not excluded (*Erschöpfungseinrede*, § 1973(1)(1) BGB).

d) *Exclusion of liability restrictions*

137 The heir loses all the above-mentioned possibilities of restricting their liability (except for estate insolvency, § 316(1) Insolvency Code) if, on the application of a creditor of the estate, the probate court has fixed a period for the heir to file the inventory (*Inventarsfrist*, §§ 1994, 2013 BGB), within which they have not filed the inventory or filed an intentionally incorrect

[227] See also Sarah König, 'Das Aufgebotsverfahren nach dem FamFG' (2020) RNotZ 485, 502–503.

inventory (§ 2005 BGB). The inventory is to state in full the objects of the estate and the obligations of the estate (§ 2001 BGB). A notary must act in an advisory capacity when preparing the inventory (§ 2002 BGB) but does not make a declaration of their own. (228) Alternatively, the heir can also apply for the official preparation of the inventory (*amtliche Aufnahme des Inventars*). In this case, the probate court appoints a notary who prepares the inventory independently, relying on information given by the heir (§ 2003 BGB). This task was also assigned to notaries in 2013 in order to reduce the workload of the probate court which, until then, had to prepare inventories themselves. (229) Finally, it should be noted that the heir also has unlimited liability if they have been sued by a creditor of the estate and the judgment is final and binding unless the limitation of the liability is reserved in the judgment (§ 780 ZPO).

e) *Community of heirs*

138 The above-mentioned possibilities of restriction apply *mutatis mutandis* to the community of heirs. However, the following particularities apply: The co-heirs are liable as joint and several debtors (*Gesamtschuldner*), ie, the creditor of the estate can demand the satisfaction of their claim in full from each co-heir (§§ 2058, 421 BGB). Yet, until the partitioning of the estate, the liability of the co-heirs is provisionally restricted to the estate (§ 2059 BGB). After partitioning, they are liable also with their private assets as joint and several debtors. Exceptionally, they are liable only for the part of an obligation of the estate that corresponds to their share of the inheritance if the creditor is excluded in the judicial call procedure, if estate insolvency proceedings have been instituted and have been terminated by distribution of the insolvency estate, or if the co-heirs may invoke the defence of withheld information (§ 2060 BGB). Insolvency proceedings may still be opened after partitioning (§ 316(2) Insolvency Code); administration of the estate is excluded at that point of time (§ 2062 BGB).

f) *Summary of the role of courts regarding the liability of the heir(s)*

139 With regard to the different liability regimes of the heir(s), the courts provide the services to administer and support the procedures to achieve a limitation of liability. In some cases, they are supported by notaries (eg, when preparing an inventory) or appoint other persons to administer the estate (eg, administrator of the estate, insolvency administrator).

---

(228) OLG Hamm FamRZ 2010, 2022, 2024; Ilse Lohmann in *Beck'scher Online-Kommentar BGB* (67th edn, Verlag C.H.BECK 1 August 2023) § 2002 BGB para 1.

(229) BT-Drucks. 17/1469, 1.

4. *Testamentary succession*

a) *Opening of dispositions* mortis causa

140 The opening of dispositions *mortis causa* (eg, wills, joint wills ([230]), contracts of inheritance ([231])) serves the public interest and is intended to ensure the orderly winding up of estates. After a disposition *mortis causa* has been opened and the heir is notified, the period to disclaim the inheritance of § 1944(2)(2) BGB begins (see above para 115), and the heir can apply for the issuance of a certificate of inheritance (§ 352 FamFG, see below paras 152ff). ([232]) The same legal consequences apply if a foreign court opens a disposition *mortis causa* and the substance of this procedure is the same as in Germany. ([233]) However, it is important to note that the opening is neither a prerequisite for the substantive effectiveness of the disposition *mortis causa* nor evidence for the succession. ([234]) It merely provides the heir with the possibility of having the effectiveness and the actual succession reviewed by the courts in a subsequent certificate of inheritance procedure (see below para 154) or contentious civil proceeding (eg, action by the statutory heir against the testamentary heir to declare their succession rights). ([235])

141 It is unclear whether the opening of a disposition *mortis causa* constitutes a 'decision' within the meaning of Article 3(1)(g) Succession Regulation and whether the disposition *mortis causa* may therefore only be opened if

---

([230]) Joint wills (*gemeinschaftliches Testament*) may be only made by spouses, § 2265 BGB. In the case of a joint will, reciprocal dispositions (*wechselbezügliche Verfügungen*) can only be revoked by the testator under special circumstances, which usually results in the ineffectiveness of the other reciprocal disposition, §§ 2270, 2271 BGB. To make a joint will, it suffices if one of the spouses makes a will written and signed in their own hand, and the other spouse co-signs the joint declaration in their own hand, § 2267 BGB.

([231]) § 1941 BGB: '(1) The deceased may by contract appoint an heir, grant legacies, and impose testamentary burdens and may also select the laws of inheritance that are to be applied (contract of inheritance – *Erbvertrag*). (2) Both the other contractual party and a third party may be appointed as an heir (contractual heir) or as a legatee.' Contracts of inheritance are regulated in detail in §§ 2274ff BGB. They can be made only by being recorded by a notary in the joint presence of both parties, § 2276(1) BGB.

([232]) Karlheinz Muscheler in *Münchener Kommentar zum FamFG* (3rd edn, Verlag C.H.BECK 2019) § 348 FamFG para 3.

([233]) Dieter Leipold in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 1944 BGB para 24.

([234]) OLG Düsseldorf FamRZ 2016, 2040, 2042; BayObLG BayObLGZ 1983, 176, 181.

([235]) Karlheinz Muscheler in *Münchener Kommentar zum FamFG* (3rd edn, Verlag C.H.BECK 2019) § 348 FamFG para 9.

Germany also has international jurisdiction. (236) However, if an opening is carried out in Germany, the procedure is the same for all dispositions *mortis causa* and is regulated in §§ 348ff FamFG, according to which, a senior judicial officer at the probate court has to open the disposition *mortis causa ex officio*. For this, they must open any document that after a preliminary assessment (*summarische Prüfung*) seems to be a disposition *mortis causa* according to its content and form; it is irrelevant whether the document is formally or substantively effective, ie, even ineffective or revoked dispositions *mortis causa* are opened. (237) The senior judicial officer has the choice of opening the dispositions *mortis causa* 'silently' (*stille Eröffnung*) – which is the rule in practice – or of setting an opening hearing date and summoning all participants (statutory and testamentary heirs, legatees, persons entitled to a compulsory share of the estate, etc) to the hearing. In any case, the senior judicial officer must keep a record of the opening and, in the case of a 'silent opening', notify the participants of the substance of the disposition *mortis causa*. If the senior judicial officer refuses the opening, a complaint of appeal may be lodged (§ 58 FamFG, § 11 RPflG).

Side note: For the opening of dispositions *mortis causa*, State-employed, civil servant notaries (*verbeamtete Notare*) instead of senior judicial officers were competent in the State of Baden-Württemberg until 31 December 2017 (old version of § 1(2) State Act on Non-contentious Jurisdiction – *Freiwillige Gerichtsbarkeit-Landesgesetz*). This was due to historically grown structures whereby also considerable differences within Baden-Württemberg occurred: in the Baden part of the State, fully qualified lawyers worked as judge notaries (*Richternotare*); whereas in Württemberg, district notaries (*Bezirksnotare*) worked in a higher administrative career and underwent a corresponding education. In addition, there were also – as is the case in the rest of Germany – self-employed notaries (*freie Notare*). With the reform of the notarial profession (*Notariatsreform*), (238) Baden-Württemberg brought its notarial structure and the structure of non-contentious jurisdiction into line **142**

(236) Against the applicability of the Succession Regulation for the opening of dispositions *mortis causa* are OLG Frankfurt aM FamRZ 2020 1502, 1504 and Walter Zimmermann in *Sternal. FamFG-Kommentar* (21st edn, Verlag C.H.BECK 2021) § 348 FamFG para 5. In favour is Anatol Dutta in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2024) Vor Art. 4 EuErbVO para 13; according to him, a court holding a disposition *mortis causa* and lacking international jurisdiction to open it is obliged to transfer the disposition mortis causa to the court that has international jurisdiction.

(237) Karlheinz Muscheler in *Münchener Kommentar zum FamFG* (3rd edn, Verlag C.H.BECK 2019) § 348 FamFG paras 10–11.

(238) *Gesetz zur Reform des Notariats- und Grundbuchwesens in Baden-Württemberg* of 13 August 2010, GBl. 2010, 555.

with the rest of Germany with effect from 1 January 2018. From then on, senior judicial officers at the probate court have been competent for opening dispositions *mortis causa* and all civil servant notary's offices were either closed or transformed into self-employed notary offices. (239)

b) *Ineffectiveness of testamentary dispositions*

143 To simplify the reading of this report, the following two subsections only deal with wills. Other dispositions *mortis causa* (eg joint wills and contracts of inheritance), to some of which slightly different rules apply, are not covered. A discussion of these dispositions *mortis causa* would also not serve to answer the research question because the type of disposition *mortis causa* has no effect on the role of courts or other authorities. (240)

144 A will can be *ipso iure* void for a variety of reasons. Firstly, it may lack the form required by law, for example, because it was written on a computer rather than written in the deceased's own hand (§§ 125, 2247 BGB). Secondly, the testator may lack testamentary capacity (§ 2229 BGB). Thirdly, it may be ineffective due to a statutory provision, for instance, if the testator made provisions for their spouse but the marriage was dissolved before the testator's death (§ 2077 BGB). Fourthly, the will may contravene a statutory prohibition, such as a testator's disposition in favour of their nursing home (§ 134 BGB, § 14(1) Nursing Home Act – *Heimgesetz*). On the other hand, due to the far-reaching testamentary autonomy, it is hardly conceivable that a will is void because it would offend common decency; (241) in particular, a will is not ineffective even if the testator makes no provision for close family members. (242) Rather, § 2303 BGB grants the statutory compulsory share of the estate (*Pflichtteil*) to descendants, parents, and spouses whom the testator has excluded by disposition *mortis causa*. According to this provision, the persons entitled to a compulsory share may claim the compulsory share from the heir under the law of obligations. (243)

---

(239) Ministerium der Justiz und Migration Baden-Württemberg, 'Fragen zur Notariatsreform' <https://notariatsreform.justiz-bw.de/pb/,Lde/Startseite/Notariatsreform> accessed 28 May 2025; see also Rolf Stürner, 'Das Württembergische Notariat – Tradition und Reform' (2010) BWNotZ 195.

(240) The only exception is in the form of the establishment of a contract of inheritance, which can only be concluded by being recorded by a notary in the simultaneous presence of both parties – and not by a declaration written and signed in one's own hand, § 2276 BGB.

(241) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 243.

(242) BGH FamRZ 1990, 730, 731; BGH FamRZ 1983, 53.

(243) Side note: Because the claim to a compulsory share of the estate in Germany is purely governed by the law of obligations and not by any automatism, courts are generally not

If someone wants to claim the ineffectiveness of the disposition *mortis causa*, they can do so in the certificate of inheritance proceeding (see below paras 162–163) or in a contentious civil proceeding. **145**

c) *Avoidance of testamentary dispositions*

Generally speaking, avoidability (*Anfechtbarkeit*) is a failure of intent that does not cause *ipso iure* ineffectiveness *ex tunc* but does so only through the exercise of a right to unilaterally modify or terminate a legal relationship (*Gestaltungsrecht*) (§ 142(1) BGB). ([244]) This also applies to the law of succession. In some cases, however, avoidance (*Anfechtung*) under the law of succession deviates considerably from the general avoidance rules of the BGB. For example, under the law of succession, ineffectiveness due to avoidance only affects the specific avoided disposition, but not necessarily the entire will containing several dispositions (§ 2085 BGB). **146**

§§ 2078 and 2079 BGB enumerate a total of five grounds of avoidance of testamentary dispositions: **147**

1. The testator was mistaken as to the contents of their declaration (*Inhaltsirrtum*).
2. The testator had no intention whatsoever of making a declaration with these contents (*Erklärungsirrtum*).
3. The testator made the disposition because they mistakenly assumed or expected that a circumstance would occur or not occur (*Motivirrtum*).
4. The testator was unlawfully induced to make the disposition by duress (*widerrechtliche Drohung*).
5. The testator omitted a person entitled to a compulsory portion, the existence of whom was unknown to the testator when they made the testamentary disposition or who was born or became entitled to a compulsory portion only after the testamentary disposition was made (*Übergehung eines Pflichtteilsberechtigten*).

The person who would directly benefit from the avoidance of the testamentary disposition is entitled to avoid it. This includes the statutory heir and – if applicable – the testamentary heir from a previous will that would revive **148**

---

involved in the settlement of the compulsory share of the estate – except the senior judicial officer who notifies the person entitled to the compulsory share of the estate (*Pflichtteilsberechtigter*) about the opening of the will, see above para 141. Only if the heir does not pay the compulsory share of the estate may the person entitled to the compulsory share of the estate take legal action against the heir for payment of the compulsory share in the contentious courts in the same way that a seller could take legal action against a buyer for payment of an outstanding purchase price.

([244]) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 418.

with the avoidance (§ 2080 BGB). A person entitled to avoid effects the avoidance by a declaration made to the competent probate court (§ 2081 BGB, § 343 FamFG). The probate court must – likewise a service provider – notify the person who directly benefits from the disposition avoided of the declaration of avoidance (§ 2081 BGB); yet this notification is not a prerequisite for an effective avoidance. (245) The probate court does not assess whether the avoidance is effective. (246) This assessment is made in the certificate of inheritance proceeding (see below para 154) or in a contentious civil proceeding. As an exception, avoidance of a legacy (*Vermächtnis*) is effected by declaration to the legatee (§ 143(4)(1) BGB); (247) hence, in this case, courts are not involved whatsoever. The right to avoid arises upon the death of the testator. (248) The avoidance may be made only within a one-year period beginning on the date on which the person entitled to avoidance obtains knowledge of the ground of avoidance (§ 2082 BGB).

d) *Summary of the role of courts regarding testamentary succession*

149 Also, in connection with testamentary succession, the probate courts assist with the proper administration and partitioning of the estate. However, they mainly open the dispositions *mortis causa*, receive declarations, and – if necessary – forward them. By doing so, they carry out little or no legal assessment.

150 This situation changes significantly when it comes to the issuance of certificates of succession.

B. *Certificates of the succession*

151 In Germany, three different certificates of succession may be issued. Firstly, there is the national certificate of inheritance (*Erbschein*), which is regulated in §§ 2353ff BGB and §§ 352ff FamFG. On the other hand, there is the European Certificate of Succession (*Europäisches Nachlasszeugnis*) according to Articles 62ff of the Succession Regulation. These two certificates have the same purpose: to prove one's right of succession to private persons, authorities, and courts. (249) In relation to the land registry (*Grundbuchamt*), proof of the right of succession must be provided by presenting a certificate of

---

(245) Dieter Leipold in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 2081 BGB para 12.

(246) BayObLG FamRZ 1997, 1179, 1180; OLG Köln FamRZ 1993, 1124.

(247) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 435.

(248) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 436.

(249) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 642.

inheritance or a European certificate of succession (§ 35(1)(1) Land Register Code – *Grundbuchordnung*). Finally, there is the executor's certificate (*Testamentsvollstreckerzeugnis*) with which the executor may prove their status in legal transactions. (250) All three Certificates of Succession have in common that the probate court issues them after verification of the asserted right of succession.

1. *Certificate of inheritance*

a) *Issuance of a certificate of inheritance*

152 The certificate of inheritance is issued by the probate court, which must assess whether the alleged right of succession exists both in fact and in law. Therefore, the issuance of the certificate of inheritance is covered by Articles 4ff of the Succession Regulation according to the European Court of Justice (251) and, as a result, the international jurisdiction of the German probate courts is determined by these provisions.

153 The local jurisdiction for the probate court is determined by the usual place of residence of the deceased at the time of death (§ 343(1) FamFG). The matter is usually assigned to a senior legal officer. However, the decision remains reserved to the judge if a testamentary disposition has been made, or the application of foreign law can be considered (§ 16(1)(6) RPflG). Yet if a senior judicial officer has issued a certificate of inheritance that remains reserved to the judge, the certificate has initial legal effects nonetheless but must be revoked due to the procedural error; even if it was correct in its substance. (252) The certificate of inheritance is only issued upon application. Those eligible to apply include the heir, the executor, the estate administrator, the estate insolvency administrator, and creditors if they require the certificate for the purposes of compulsory enforcement (§§ 792, 896 ZPO). The participants (eg, legal heirs or other potential heirs) must be included upon their application therefor (§ 345(1) FamFG).

---

(250) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 802.

(251) Case C–20/17 *Oberle* [2018] FamRZ 1262, para 44. Before this decision, there was a dispute over this matter. While the German legislator opposed the applicability of the Succession Regulation (BT-Drucks. 18/4201, 59), the applicability of the Succession Regulation was always supported by Anatol Dutta, 'Die europäische Erbrechtsverordnung vor ihrem Anwendungsbeginn: Zehn ausgewählte Streitstandsminiaturen' (2015) IPRax 32, 37–38 and Dieter Leipold, 'Die internationale Zuständigkeit für die Ausschlagung der Erbschaft nach EuErbVO und IntErbRVG' (2015) ZEV, 553, 557–558. Some courts have also ruled in favour of the applicability of the Succession Regulation, cf, OLG Hamm FamRZ 2019, 1553, 1554.

(252) LG Koblenz DNotZ 69, 431; D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 644.

154 The probate court conducts necessary inquiries *ex officio* (*Amtsermittlungspflicht*) to verify the claimed right of succession (§ 26 FamFG). If the probate court considers the facts upon which the application is based to be established, it will make a decision by way of an order and will issue the certificate of inheritance immediately afterwards (§ 352e(1) FamFG). If, however, the order is contrary to the stated wishes of a participant, the probate court will suspend the immediate effectiveness of the order and postpone the issuance of the certificate of inheritance until the order becomes formally final and binding (ie, the decision on the complaint on appeal may have to be awaited, § 352e(2) FamFG). Related to that point, it is noteworthy that the certificate of inheritance does not become *res judicata* as to its substance as it must be revoked *ex officio* if it is incorrect (§ 2361 BGB, see below para 162). ([253])

155 Even though the probate court conducts necessary inquiries *ex officio*, in practice it will regularly rely on public documents (*öffentliche Urkunden*) or declarations in lieu of an oath (*eidesstattliche Versicherung*), which are often declared before a notary, instead of establishing the facts of the case itself. This is because statutory heirs who apply for the issuance of a certificate of inheritance must provide a range of information (eg, time of death of the testator, relationship upon which the inheritance right is based, the amount of the hereditary share) directly to the probate court following § 352 FamFG. To evidence this information, public documents, or a declaration in lieu of an oath, must be submitted (§ 352(3) FamFG). Ultimately, this gives notaries a considerable influence on the issuing of the certificate of inheritance, as they are the ones who collect and structure the information, prepare it for the declaration in lieu of an oath, and finally submit it to the probate court, ([254]) which often agrees with the facts established by the notary.

156 A complaint on appeal may be lodged against the decision of the probate court to issue or not to issue a certificate of inheritance (§ 58(1) FamFG, § 11(1) RPflG). In this case, the Higher Regional Court reviews the claimed right of succession in its entirety, even if the appellant is not adversely affected due to the incorrectness of the certificate of inheritance. ([255]) Under certain circumstances, the Higher Regional Court may admit an appeal on points of law (*Rechtsbeschwerde*) to the Federal Court of Justice (§ 70 FamFG).

([253]) BVerfG ZEV 2006, 74, BGH FamRZ 2010, 1068, 1069.

([254]) Cf, Florian Dietz and Sebastian Sammet in Heribert Heckschen, Sebastian Herrler, and Christof Münch (eds.), *Beck'sches Notar-Handbuch* (8th edn, Verlag C.H.BECK 2024) § 17(421, 528).

([255]) BGH FamRZ 2016, 533, 534.

b) *Contents and effects of a certificate of inheritance*

157 The certificate of inheritance contains information on who is the heir and the size of their share of the inheritance (§ 2353 BGB). In the case of joint inheritance, only one joint certificate of inheritance may be issued upon application (§ 352a FamFG). If the testator has appointed an executor, the appointment shall also be provided in the certificate of inheritance (§ 352b(2) FamFG).

158 The certificate of inheritance is generally issued for the entire estate. This also applies if the succession is to be assessed according to foreign law or if some objects of the estate are located outside Germany. Upon application, however, it is possible to limit the certificate of inheritance to those objects that are located within Germany (§ 352c(1) FamFG). This might be useful, for example, in the case of legal scission of the estate as the certificate of inheritance can be limited to the German part of the estate and can thus be issued more quickly because the foreign law does not have to be determined with great difficulty.

159 It is presumed that the certificate of inheritance is correct and hence that the person who is named as heir in the certificate has the right of succession stated in it, and that they are not restricted by any directions other than those stated (§ 2365 BGB ([256])). This presumption is rebuttable. However, the person who disputes the presumption (and thus the correctness of the certificate of inheritance) must prove the opposite. This does not apply, on the other hand, if another potential heir asserts their right of succession; in this case, the general principles of burden of proof apply. ([257])

160 The certificate of inheritance also has public faith (*öffentlicher Glaube*); ie, a *bona fide* acquisition (*gutgläubiger Erwerb*) from the heir named in the certificate of inheritance is possible unless the acquirer has positive knowledge of the incorrectness of the certificate of inheritance (§ 2366 BGB ([258])). This rule applies to any acquisition by a legal transaction *in rem* but not to

---

([256]) This provision corresponds to the provision of Art 69(2) Succession Regulation applicable to the European certificate of succession.

([257]) BGH FamRZ 1983, 383; BGH FamRZ 1993, 1059, 1060.

([258]) This provision corresponds to the provision of Art 69(3) and (4) Succession Regulation applicable to the European Certificate of Succession. However, public faith is stronger in the case of the German certificate of inheritance because good faith only ceases to exist if the acquirer is aware of the incorrectness, whereas, in the case of the European certificate of inheritance, reliance on the correctness already ceases in the case of grossly negligent ignorance.

relationships of obligation. (259) Furthermore, the public faith includes only the status of the heir but not whether the object belongs to the estate.

161 Because the substance of the certificate of inheritance does not become *res judicata* (260) – even if it can no longer be appealed – the recognisability of the certificate of inheritance abroad has been questioned by German scholars. (261) Nevertheless, the ECJ's reasonings (262) suggest that the certificate of inheritance should be regarded as a 'decision' under Article 3(1)(g) Succession Regulation because it is issued by a formal court in a potentially contentious proceeding and the court must therefore issue an order. (263) Thus, the certificate of inheritance would, in principle, be recognisable under Article 39 Succession Regulation. However, it is still completely unclear which concrete content and effect of the certificate of inheritance is actually recognisable. (264) In any case, as far as can be seen, no case is known to date in which a court has issued an attestation based on Articles 46(3)(b) or 59(1)(2) Succession Regulation. In a recent decision, the Higher Regional Court of Cologne left that question unanswered since the notary who made the application to issue the attestation was not entitled to do so. (265)

c) *Revocation and declaration of invalidity of an inaccurate certificate of inheritance – the problem of* res judicata *in succession matters*

162 Another person can still assert their right of succession after issuance of the certificate of inheritance as the certificate of inheritance does not become *res*

---

(259) Eg, the content of the certificate of inheritance is not deemed to be correct if a tenant concludes a tenancy agreement in good faith with a person falsely named as an heir in the certificate of inheritance for a dwelling belonging to the estate, D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 660.

(260) BVerfG ZEV 2006, 74, BGH FamRZ 2010, 1068, 1069.

(261) Eg, Christian Hertel in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht* (4th edn, otto.schmidt 2016) Art. 4 EuErbVO paras 4–6; Jan Peter Schmidt in Anatol Dutta and Johannes Weber (eds), *Internationales Erbrecht* (2nd edn, Verlag C.H.BECK 2021) Art. 3 EuErbVO para 10.

(262) Case C–20/17 *Oberle* [2018] FamRZ 1262; Case C–658/17 *WB v Notariusz Przemysława Bac* [2019] FamRZ 1184; Case C–80/19 *E. E.* [2020] FamRZ 1496.

(263) See the detailed analysis by Matteo Fornasier, 'Auf der Suche nach den Auslandswirkungen des deutschen Erbscheins – eine Zwischenbilanz zehn Jahre nach Inkrafttreten der EuErbVO' (2023) IPRax 468, 470–471.

(264) Matteo Fornasier, 'Auf der Suche nach den Auslandswirkungen des deutschen Erbscheins ' eine Zwischenbilanz zehn Jahre nach Inkrafttreten der EuErbVO' (2023) IPRax 468, 471; Rolf Wagner, 'Annahme öffentlicher Urkunden (Art. 59 EuErbVO) und Vermutungs- sowie Gutglaubenswirkungen nationaler Erbnachweise' (2023) FamRZ 1604, 1613.

(265) OLG Köln FamRZ 2022, 993, 994.

judicata. (266) In any case, the probate court must revoke the certificate of inheritance *ex officio* if it transpires that the certificate of inheritance that has been issued is incorrect or if the court's conviction that the certificate is correct is manifestly called into question. The certificate of inheritance becomes invalid upon its revocation (§ 2361 BGB). Furthermore, the true heir may also demand from a person in possession of an incorrect certificate of inheritance that the latter surrender it to the probate court (§ 2362 BGB). If the person in possession of the incorrect certificate of inheritance does not act accordingly, the true heir can file a complaint through contentious litigation. (267)

163 *Res judicata* with regard to the status of the heir can only be effected by a declaratory judgment (*Feststellungsurteil*) of a contentious civil court (§ 256 ZPO; eg, a complaint may be filed to establish the existence or non-existence of an asserted right of succession). (268) However, this *res judicata* applies only between the parties to the dispute (*inter partes*, § 325 ZPO). As a result, a third person could still assert their status as an heir even after the declaratory judgment became *res judicata*.

2. *Executor's certificate*

164 Upon application, the probate court is to issue to an executor a certificate of their appointment. The just presented provisions on a certificate of inheritance apply accordingly to this certificate (§ 2368 BGB, § 354 FamFG); upon the ending of the office of the testator, the certificate becomes invalid.

3. *European Certificate of Succession*

165 Germany also issues a European Certificate of Succession upon request in accordance with Articles 62ff Succession Regulation. At this point, only a brief discussion of the German implementation of the procedural provisions set out in §§ 33–44 International Succession Procedure Act (*Internationales Erbrechtsverfahrensgesetz*, hereinafter: IntErbRVG) will be provided.

166 Locally, the probate court in whose district the deceased had their habitual residence at the time of death has exclusive jurisdiction (§ 34 IntErbRVG). At the probate court, in principle, a senior judicial officer decides unless a testamentary disposition has been made or the application of foreign law can be considered. In these cases, a judge is competent (§§ 3(2)(i), 16(2) and

(266) BVerfG ZEV 2006, 74, BGH FamRZ 2010, 1068, 1069.

(267) Herbert Grziwotz in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 2362 BGB para 6.

(268) BGH FamRZ 2010, 1068, 1069.

(3)(1)(2) RPflG). The facts of the case and other evidence provided are to be verified by the issuing authority *ex officio* (Article 66(1) Succession Regulation, § 35(1) IntErbRVG, § 26 FamFG). Nevertheless, in practice, the probate court will often follow the heir's declaration in lieu of an oath made before a notary (Article 66(3) Succession Regulation, § 36(2)(1) IntErbRVG), so that German notaries ultimately have considerable influence on the issuing of European Certificates of Succession. [269] The probate court decides – provided all prerequisites are met – by issuing an original of the European Certificate of Succession (§ 39(1) IntErbRVG). This decision becomes effective when the European Certificate of Succession is handed over to the court registry (*Geschäftsstelle*) for the purpose of notification (§ 41 IntErbRVG). A complaint on appeal may be lodged against the decision (§ 43 IntErbRVG). According to the European Court of Justice, the court of first instance is not a 'court' within the meaning of Article 267 TFEU and, therefore, may not make a reference to the Court of Justice, as it does not exercise a judicial function. [270]

C. *Administration of estates* [271]

1. *Ground rule: (joint) management of the estate by the heir(s)*

167 Upon the death of the testator, the heir *ipso iure* takes the place of the testator (§ 1922 BGB), ie, the right to manage and transfer the estate passes to the heir immediately. As a rule, therefore, this right is not (preliminarily) exercised by an authority or a court.

168 The same also applies in the case of a community of heirs: the heirs are jointly entitled to the management of the estate (§ 2038 BGB). As a rule, all co-heirs must act together for this purpose (principle of unanimity – *Einstimmigkeitsprinzip*). Hence, every co-heir is obliged to the others to cooperate in measures that are necessary for due management (§ 2038(1)(2) BGB). If they do not comply, they may be sued and ordered to consent to a particular management measure. [272] A breach of the principle of unanimity can be found in §§ 2038(2)(1), 745 BGB. According to these provisions, a majority

---

[269] In general, the procedure – and thus the notarial influence – is very similar to that for issuing a national certificate of inheritance, see above para 155; cf, Felix Odersky in Rainer Hausmann and Felix Odersky (eds), *Internationales Privatrecht in der Notar- und Gestaltungspraxis* (4th edn, Verlag C.H.BECK 2021) § 15(374).

[270] Case C–187/23 *Albausy* [2015] ECLI:EU:C:2025:34, para 66. This is different concerning the issuance of the German certificate of inheritance, see para 152 above.

[271] For the term 'administration of estates' used here, see fn 223 above.

[272] D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 732.

of the co-heirs (calculated according to the size of the shares in the estate) may resolve that there is to be proper administration and use appropriate to the nature of the estate or of one object of the estate. Furthermore, measures necessary for the preservation of an object of the estate may be undertaken by each co-heir alone (§ 2038(1)(2) BGB). However, the heirs may alienate an object of the estate only jointly (§ 2040(1) BGB) whereby it is sufficient if they consent in advance (§ 185(1) BGB, *Einwilligung*) or ratify subsequently (§ 185(2) BGB, *Genehmigung*). Nonetheless, if alienation is necessary for the preservation of an object of the estate, a co-heir may alienate it without the cooperation of the others according to the *ratio* of § 2038(1)(2) BGB and contrary to the wording of § 2040(1) BGB. (273) Any co-heir can individually claim performance of a claim to all co-heirs jointly and also assert it in court with a statutory representative action (§ 2039 BGB, *gesetzliche Prozessstandschaft*). (274)

Overall, the responsibility for managing the estate therefore lies solely with the heir(s). Courts only intervene on application if problems arise in the joint management of the estate or if the co-heirs fail to cooperate. **169**

2. *Executor*

The testator may appoint one or more executors (*Testamentsvollstrecker*) by dispositions *mortis causa* to ensure the proper administration or partitioning of the estate. Provisions to this regard are found in §§ 2197ff BGB. **170**

a) *Beginning of the office of the executor*

One or more executors, who are private persons, can be appointed by dispositions *mortis causa* of the testator (§ 2197 BGB). The testator may also leave the determination of the person who is to act as executor to a third party or the probate court (§§ 2198, 2200 BGB). However, in the absence of any corresponding appointment or direction of the testator, the administration of the estate by executor is not possible. (275) If the appointment is to be made by the probate court, the probate court is not obliged to appoint an executor but can decide freely after a due assessment of the circumstances (*pflichtgemäßes Ermessen*). (276) There are no restrictions regarding the **171**

(273) BGH FamRZ 1989, 963, 966.
(274) BGH FamRZ 2006, 941.
(275) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 789.
(276) BayObLG FamRZ 2004, 1406; OLG Hamm RPfleger 1984, 316.

selection of the person, meaning that, for example, one or all co-heirs may also be appointed as executor. (277)

172 The office of the executor begins at the time when the appointed person accepts the office by declaration to the probate court. This declaration does not require any form but may not be made subject to a condition or a stipulation as to time (§ 2202 BGB). However, in general, there is no obligation to accept the office. The probate court issues a confirmation of receipt (*Eingangsbestätigung*; not to be confused with the executor's certificate according to § 2368 BGB, see above para 164) without substantively assessing the prerequisites for acceptance. (278)

b) *Tasks and powers of the executor*

173 As a rule, the executor is responsible for the proper execution of the testator's will (*Abwicklungsvollstreckung*), ie, they execute the testator's testamentary dispositions (eg, legacies and testamentary burdens – *Auflagen*) (§ 2203 BGB), effect the partitioning of the estate among the co-heirs (§ 2204 BGB), and provisionally administer the estate (§ 2205 BGB). For this purpose, the testator may also extend the authority (eg, by not restricting the executor in incurring obligations on account of the estate, § 2207 BGB), or limit the rights of the executor (eg, by appointing the executor to only administer some individual objects of the estate or to prohibit the disposal of individual objects of the estate, § 2208 BGB). Such a restriction also has effects *in rem*. (279) Hence the executor would make the disposition over these objects without authority; however, the public faith of the executor's certificate also has effect in this case if the restriction is not noted in the certificate. (280) Further, the testator may order permanent execution (§ 2209, *Dauervollstreckung*) which ends after thirty years unless otherwise directed (§ 2210 BGB).

174 The executor does not hold a public office but a private office. (281) The executor is nevertheless entitled to take possession of the estate and alienate the objects of the estate; however, gratuitous dispositions are – as a rule – excluded (§ 2205 BGB). As long as the executor is in office, the heir may not alienate an object of the estate (§ 2211(1) BGB); however, acquisition in good faith from the heir remains possible (§ 2211(2) BGB). Unless otherwise

---

(277) RG, RGZ 163, 57, 58–59; BGH FamRZ 2005, 614, 616; BayObLG FamRZ 2002, 991, 993.

(278) OLG Köln FGPrax, 2023, 227; OLG Braunschweig FamRZ 2023, 1085, 1086.

(279) BGH BGHZ 40, 115; BGH FamRZ 1984, 780.

(280) OLG München FamRZ 2016, 848, 849–850.

(281) D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 799.

directed, the executor is entitled to incur obligations on behalf of the estate only to the extent that it is necessary to incur them for the proper administration thereof or to alienate the object (§ 2206 BGB). Moreover, only the executor is entitled to assert a right subject to the administration of the executor in court (§ 2212 BGB). The *res judicata* effect of a judgment issued thereupon is also effective for and against the heir (§ 327 ZPO). However, this does not apply if the executor files an action to establish the existence of the right of succession, as they may not dispose of the right of succession as such. A corresponding judgment would therefore have no *res judicata* effect against the true heir. (282) Third parties may assert their claim that is directed against the estate in court both against the heir and against the executor (§ 2213 BGB). However, if the third party obtains a judgment only against the heir, the *res judicata* does not affect the executor (*e contrario* § 327 ZPO). (283)

175 Mandatory obligations from which the testator cannot release the executor (§ 2220 BGB) are *inter alia* the preparation of an inventory of the objects of the estate (§ 2215 BGB), the administration of the estate in a proper manner (§ 2216 BGB), as well as the liability for any damage due to a culpable breach of duties imposed upon the executor (§ 2219 BGB). In return, the executor receives reasonable remuneration for the performance of their office, unless the testator has provided otherwise (§ 2221 BGB). Regarding the inventory, the executor is entitled to have it taken by a notary; and must do so if the heir requests it (§ 2215(4) BGB). The notary must subsequently determine the estate themselves, as far as possible. (284) In this instance, the notary acts on behalf of the executor and not – as in the case of the official preparation of the inventory according to § 2003 BGB, see above para 137 – as an auxiliary organ of the probate court. (285)

c) *Tasks of the probate court*

176 Even though the probate court does not generally supervise the executor, it has various tasks in this context. Firstly, the testator, in the will, may request

(282) RG JW 1919, 724; Anatol Dutta *in J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (Sellier/de Gruyter 2021) § 2212 BGB para 26; Walter Zimmermann in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 2212 BGB para 10.

(283) RG RGZ 109, 166; Anatol Dutta in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (Sellier/de Gruyter 2021) § 2213 BGB para 6; Walter Zimmermann in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 2213 BGB para 7.

(284) BVerfG FamRZ 2016, 1141; OLG Düsseldorf RNotZ 2008, 105; OLG Celle DNotZ 2003, 62.

(285) Ingo Schreinert, 'Das notarielle Nachlassverzeichnis' (2008) RNotZ 61, 68–69.

the probate court to appoint an executor (§ 2200 BGB, see above para 171). Secondly, the probate court may, upon the application of one of the persons concerned, dismiss the executor if a compelling reason exists (eg, gross breach of duty or incapacity to effect proper management, § 2227 BGB). Thirdly, if several executors perform the duties of the office jointly, the probate court decides in the event of a difference in opinion (§ 2224 BGB). Finally, the probate court may cancel a direction that the testator has given by testamentary disposition upon application by the executor or by any other party concerned if compliance with it would substantially endanger the estate (§ 2216(2)(2) BGB).

d) *End of the office of the executor*

177 The office of the executor expires *ipso iure* if the executor has fulfilled all tasks directed to them. [286] It also ends automatically with the passage of time (usually thirty years, § 2210 BGB, see above para 173), or if the executor dies, becomes incapable or limited in their capability to contract, or has been given a custodian to attend to their financial affairs (§§ 2225, 2201 BGB). Furthermore, the office expires if the executor has been dismissed by the probate court (§ 2227 BGB). Finally, the executor can also terminate the office themselves (almost) at any time by a form-free declaration to the probate court (§ 2226 BGB). When the office expires, the executor is obliged to surrender the estate to the heir (§§ 2218(1), 667 BGB).

3. *Administration of the estate and estate insolvency*

178 If the probate court orders the administration of the estate or if the insolvency court opens insolvency proceedings, the authority to manage the estate and to alienate it are transferred to the administrator of the estate or the insolvency administrator appointed by the competent court (§§ 1984, 1985 BGB, § 80(1) Insolvency Code, see above paras 134–135). The heir loses the corresponding authorities as long as the administration of the estate or the estate insolvency continues.

4. *Curatorship of the estate*

179 Until the inheritance is accepted, or if the heir is unknown, the probate court is to ensure *ipso iure* that the estate is secured, to the extent a need for this is given (§ 1960 BGB). For that purpose, the probate court may order *inter alia* the deposit of money and valuables (*Hinterlegung*) as well as the drawing

[286] D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 809.

up of an estate inventory by a notary (§ 1960(2) BGB, § 20(1) Federal Code for Notaries – *Bundesnotarordnung*). In addition, it may appoint a curator for the person who becomes heir (curator of the estate – *Nachlasspfleger*, § 1960(2) BGB). If the appointment of the curator is applied for by a person entitled to a claim that is directed against the estate for the purpose of judicially asserting that claim, the probate court is to appoint a curator of the estate (§ 1961 BGB). The curator of the estate is selected according to suitability (§ 1816 BGB). A potential heir or the appointed curator of the estate may lodge a complaint on appeal against the appointment or the selection of the curator (§ 58 FamFG). (287)

180 As regards the curatorship of the estate, the provisions applicable to a custodianship apply *mutatis mutandis* (§ 1888(1) BGB, see in more detail below, paras 205ff). Therefore, the curator of the estate is subject to the supervision and advice of the probate court (§§ 1861, 1962 BGB). Among others, the curator's tasks include identifying an unknown heir as well as securing and managing the estate. (288) They take possession of the estate, (289) submit an inventory of the estate to the probate court (§ 1835 BGB), and must act in the interests of the heir (§ 1821 BGB). (290) In principle, the curator of the estate can dispose of objects of the estate and conclude corresponding obligations freely; yet some transactions, which are of particular significance or are especially risky, require ratification by the probate court (§§ 1848ff, 1962 BGB). The curator of the estate acts as the legal representative of the final heir. (291) Therefore, the curatorship of the estate does not restrict the heir's power of disposition. (292)

181 If the inheritance is accepted, the probate court cancels the curatorship of the estate *ex officio* by constitutive order (§§ 1870, 1871 BGB). (293) The curator of the estate must subsequently surrender the estate to the heir and – if the heir demands – render accounts for the management (§ 1872 BGB).

---

(287) OLG Bremen FamRZ 2018, 296.

(288) BGH FamRZ 1968, 26; BGH FamRZ 1983, 56; OLG Schleswig OLGR 1998, 358.

(289) BGH NJW 1972, 1752; BGH FamRZ 1983, 56.

(290) Thomas Hoeren in Reiner Schulze et al (eds), *NomosHandkommentar-BGB* (11th edn, Nomos Verlagsgesellschaft 2021) § 1960 BGB para 10.

(291) BGH FamRZ 1968, 26; BGH NJW 1981, 2299; BGH FamRZ 1983, 56; BGH BGHZ 94, 312.

(292) Thomas Hoeren in Reiner Schulze et al (eds), *NomosHandkommentar-BGB* (11th edn, Nomos Verlagsgesellschaft 2021) § 1960 BGB para 9; D Leipold, *Erbrecht* (22nd edn, Mohr Siebeck 2020), para 627.

(293) RG RGZ 106, 46, 48; OLG Köln FamRZ 1997, 1176, 1177.

D. *Conclusion to succession law*

182 German succession law allows a high degree of private autonomy. This starts with the testamentary freedom, extends to the free administration of the estate, and ends with the partitioning of the estate by contract. Therefore, the probate court acts somewhat like a letterbox by receiving, registering, and, if necessary, communicating declarations of intent (eg, acceptance and disclaimer of the inheritance or declarations on avoidance). In addition, it has a service provider function by opening a disposition *mortis causa* and generally ensuring the proper administration and partitioning of the estate. In this way, it protects the creditors of the estate, (potential) heirs, and persons entitled to a compulsory share of the estate equally. For this purpose, it has various competences, such as the appointment of curatorship or the administration of the estate, the initiation of the judicial call procedure, or the opening of estate insolvency proceedings. In some cases (eg, in property distribution proceedings or for the preparation of inventories), the probate court may appoint notaries for assistance. In any case, the probate court hardly ever makes decisions and if it does, the decisions usually do not become *res judicata* and are sometimes largely prepared by notaries. A prime example of this is the certificate of inheritance, which, despite its lack of *res judicata* and the fact that evidence is hardly ever taken by the probate court but rather by notaries, nevertheless has far-reaching effects on legal transactions due to its public faith (at least within Germany). However, the contentious courts are responsible for decisions that should become *res judicata* (eg, when it comes to establishing the status of the heir, the partitioning of the estate, or the payment of the compulsory share of the estate).

IV. Status of natural persons

A. *Name changes*

183 German law has a strong obsession when it comes to regulating names. Without delving too deeply into the tangles of German naming law, which is full of contradictions, (294) the main regulations can be found in §§ 1355,

(294) Anatol Dutta, 'Die Namensregelungsobsession geht weiter – Der Referentenentwurf eines Gesetzes zur Änderung des Ehenamens- und Geburtsnamensrechts' (2023) FamRZ 817; Reinhard Hepting, 'Grundlinien des aktuellen Familiennamensrechts' (2002) FPR 115, 119–120.

1616ff BGB ([295]) and in the Name Change Act (*Namensänderungsgesetz*). On the one hand, civil law provides for a name change because the personal status changes (eg, through marriage or change of parenthood). On the other hand, it is possible to have one's name changed for compelling reasons in an administrative procedure. Courts are rarely involved in either of these procedures. The following overview largely refers to the legal situation valid until 30 April 2025. The amendments to the law on names that have come into force since 1 May 2025 are outlined in a separate section at the end (see para 192). However, these amendments have only minimal impact on the judicial role.

1. *Name change due to a change in the personal status*

a) *Marriage*

184 As a rule, the spouses are to determine, by declaration to the registry office at conclusion of the marriage, a common family name (*Ehename*) which might be the birth name (*Geburtsname*) of one spouse, the name one spouse was using at the time of the declaration or a double name (*Doppelname*) composed of either of the aforementioned names from both spouses. If the declaration is made later, it must be publicly certified. If, however, the spouses do not determine a family name, they will continue using the names they used at the time of concluding the marriage (§ 1355(1)–(3) BGB). In addition, a spouse whose name does not become the family name may, by declaration to the registry office, prepend or append to the family name their birth name or the name they are using at the time of the declaration on the determination of the family name (*Begleitname*). The spouse can revoke their declaration regarding this prepended or appended name at any time vis-à-vis the registry office, in order to henceforth have only the legally desired one-limbed family name. ([296]) The revocation is binding for the duration of the marriage and cannot be reversed (§ 1355a BGB). ([297]) The dissolution of the marriage (eg, through death or divorce) has no *ipso iure* effect on the

([295]) Reinhard Hepting, 'Grundlinien des aktuellen Familiennamensrechts' (2002) FPR 115ff; Saskia Lettmaier, 'Notwendigkeit einer Reform des (Familien-)Namensrechts?' (2020) FamRZ 1, 2.

([296]) Karl August Prinz von Sachsen Gessaphe in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 1355 BGB para 54; Thomas Wagenitz, 'Grundlinien des neuen Familiennamensrechts' (1994) FamRZ 409, 411. However, please refer to para 192 below for information on the possibility of having 'genuine' double names from 1 May 2025 onwards.

([297]) BayObLG NJW-RR 1998, 1015.

family name. However, the widowed or divorced spouse may, by declaration to the registry office, reassume their birth name or the name they were using until the determination of the family name or prepend or append these names (§ 1355(5) BGB).

b) *Child*

185 The child receives the family name of their parents as their birth name (§ 1616 BGB). If the parents have no common family name and if only one of them has parental custody, the child receives the name that this parent has at the date of the birth of the child; yet the parent who has the sole parental custody may, by declaration to the registry office, give the child the name of the other parent, provided the other parent and the child – if the child is older than five years of age – consent (§ 1617a BGB). If the parents have no common family name but have joint parental custody, then, by declaration to the registry office, they designate the name that the father or the mother has at the time of the declaration as the birth name of the child. The designation made by the parents also applies to their other children (§ 1617(5) BGB). If joint parental custody begins only when the child already has a name, the name of the child may be newly designated within three months after the beginning of the joint parental custody, provided the child consents if they are older than five years of age (§ 1617b(1) BGB). Where it is finally and bindingly established that a man whose family name has become the birth name of the child is not the father of the child, the child, on their application by declaration to the registry office, receives as their birth name the name that the mother had at the date of the birth of the child (§ 1617b(2) BGB). If the parents designate a family name after the child has reached the age of five, the family name is also the birth name of the child only if the child agrees with the naming (§ 1617c BGB).

c) *Adoption*

186 Only if the name changes due to adoption are family courts involved. As a rule, the adoptee receives as its birth name the family name of the adoptive parent. This rule applies likewise to the adoption of minors and of adults (cf, §§ 1757, 1767(2) BGB). The change of name is effected *ipso iure* with the final and binding adoption decree; a corresponding reference in the adoption decree has a purely declaratory effect (§ 1757(1) BGB). ([298]) If the family court, in the case of the adoption of a minor, however, on application by the

([298]) BGH FamRZ 2017, 1583.

adoptive parent and with the consent of the child to the pronouncement of the adoption, changes the first name of the child, or prepend or append the previous family name to the new family name of the child for reasons in the best interests of the child (§ 1757(3) BGB), the adoption decree, also regarding the name changes, is constitutive in nature. ([299]) If, on the other hand, in the case of an adoption of adults, the adoptee is married, the change of the birth name extends to the family name of the adoptee and their spouses and children only if the spouse agrees with and accepts the change of name, before the pronouncement of the adoption, by a publicly certified declaration to the family court. Upon the cancellation of the adoption, the adoptee loses the right to use the family name of the adopter as their birth name unless the court orders differently, on the application of the adoptee (§ 1765 BGB). Even though the order in which the court pronounces the adoption is not appealable as such (§ 197(3) FamFG), the part of the court's order concerning the constitutive change of name due to the adoption is appealable. ([300])

d) *Transsexual and intersex persons*

187 If a person changes their gender under the Transsexuals Act (*Transsexuellengesetz*), they can also choose a gender-appropriate first name (see in detail below, para 194). Intersex persons whose gender is registered as 'diverse' (*divers*) in the civil status register can have their gender changed to 'male' or 'female' during their lifetime by making a publicly registered declaration to the civil registrar (see below para 196). At the same time, they can also determine a new first name (§ 45b(1) Civil Status Act – *Personenstandsgesetz*). However, these two provisions no longer apply since 1 November 2024 when the Self-Determination Act (*Selbstbestimmungsgesetz*) came into force (see below paras 201–204). § 2(3) Self-Determination Act does, though, also provide for a change of the first name by a declaration in parallel with the declaration of the change of gender-marker.

e) *Avoidance of name change declarations and effects of the civil status register*

188 Avoidance of a declared name change, as just presented, based on general civil law principles (eg, on the grounds of mistake, deceit, or unlawful duress, §§ 119, 123 BGB) is, for legal certainty reasons according to the prevailing

([299]) Wolfgang Keuter, 'Nenn ich dich, so kenn ich dich' (2021) FamRZ 165, 169.

([300]) With numerous further references, BGH FamRZ 2020, 1275 para 12; Wolfgang Keuter, 'Nenn ich dich, so kenn ich dich' (2021) FamRZ 165, 168.

opinion amongst German scholars and case-law, not possible. (301) However, due to practicability, a correction until the entry of the name change in the civil status register is considered permissible. (302) In addition, a challenge may also be conceivable in extremely exceptional cases for very obvious errors or gross procedural defects (eg, the registrar did not provide proper and complete information about the law on names). (303)

189 The entry of the name change in the civil status register is merely declaratory in nature. (304) By the entry, the name change can be proven. However, proof to the contrary is admissible (§ 54 Civil Status Act). (305) If the register is incorrect (eg, the registered name change was not declared), it must be corrected either *ex officio* by the civil registrar in the cases exhaustively listed in § 47 Civil Status Act (eg, obvious typing errors) or, upon application of a participant, the civil registry, or the supervisory authority, by order of the court in accordance with § 48 Civil Status Act. (306)

2. *Administrative name change procedure for compelling reasons*

190 Besides the presented name changes by civil law, an administrative name change procedure – which applies likewise to first and last names – exists for compelling reasons (§ 3 Name Change Act), such as offensive or ridiculous names, or names that give rise to inappropriate puns. (307) Furthermore, a change of name can be considered if it is absolutely necessary in the best interests of the child. (308) However, the public right to change one's name

---

(301) BayObLG FamRZ 1993, 61, 62; BayObLG NJW-RR 1998, 1015, 1016; OLG Zweibrücken NJWE-FER 2000, 4; OLG München StAZ 2009, 78, 79; AG Gießen, StAZ 2009, 208, 209; Anatol Dutta in Reinhard Hepting and Anatol Dutta, *Familie und Personenstand* (4th edn, Verlag für Standesamtswesen 2022) para II-153; Karl August Prinz von Sachsen Gessaphe in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 1355 BGB para 29.

(302) Anatol Dutta in Reinhard Hepting and Anatol Dutta, *Familie und Personenstand* (4th edn, Verlag für Standesamtswesen 2022) para II-154; Karl August Prinz von Sachsen Gessaphe in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 1355 BGB para 29.

(303) AG Gießen, StAZ 2009, 208, 209. See also BayObLG FamRZ 1993, 61, 62.

(304) OLG München StAZ 2009, 78, 79.

(305) BGH FamRZ 2019, 614, 616.

(306) OLG München StAZ 2009, 78, 79; Karl August Prinz von Sachsen Gessaphe in *Münchener Kommentar zum BGB* (9th edn, Verlag C.H.BECK 2022) § 1355 BGB para 29.

(307) No 35 of the General Administrative Regulation to the Name Change Act (*Allgemeine Verwaltungsvorschrift zum Gesetz über die Änderung von Familiennamen und Vornamen*).

(308) No 40 and 62 of the General Administrative Regulation to the Name Change Act (*Allgemeine Verwaltungsvorschrift zum Gesetz über die Änderung von Familiennamen und*

does not, in principle, permit any correction or supplementation of the right to change one's name under civil law just described; to the contrary, it is subsidiary to it. (309) Hence the threshold for such changes under administrative law is very high, and the procedure is therefore rarely used in practice. (310)

191 The procedure will be initiated upon application in writing or on record to the competent State authority. For children, the legal representative files the application. The authority decides on the application and arranges for subsequent certifications, eg, an entry in the civil status register (§§ 1, 2, 5, and 9 Name Change Act). The change of name is effected after a formal administrative act (*Verwaltungsakt*) that is constitutive in nature, has been announced (*bekannt geben*), (311) and has become binding (*bestandskräftig werden*). (312) To this administrative act the general provisions of administrative law apply; ie, the administrative act becomes binding one month after announcement (§§ 70(1), 74(1) Code of Administrative Court Procedure – *Verwaltungsgerichtsordnung*) even if it is unlawful (*Bestandskraft*) – unless an objection (*Widerspruch*) or a rescissory action (*Anfechtungsklage*) is timely lodged. Nevertheless, it does not become *res judicata* (313) since the issuing authority can still unilaterally withdraw (*Rücknahme*) or revoke (*Widerruf*) it in accordance with the general principles of administrative law (§§ 48ff Administrative Procedure Act – *Verwaltungsverfahrensgesetz*). (314) However, for lawful withdrawal or revocation, the protection of the legitimate expectations of the person concerned plays a significant role and sets high thresholds. (315)

3. *Latest legislative development*

192 Although a legislative procedure to amend the law on names has only

---

Vornamen); BVerwG FamRZ 2002, 1104, 1006; Barbara Thomas, 'Öffentlich-rechtliche Namensänderung' (2010) StAZ 33, 37 lists exemplary cases from German case-law.

(309) VGH München BeckRS 2019, 6047; VGH München StAZ 2017, 113; Barbara Thomas, 'Öffentlich-rechtliche Namensänderung' (2010) StAZ 33, 34.

(310) Barbara Thomas, 'Öffentlich-rechtliche Namensänderung' (2010) StAZ 33, 38.

(311) Jörg Fritzsche in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (Sellier/de Gruyter 2018) § 12 BGB para 219.

(312) Barbara Thomas, 'Öffentlich-rechtliche Namensänderung' (2010) StAZ 33, 38.

(313) Steffen Detterbeck, *Allgemeines Verwaltungsrecht* (17th edn, Verlag C.H.BECK 2019) para 563.

(314) Jörg Fritzsche in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (Sellier/de Gruyter 2018) § 12 BGB para 219.

(315) Steffen Detterbeck, *Allgemeines Verwaltungsrecht* (17th edn, Verlag C.H.BECK 2019) para 694.

recently been completed, (316) the hoped-for simplification has not been realised; instead, the regulatory obsession remains in place. The new law, which came into force on 1 May 2025, contains only a few amendments to substantive civil law on names. These include the possibility of 'genuine' double names and gender-adjusted forms of family names according to Danish, Frisian and Sorbian customary law. The new law on names also covers changes to the names of children after divorce or the death of one parent. (317) The basic system (ie, ipso iure or declared change of name due to a change in personal status, on the one hand, and an administrative law name change procedure due to compelling reasons, on the other hand) remains unaffected. (318) The birth name can, however, be changed once in a lifetime upon reaching the age of majority by declaration to the registry office (cf, § 1617i(1), (5) BGB). (319) Moreover, the German parliament (*Bundestag*) has also called on the federal government to submit a draft bill to simplify the procedure of changing names under administrative law. According to this, the threshold to change one's name is to be lowered from a 'compelling reason' to a 'legitimate interest'. (320) Furthermore, the new federal government, which took office in May 2025, has agreed in its coalition agreement to simplify and structure the law on names. (321) Thus, more reforms to the law on names – including further de-judicialisation – are to be expected in the future.

B. *Gender recognition*

193 A Law on gender identity has also just been passed in the parliamentary process. In contrast to the Law on names just described, it provides a

---

(316) *Gesetz zur Änderung des Ehenamens- und Geburtsnamensrechts und des Internationalen Namensrechts* of 11 June 2024, BGBl. 2024 I, No 185.

(317) See in detail, Christiane von Bary, 'Änderungen im Namensrecht ab 1. Mai 2025: Ein Überblick' (2024) StAZ 225ff.

(318) Disappointed about that are Christiane von Bary, 'Namensrecht: Warum einfach, wenn's auch kompliziert geht?' [2023] ZRP 98, 101, Eva Kiehn, 'Entwurf eines Gesetzes zur Änderung des Ehenamens- und Geburtsnamensrechts' (2023) StAZ 359, 365, and Anatol Dutta, 'Die Namensregelungsobsession geht weiter – Der Referentenentwurf eines Gesetzes zur Änderung des Ehenamens- und Geburtsnamensrechts' (2023) FamRZ 817, 820. The latter pleads for a public right for free choice of name without (or with hardly any) legislative restrictions.

(319) After all, no compelling reasons are required for that name change. Nevertheless, the declarant does not have a free choice, but can only choose from a specific, very narrow set of names, including their birth names or the birth names of their parents.

(320) BT-Drucks. 20/11004, 29.

(321) Coalition agreement between CDU, CSU, and SPD, 'Verantwortung für Deutschland' (2025) para 2913.

considerable degree of private autonomy in this area. This new Law, known as the Self-Determination Act (*Selbstbestimmungsgesetz*), is discussed below in paras 200–203. Before that, the previous burdensome and complex legal situation is examined.

1. *Legal situation until 31 October 2024*

a) *Gender identity*

194 In contrast to the new Self-Determination Act, the former legal situation was significantly more restrictive in Germany. Admittedly, the Transsexuals Act (*Transsexuellengesetz*), which dated back to the 1980s and which was amended several times due to orders of the Federal Constitutional Court, ([322]) already focused on binary and non-binary ([323]) gender identity instead of physical sex characteristics. However, the Law provided for a very burdensome procedure at the district courts in which two independent expert opinions had to confirm that 'the applicant's sense of gender affiliation is highly unlikely to change' (§ 4(3) Transsexuals Act). This prerequisite was often criticised as paternalistic and outdated. ([324]) The Act allowed for a 'minor solution' (*kleine Lösung*), in which only the first name was changed, and a 'major solution' (*große Lösung*) that also changed the gender-marker in the civil status register. ([325]) In both cases, the court decided. Both 'solutions' required the same substantive prerequisites and followed the same procedure. ([326]) As soon as the decision became *res judicata* (ie, when the one-month period for filing a complaint on appeal expired, §§ 58, 63(1)

([322]) In chronological order: BVerfG FamRZ 1979, 25; BVerfG StAZ 1982, 170; BVerfG FamRZ 1993, 657; BVerfG StAZ 1997, 270; BVerfG FamRZ 2006, 182; BVerfG FamRZ 2006, 1818; BVerfG FamRZ 2008, 1593; BVerfG StAZ 2011, 141; BVerfG FamRZ 2012, 188; BVerfG FamRZ 2017, 2046.

([323]) BGH FamRZ 2020, 1009, 1012–1013.

([324]) Eg, Anatol Dutta, 'Geschlechtsidentität statt Körper' (2023) FamRZ 993, 994; Anatol Dutta and Matteo Fornasier, 'Anmerkung zu BGH FamRZ 2020. 1009' (2020) FamRZ 1015, 1016; Moritz L Jäschke, 'Überlegungen zur Abschaffung des Transsexuellengesetzes (TSG)' (2019) NZFam 895ff; Anna Katharina Mangold, 'Menschenrechtlich gebotene geschlechtliche Selbstbestimmung' (2022) ZRP 180, 181; Wolf Sieberichs, 'Die diversen Geschlechter' (2019) FamRZ 329, 332.

([325]) Alix Schulz, 'Geschlechtliche Selbstbestimmung im Recht' in Christiane von Bary (ed), *Aktuelle Reformen im Familienrecht* (Wolfgang Metzner Verlag 2023) 103, 107.

([326]) Jan Plobner and Clara Markurt, 'Hintergründe zum Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag' (2024) StAZ 193.

FamFG), (327) it was effective (§ 4(4)(2) and § 10(1) Transsexuals Act). The court decision was constitutive since § 10(1) Transsexuals Act stated that with the final and binding decision, the applicant was to be considered as belonging to the opposite gender. Consequently, the subsequent entry of the changed gender in the civil status register could only have a declaratory effect.

b) *Physical variations in sex development*

195 Persons who show a physical variation in sex development (*Varianten der Geschlechtsentwicklung*) are entered in the birth register as 'diverse' at birth (§ 22(3) Civil Status Act). This regulation explicitly does not apply to a gender identity that has not yet been developed but focuses merely on physical characteristics. (328)

196 Persons with a physical variation in sex development could also have their gender entry changed later to 'diverse', 'male', or 'female' – at their own discretion – or have the gender entry deleted completely (§ 45b Civil Status Act). A publicly registered declaration to the registry office maintaining the register was sufficient for this. For children under the age of 14, only the legal representative could make the declaration. If the child is older, they made the declaration themselves but required the consent of the legal representative. If the legal representative did not consent, the family court replaced the consent if it was not contrary to the child's best interests (§ 45b(2) Civil Status Act). The variation in sex development must be proven by presenting a simple medical certificate (eg, from a general practitioner); a specific diagnosis was not necessary. (329) It was therefore by far not required to present such a detailed opinion as in the just-described procedures according to the Transsexuals Act. (330)

197 It is likely that what has been said about the avoidance in the case of name declarations (see above para 188) applied accordingly regarding the declaration concerning gender entry in the civil status register. (331) Hence, this declaration was, in principle, not avoidable. However, this was not too much of a problem in practice since declarations could be made several times and

---

(327) Maria Sabine Augstein in NomosKommentar Transsexuellengesetz (Nomos Verlagsgesellschaft 2012) § 4 TSG para 6.

(328) OLG München FamRZ 2024, 53.

(329) BT-Drucks. 19/4669, 11.

(330) Wolf Sieberichs, 'Die diversen Geschlechter' (2019) FamRZ 329, 330.

(331) Anatol Dutta, 'Geschlechtsidentität statt Körper' (2023) FamRZ 993, 994 also sees it similarly with regard to the declarations within the framework of the draft for the Self-Determination Act (*Selbstbestimmungsgesetz*).

thus an entry that had been made could easily be reversed. (332) It was presumed that the registered gender of the person concerned was correct until the incorrectness was proven (§ 54(1) and (3) Civil Status Act). (333) Thus, the entry did not have a constitutive but merely a declaratory effect. (334)

c) *Foreign gender recognition*

198 The recognition of a gender change established abroad depends on the way in which the gender was changed.

199 If the gender was changed by decision of a court or another competent authority (as, for example, the former procedure under the Transsexuals Act would provide), a procedural recognition under §§ 108, 109 FamFG may be considered. (335) According to this, the effect of the foreign decision automatically extends to Germany, whereby the requirements for recognition must be assessed by the respective authority in each case. (336)

200 On the other hand, if the change of gender is caused by declarations (as was the case, for example, in the event of physical variations in sex development in Germany), the law applicable to the gender must be determined under the German conflict-of-law rules, according to which, gender assignment was governed by the law of the State of which the person is a national. (337) It must then be assessed whether the declaration triggers the intended legal consequence and therefore effectively changes the legal gender according to the applicable law. Only if this is the case, will the declared gender change be recognised in Germany. (338) However, the conflict-of-laws rule also

(332) BT-Drucks. 19/4669, 11.

(333) Alix Schulz, 'Geschlechtliche Selbstbestimmung im Recht' in Christiane von Bary (ed), *Aktuelle Reformen im Familienrecht* (Wolfgang Metzner Verlag 2023) 103, 113. See also Anatol Dutta and Matteo Fornasier, *Jenseits von männlich und weiblich – Menschen mit Varianten der Geschlechtsentwicklung im Arbeitsrecht und öffentlichen Dienstrecht des Bundes* (Nomos Verlagsgesellschaft 2020) 9.

(334) Alix Schulz, 'Geschlechtervielfalt in Europa' (2021) ZEuP 64, 67.

(335) OLG Schleswig FamRZ 2020, 1095, 1097.

(336) Anatol Dutta in Reinhard Hepting and Anatol Dutta, *Familie und Personenstand* (4th edn, Verlag für Standesamtswesen 2022) para V-956.

(337) There was no written provision on this, but the prevailing opinion adopted this by analogy from Article 7 of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*) which determines the law applicable on legal capacity: OLG Schleswig FamRZ 2020, 1095, 1096; Anatol Dutta in Reinhard Hepting and Anatol Dutta, *Familie und Personenstand* (4th edn, Verlag für Standesamtswesen 2022) para IV-236; Alix Schulz, 'Geschlechtervielfalt in Europa' (2021) ZEuP 64, 80.

(338) Anatol Dutta in Reinhard Hepting and Anatol Dutta, *Familie und Personenstand* (4th edn, Verlag für Standesamtswesen 2022) para V-957.

changed with the introduction of the Self-Determination Act (see below para 204).

2. *Shift to out-of-court gender recognition – the new Self-Determination Act*

201 A new Self-Determination Act (*Selbstbestimmungsgesetz*) replaced the former Transsexual Act and amended § 45b Civil Status Act considerably from 1 November 2024 onwards. (339) § 2(1) of the Self-Determination Act permits a change of gender entry and at the same time a change of the first name by declaration due to a different gender identity in a similar way as in the case of a physical variation in sex development according to the former version of § 45b Civil Status Act. However, the new Self-Determination Act contains a few peculiarities compared to the former § 45b Civil Status Act which were alien to German civil status law until then: Firstly, the person must affirm that the selected gender entry most accurately reflects their gender identity and that they are aware of the implications of the declaration (*Eigenversicherung*, § 2(2) Self-Determination Act). Secondly, there is a 'cooling-off' period as the person concerned must notify the registry office about the planned declaration at least three months in advance; if they subsequently do not declare the gender change within six months of notification, the notification becomes void (*Anmeldung der Änderungserklärung*, § 4 Self-Determination Act). Thirdly, according to the planned 'blocking period', a person can make corresponding declarations for a maximum of once a year (*Sperrfrist*, § 5 Self-Determination Act). With regard to the capacity to make these declarations, the same rules apply as with the current § 45b(2) Civil Status Act (§ 3 Self-Determination Act; see above para 196). (340)

---

(339) *Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag und zur Änderung weiterer Vorschriften* of 19 June 2024, BGBl. 2024 I, No 206. See in general about the Self-Determination Act, Heinrich Bornhofen, 'Selbstbestimmung im standesamtlichen Verfahren nach § 45b PStG. Wandlung der Erklärungsnorm zur Verfahrensvorschrift' (2024) StAZ 325ff; Wolfgang Keuter, 'Das neue Selbstbestimmungsgesetz – Anmerkungen zu den status-, abstammungs- und namensrechtlichen Neuerungen' (2024) FamRZ 1073ff; Jan Plobner and Clara Markurt, 'Hintergründe zum Gesetz über die Selbstbestimmung in Bezug auf den Geschlechtseintrag' (2024) StAZ 193ff.

(340) Alix Schulz, 'Geschlechtliche Selbstbestimmung im Recht' in Christiane von Bary (ed), *Aktuelle Reformen im Familienrecht* (Wolfgang Metzner Verlag 2023) 103, 118–119.

202 According to the explanatory report, the entry of the declared gender in the civil status register is constitutive, (341) while the entry of the newly declared first name remains purely declaratory. (342) What has been written about the declarations under the law on names (see above para 188) applies accordingly regarding the avoidance of the Self-Determination Act declarations. (343) Due to the three-month notification period for the declaration and a possible new declaration once a year, however, avoidance might not be such a significant issue in practice. In general, a complete de-judicialisation regarding gender recognition took place with the entry into force of the new Self-Determination Act.

203 The changed gender entry in the civil status register also has some implications on parenthood matters: in the case of *ipso iure* motherhood (§ 1591 BGB) or judicially established fatherhood (§ 1592(3) BGB) – both of which are based on genetical descent (see above paras 33, 35, 45) – the changed gender-marker in the civil status register, however, is irrelevant. Regarding fatherhood by virtue of marriage or acknowledgement (§ 1592(1) and (2) BGB), on the other hand, the changed gender-marker in the civil status register is relevant and must be 'male' to establish legal fatherhood (§ 11 Self-Determination Act). (344) However, if also the new law on parenthood enters into force, this will no longer be relevant since the key points also provide for co-motherhood (see above para 33). (345) Hence, the gender-marker would be irrelevant for the establishment of the second parent position.

---

(341) *Gesetzesentwurf der Bundesregierung, 'Entwurf eines Gesetzes über die Selbstbestimmung in Bezug auf den Geschlechtseintrag und zur Änderung weiterer Vorschriften'* (23 August 2023) <https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RegE/RegE_Selbstbestimmung.pdf?__blob=publicationFile&v=2> accessed 28 May 2025, pp 37, 58.

(342) *Gesetzesentwurf der Bundesregierung, 'Entwurf eines Gesetzes über die Selbstbestimmung in Bezug auf den Geschlechtseintrag und zur Änderung weiterer Vorschriften'* (23 August 2023) <https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RegE/RegE_Selbstbestimmung.pdf?__blob=publicationFile&v=2> accessed 28 May 2025, p 39.

(343) Similar Anatol Dutta, 'Geschlechtsidentität statt Körper' (2023) FamRZ 993, 994.

(344) *Gesetzesentwurf der Bundesregierung, 'Entwurf eines Gesetzes über die Selbstbestimmung in Bezug auf den Geschlechtseintrag und zur Änderung weiterer Vorschriften'* (23 August 2023) <https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RegE/RegE_Selbstbestimmung.pdf?__blob=publicationFile&v=2> accessed 28 May 2025, p 58.

(345) *Eckpunkte des Bundesministeriums der Justiz für eine Reform des Abstammungsrechts* (16 January 2024), <https://www.bmj.de/SharedDocs/Downloads/DE/Themen/Nav_Themen/240115_Eckpunkte_Abstammungsrecht.pdf?__blob=publicationFile&v=2> accessed 28 May 2025, p 6. However, it remains unclear whether the new government, which has been in office since May 2025, intends to pursue the reform.

204 Along with the introduction of the Self-Determination Act, the German conflict-of-law rules were amended to the effect that persons habitually residing in Germany can choose German law to apply to their gender change even though nationality remains the main connecting factor (cf, the new Article 7a(2) of the Introductory Act to the Civil Code – *Einführungsgesetz zum Bürgerlichen Gesetzbuche*; cf, also above para 199). (346) If a person makes use of this option, they can change their gender according to the rules of the Self-Determination Act. (347) Whether a corresponding gender change will subsequently be recognised in the home country is, of course, another question. (348)

C. *Protection of adults*

205 The law on custodianship (*Betreuungsrecht*) was significantly amended with effect from 1 January 2023. (349) The aim was to shift the focus away from the welfare of the person under custodianship (*Betreuter*) (§ 1901(2)(1) BGB old version) to the wishes of the person under custodianship (§ 1821(2) BGB new version). Unless otherwise stated, this report refers to the currently applicable law on custodianship.

206 With regard to competence, special divisions are to be established at the district courts for custodianship matters (§ 23c GVG). These divisions are called 'custodianship courts' (*Betreuungsgericht*). Within the custodianship court, the senior judicial officer – as a rule – hears custodianship cases (§ 3(2)(b) RPflG). However, some matters remain reserved to the judge, including ordering custodianship, appointing a custodian (*Betreuer*), cancelling a custodianship, removing the custodian, as well as ratifying particularly significant acts of the custodian for the person under custodianship (eg, sterilisation, gender recognition, marriage, and divorce) (§ 15 RPflG). The procedural rules are found in §§ 271ff FamFG.

1. *Beginning of custodianship and the role of powers of attorney*

207 The new custodianship law has placed even more focus on the private autonomy of the person concerned. § 1814 BGB therefore stipulates that the

---

(346) In depth Rolf Wagner, 'Internationalprivatrechtliche Neuregleung zur »Geschlechtszugehörigkeit« in Art. 7a EGBGB' (2024) StAZ 331ff.

(347) *Gesetzesentwurf der Bundesregierung, 'Entwurf eines Gesetzes über die Selbstbestimmung in Bezug auf den Geschlechtseintrag und zur Änderung weiterer Vorschriften'* (23 August 2023) <https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RegE/RegE_Selbstbestimmung.pdf?__blob=publicationFile&v=2> accessed 28 May 2025, p 16.

(348) See on that point, Alix Schulz, 'Geschlechtervielfalt in Europa' (2021) ZEuP 64, 81.

(349) *Gesetz zur Reform des Vormundschafts- und Betreuungsrechts* of 12 May 2021, BGBl. 2021 I, p 882.

custodianship court may only appoint a custodian for a person of full age (ie, 18 years old) who is no longer able to take care of their affairs in whole or in part due to an illness or disability; however, it is not necessary that the person is legally incapacitated. (350) Furthermore, the appointment of a custodian must not be against the person's free will and must be required. In particular, custodianship is not required if the person concerned has granted an effective power of attorney (*Vorsorgevollmacht*) and if the authorised person can take care of the affairs just as well as a custodian (§ 1814(3)(2)(1) BGB).

208 Generally, a power of attorney can be used as a precautionary measure to legally authorise one or more trusted persons (*Vertrauensperson*) (351) to manage the affairs of the principal (*Vollmachtgeber*) if this person is no longer or only partially able to take care of their own legal affairs. The power of attorney itself does not constitute a contract, meaning that no obligations arise for the authorised person. The situation is different only if the power of attorney is exceptionally based on a contractual relationship. Only regarding specific measures (eg, regarding medical treatment or placement involving deprivation of liberty) must the power of attorney be in writing and expressly cover the corresponding measure to be effective (§ 1820(2) BGB); in all other cases, no mandatory formal requirements exist. Further, it is not mandatory for the power of attorney to be filed in a register. However, there is a central register of powers of attorney (*Zentrales Vorsorgeregister*) operated by the Federal Chamber of Notaries (*Bundesnotarkammer*). (352) Although only the name of the authorised person is listed in this register, and the power of attorney document is not deposited there, the custodianship court can ascertain the existence of the power of attorney more quickly if it is registered.

209 Also, § 1820(1) BGB helps the custodianship court to find out about the existence of the power of attorney as anyone who is in possession of a power of attorney and who obtains knowledge that proceedings for the appointment of a custodian have been commenced must inform the custodianship court without undue delay. The custodianship court will assess whether the power of attorney is effective, and may, nevertheless, appoint a custodian, despite an existing and effective power of attorney, who asserts the rights of

(350) S Lettmaier, *Familienrecht* (Verlag Franz Vahlen 2022), § 12(23).

(351) If multiple people are authorised, the appointment of an additional custodian can be avoided in case the originally designated trusted person is unable to fulfill their role, cf, Steffen Kurth, 'Vorsorgevollmachten – ausgewählte Praxisprobleme und entsprechende Gestaltungsmöglichkeiten' (2024) NJW 2137 para 22.

(352) <https://www.vorsorgeregister.de> accessed 28 May 2025.

the person under custodianship vis-à-vis the person authorised by them (*Kontrollbetreuer*), (353) or order that the authorised person may not exercise the power of attorney (*Suspendierung der Vorsorgevollmacht*) if it can be assumed that the authorised person is not acting in accordance with the wishes of the principal (§ 1820(3) and (4) BGB). (354) If a custodian has been appointed despite the existence of a power of attorney, the custodian can only revoke the power of attorney with ratification of the custodianship court as an *ultima ratio* if there is a risk of harm to the person under custodianship or their assets (§ 1820(5) BGB). (355) In the event of suspension or revocation of the power of attorney, the custodianship court may decide that the power of attorney be surrendered to the custodian by way of an order and – if necessary – enforce it (§ 1820(4) and (5)(3) BGB, §§ 285(2), 86(1)(1) FamFG). (356)

210 If there is no power of attorney, a custodian is appointed out of the custodianship court's own motion or upon application of the person concerned. The appointment can only be made upon application of the person concerned – and not *ex officio* – if they are unable to take care of their affairs solely due to physical illness or disability (§ 1814(4) BGB). The court selects a suitable custodian, taking into account the wishes of the person concerned (§ 1816 BGB). (357) A professional custodian should only be appointed if no other suitable person is available who is prepared to conduct the custodianship on a voluntary basis (§ 1816(5) BGB). The custodianship court can also appoint more than one custodian who – if they are entrusted with the same scope of functions – jointly take care of the affairs of the person under

---

(353) To avoid the appointment of an unknown custodian, the principal can also designate a supervisory person (*Kontrollbevollmächtigter*), cf, Steffen Kurth, 'Vorsorgevollmachten – ausgewählte Praxisprobleme und entsprechende Gestaltungsmöglichkeiten' (2024) NJW 2137 para 35.

(354) However, the thresholds for this are quite high since, in principle, the wish of the concerned person for a particular custodian must be complied with even if another custodian would be objectively more advantageous, BGH BeckRS 2024, 2620; Verena Spernath and Valentin Spernath, 'Widerruf und „Suspendierung" einer Vorsorgevollmacht nach § 1820 BGB' (2024) FamRZ 663, 669.

(355) Verena Spernath and Valentin Spernath, 'Widerruf und „Suspendierung" einer Vorsorgevollmacht nach § 1820 BGB' (2024) FamRZ 663, 667–668.

(356) See for general information about the newly established role of powers of attorney, Gabriele Müller Engels, 'Vorsorgevollmacht und Kontrollbetreuung in der Reform – was kommt, was bleibt?' (2021) FamRZ 645; Sonja K A Ritter, 'Änderungen durch das Gesetz zur Reform des Vormundschafts- und Betreuungsrechts – die Vorsorgevollmacht ab 1.1.2023' (2022) NotBZ 372. See especially regarding suspension and revocation of the power of attorney Verena Spernath and Valentin Spernath, 'Widerruf und „Suspendierung" einer Vorsorgevollmacht nach § 1820 BGB' (2024) FamRZ 663ff.

(357) These wishes play a very significant role, cf, fn 351.

custodianship (§ 1817 BGB). In any case, the appointment of a custodian must be limited to a specific and required scope of functions (§ 1815 BGB). The selected person is obliged to assume custodianship (§ 1819(1) BGB). However, if the person refuses to agree to assume custodianship, the custodianship court has *de facto* no means of forcing this person to do so; giving the selected person ultimately a right of veto. If the selected person has not agreed to the appointment as custodian and the custodianship court has appointed them as custodian anyway, the appointment of the custodian is nevertheless effective but contestable by a complaint on appeal. (358) Furthermore, since this approval is not a declaration of intent, the selected person can freely revoke it at any time; at least until their appointment as custodian. (359)

2. *Tasks and powers of the custodian*

211 Within the scope of functions assigned to the custodian, they are entitled and competent to represent the person under custodianship in and out of court without restrictions (§ 1823 BGB). (360) The scope of functions results exclusively from the operative provisions (*Beschlussformel*) of the appointment order (§ 286(1)(1) FamFG). (361) Admittedly, the custodian also receives a certificate of appointment (*Bestellungsurkunde*) in which the scope of functions is listed (§ 290(1)(3) FamFG). However, this certificate of appointment does not constitute a letter of authorisation (*Vollmachtsurkunde*) within the meaning of § 172 BGB, and therefore the power of agency cannot be effected by it. (362)

212 In relation to the person under custodianship, however, the custodian must act in accordance with their wishes or, subsidiarily, in accordance with their presumed wishes and discuss their affairs with them. Furthermore, the custodian may not represent the person under custodianship beyond what is required (§ 1821 BGB). If the custodian acts contrary to this, they may be

(358) BGH FamRZ 2020, 778, 779; BayObLG FamRZ 1994, 1061; Gabriele Müller-Engels in *Beck'scher Online-Kommentar BGB* (67th edn, Verlag C.H.BECK 1 May 2023) § 1819 BGB para 5.

(359) BGH FamRZ 2020, 778, 779.

(360) BT-Drucks. 19/24445, 258; Dieter Schwab, 'Die große Paragraphenwanderung und mehr – Zum Referentenentwurf einer Reform des Vormundschafts- und Betreuungsrechts' (2020) FamRZ 1321, 1325.

(361) Philipp Kersting in *Beck'scher Online-Kommentar ZPO* (50th edn, Verlag C.H.BECK 1 September 2023) § 53 ZPO para 12.

(362) BGH FamRZ 2010, 968, 969.

liable for damages (§ 1826 BGB). (363) The custodian is also subject to restrictions in the event of conflicts of interest (§ 1824 BGB) and in the event of particularly significant or risky decisions for the health or assets of the person under custodianship (§§ 1829ff, 1848ff BGB). In these circumstances, the custodian requires ratification of the custodianship court (§§ 1855ff BGB). The ratification of the custodianship court is a sovereign act and not a declaration of intent, (364) with the result that no avoidance is possible. (365)

213 Moreover, it is important to mention that the order of custodianship has no effect on the legal capacity of the person under custodianship, ie they may in principle continue to participate in legal transactions. (366) However, the custodianship court can also order a reservation of consent (*Einwilligungsvorbehalt*) to the extent that this is necessary to prevent a substantial danger for the person under custodianship or their assets. Due to the reservation of consent, the person under custodianship – similar to a person with limited capacity to contract according to §§ 106ff BGB (367) – requires the consent of the custodian for a declaration of intent that relates to their scope of functions (§ 1825 BGB). (368)

214 As long as, or to the extent that, the court has not ordered a reservation of consent and provided that the person under custodianship still has legal capacity, the person under custodianship, in principle, still has the capacity to sue or be sued (§§ 53(1), 51 and 52 ZPO). Nevertheless, the custodian can also represent them in court within the scope of functions of the custodian (§ 1823 BGB). This can lead to a co-existence of contradictory procedural acts by the custodian, on the one hand, and the person under custodianship, on the other. (369) Therefore, the custodian may declare in writing or by recording with the registry for the files of the court that the litigation will be conducted exclusively by them (*Ausschließlichkeitserklärung*). This has the

---

(363) Georg Dodegge, 'Vom Wohl des Betroffenen zu dessen Wünschen und Willen – neue Maßstäbe für die Betreuertätigkeit' (2022) FamRZ 844, 851.

(364) RG RGZ 99, 72, 74.

(365) Jakob Kadelbach in *Beck'scher Online-Kommentar BGB* (67th edn, Verlag C.H.BECK 1 August 2023) § 1855 BGB para 2.

(366) BT-Drucks. 19/24445, 258; S Lettmaier, *Familienrecht* (Verlag Franz Vahlen 2022), § 12(27).

(367) BGH FamRZ 2015, 1386, 1387.

(368) In practice, a reservation of consent is only ordered in approximately 2 % of all custodianships, Philipp Kersting in *Beck'scher Online-Kommentar ZPO* (50th edn, Verlag C.H.BECK 1 September 2023) § 53 ZPO para 7.

(369) T Fröschle, *Das neue Vormundschafts- und Betreuungsrecht* (Verlag C.H.BECK 2022) paras 1185–1188; Philipp Kersting in *Beck'scher Online-Kommentar ZPO* (50th edn, Verlag C.H.BECK 1 September 2023) § 53 ZPO para 13.

consequence that the person under custodianship has the equivalent position in the legal dispute as a person who is under legal disability (*nicht prozessfähige Person*; § 53(2) ZPO). To reverse this declaration of exclusivity, the custodian can withdraw it in the same manner. (370) Whether the custodian is allowed to make this declaration at all depends on the wishes and needs of the person under custodianship (§ 1821 BGB); but – even if they were not allowed to do so – this does not affect the effectiveness of the declaration as long as the declaration is within the scope of functions of the custodian. (371) In any case, the *res judicata* of the judgment rendered in the proceedings takes direct effect only for and against the person under custodianship (§ 325(1) BGB). (372)

3. *Tasks of the custodianship court*

215 In addition to the aforementioned constitutive appointment of the custodian, the ratification of particularly significant or risky legal transactions, and the constitutive cancellation of custodianship (see above para 206), the custodianship court supervises the custodianship and intervenes through appropriate instructions or prohibitions (§ 1862 BGB). Supervision is enabled by reporting obligations of the custodian. The custodian reports to the custodianship court on the personal circumstances of the person under custodianship when they start acting as a custodian and annually thereafter; if it is within their scope of functions, they also attach an inventory of assets (§§ 1863, 1835 BGB). Furthermore, the custodian must, of their own motion, inform the court without undue delay of any significant changes in the personal and financial circumstances of the person under custodianship. The court may also demand such information at any time (§ 1864 BGB). Finally, the custodian must render accounts to the court on their management of the assets, which the court must check (§§ 1865, 1866 BGB).

216 To assist the custodian, they may at any time seek the advice of the custodianship court on their rights and obligations vis-à-vis the persons under custodianship, the custodianship court, and third parties. (373) In the case of a volunteer custodian, an initial counselling interview is obligatory as soon as they are appointed (§ 1861 BGB). However, this interview is not

(370) BT-Drucks. 19/24445, 451.

(371) Philipp Kersting in *Beck'scher Online-Kommentar ZPO* (50th edn, Verlag C.H.BECK 1 September 2023) § 53 ZPO para 23.

(372) Peter Gottwald in *Münchener Kommentar zur ZPO* (6th edn, Verlag C.H.BECK 2020) § 325 ZPO para 14.

(373) BT-Drucks. 19/24445, 297.

constitutive, ie, the appointment of the custodian is also effective if the interview does not take place (§ 287(1) FamFG). (374)

217 To ensure that custodianship is only ordered as long as necessary, the custodianship court shall decide on the cancellation of the custodianship or the reservation of consent at the latest seven years after such measures have been ordered. If the measure was ordered against the declared will of the person concerned, the first decision on cancellation must be taken after two years at the latest (§ 295(2) FamFG). However, a violation of the provision does not result in *ipso iure* cancellation of custodianship. (375)

4. *End of custodianship*

218 The custodianship ends with the constitutive cancellation by the custodianship court or with the death of the person under custodianship (§ 1870 BGB). It is to be cancelled *ex officio* if its prerequisites cease to be met. If these prerequisites cease to be met for only a part of the custodian's scope of functions, then the custodian's scope functions is to be restricted. Likewise, the scope of functions can be extended if this becomes necessary (§ 1871 BGB). Instead of cancellation of the custodianship as a whole, the custodianship court can also remove only the custodian. It will do so, on the one hand, if the custodian's suitability to attend to the affairs of the person under custodianship is no longer guaranteed or if there is another compelling reason for the removal. On the other hand, the custodian may demand to be removed if, following their appointment, circumstances arise on the basis of which they can no longer reasonably be expected to conduct the custodianship. Lastly, the court may remove the custodian if the person under custodianship suggests an equally suitable person who is prepared to assume the custodianship (§ 1868 BGB). If the custodian dies or if they are removed, a new custodian is to be appointed as the custodianship itself does not cease to be in force because of this (§ 1869 BGB). (376) The custodian must, after their removal or the cancellation of the custodianship, surrender the assets and documents obtained in the course of custodianship to the person who was under custodianship or their successors and – if those persons demand – render accounts for the management of the assets (§ 1872 BGB).

D. *Conclusion to status of natural persons*

219 The judicial influence on the status of natural persons varies. While courts play virtually no role in the determination and change of names (except in

(374) BT-Drucks. 19/24445, 297.

(375) S Lettmaier, *Familienrecht* (Verlag Franz Vahlen 2022), § 12(30).

(376) Jakob Kadelbach in *Beck'scher Online-Kommentar BGB* (67th edn, Verlag C.H.BECK 1 August 2023) § 1869 BGB para 1.

adoption cases), they were, until 1 November 2024, active in a constitutive nature in the context of legal gender recognition. In the area of adult protection, too, they have an essential supervisory and constitutive function. Overall, however, slight liberalisation tendencies can be detected. Thus, **220** private autonomy and the wishes of the adult concerned play a considerable role in the new custodianship law. Ordering of custodianship by courts can even be avoided completely through well-considered and legally binding powers of attorney. The courts also no longer play a significant role in gender recognition since the new Self-Determination Act came into force.

V. Conclusions

German procedural law in family and succession matters is in its entirety still **221** very traditional, with the result that a large number of competences lie exclusively with the courts. This applies all the more to family law, where the establishment and dissolution of status relationships are at stake. When it comes to purely proprietary disputes, however, the German legislature requires less judicial control as can be seen from the examples of matrimonial property law or, to a large extent, succession law. In the areas of asset administration and other recurring matters, the judges' workload is also reduced by the assignment of many tasks to senior judicial officers. (377) Further, in succession law, the courts are assisted by notaries in some matters. However, most decisions that can become *res judicata* are still assigned to judges.

Generally, slowly but surely, a slight trend towards liberalisation can be **222** detected, as evidenced by the (planned) legislative initiatives in the areas of gender recognition, the establishment of legal parenthood, and parental responsibility. Nevertheless, the German legislature remains quite cautious with regard to the extra-judicial administration of justice, thus making, for instance, out-of-court divorce proceedings in the near future inconceivable.

(377) Kornelia Schmid in *NomosKommentar Rechtspflegergesetz* (Nomos Verlagsgesellschaft 2012) Einleitung para 4.

GREECE

by *Eleni Zervogianni*

I. Introduction

Greece is a unitary state with a civil law system. Substantive family and succession law are codified and form part of the Greek Civil Code of 1940 (hereinafter: GrCC), (1) which, as far as family law is concerned, has been subsequently amended substantially. (2) **1**

Issues of family and succession law are basically dealt with by civil courts. All procedures before the civil courts are regulated by the Code of Civil Procedure (hereinafter: GrCCP). This Code includes special rules applicable to family law cases that are tried through contentious proceedings, (3) as well as rules on non-contentious proceedings in family, succession, and civil status matters. (4) Family or succession law cases are brought before the Court of First Instance and may then be tried in the second instance if the judgments of the first instance are appealed. Although both the scientific community and legal practitioners have constantly advocated for the establishment of family courts, with specially trained judges, supported by social services and other specialised personnel, (5) this has not happened to date. The highest court in civil matters is *Areios Pagos*, which is a Court of Cassation; there is no Constitutional Court in Greece. **2**

---

(1) See the fourth book of the Greek Civil Code of 1940 (Arts 1346-1694), which entered into force on 23 February 1946.

(2) The most significant amendments of the Civil Code in family law were introduced by Law 1250/1982 on civil marriage; Law 1329/1983 on the alignment of the provisions of the Civil Code with the principle of equality between men and women and the modernisation of family law; Law 2447/1996 on adoption, guardianship, foster care, and adult protection; Law 3089/2002 on medically assisted reproduction; Law 4800/2020 on the relations between parents and children; Law 5089/2024 on equality in civil marriage. Moreover, Art 22 of Law 4509/2017 rendered divorce by mutual consent non-judicial.

(3) Art 592 GrCCP.

(4) See, among others, Art 782 GrCCP for the change of acts of the civil registry, Art 796 GrCCP on the appointment of a guardian for a minor by the court, Art 797 GrCCP for authorisations needed for the administration of a minor's property, Art 799 GrCCP for authorisations for post mortem assisted reproduction and for surrogacy, Art 800 GrCCP on adoption, Art 801 GrCCP ff on 'judicial assistance' (*δικαστική συμπαράσταση*), which is a protective legal regime for adults, Art 807 ff GrCCP on the publication of a will, Art 814 GrCCP on judicial liquidation of an estate (*δικαστική εκκαθάριση κληρονομίας*), Arts 819 ff GrCCP on certificates of succession.

(5) See, among others, Theofano Papazisi, 'Oikogeneiako Dikastirio os Meso Prostasias tis Oikogeneias' (2014) Efarmoges Astikou Dikaiou (hereinafter: EfAD) 220; Ioannis Valmantonis, 'Skepseis gia mia Filiki pros to Paidi Astiki Dikaiosyni' (2022) EfAD 992.

3 Because of the great delay in the administration of justice, for which Greece has been repeatedly condemned by the European Court of Human Rights, (6) there is an ongoing discussion on the acceleration of the handling of cases. It is for this reason that the Code of Civil Procedure has being constantly amended in the last few years, (7) while, at the same time, there have been efforts to decrease the workload of courts by reducing the number of cases that end up before courts. To this last end, there have been two main legislative trends, both particularly noticeable in family law:

4 The first is the promotion of mediation, which is compulsory for many (but not all) family law disputes, (8) in the sense that the participation of both parties, with their lawyers, in an initial mediation session that aims at exploring the possibility of viable and mutually satisfactory resolution of the parties' dispute, amounts to a prerequisite for the hearing of the case before the court. (9)

5 The second approach to decrease courts' workload is de-judicialisation by shifting specific types of cases away from courts, and assigning them to

---

(6) Almost half of the cases in which Greece has been condemned by the European Court of Human Rights for violations of the European Convention on Human Rights concerned the violation of Art 6 ECHR (right to a fair trial) and were due to the excessive length of proceedings. See <https://hudoc.echr.coe.int/ > accessed 6 November 2024. In family law cases, the excessive length of proceedings has also been considered as a violation of Art 8 (protection of private and family life). See, for instance, *Paparrigopoulos v Greece* App no 61657/16 (ECHR, 30 June 2022); *Anagnostakis and others v Greece* App no 46075/16 (ECHR, 23 September 2021); *I.S. v Greece* App no 19165/20 (ECHR, 23 May 2023).

(7) See, for instance, Law 4055/2012 on fair trial and reasonable duration of proceedings, which transferred most non-contentious proceedings to the competence of Courts of Peace; Law 4335/2015, that considerably amended the provisions on special proceedings; Law 4640/2019 on mediation in civil and commercial cases, which provided for compulsory mediation sessions is many family law cases; Law 4842/2021 on speedy civil proceedings. Individual provisions of the Code of Civil Procedure are frequently amended by laws that primarily aim at the regulation of other issues. Only in 2022 did the following laws include amendments to the Code of Civil Procedure: Law 4912/2022, Law 4937/2022, Law 4938/2022, Law 4947/2022 and Law 4963/2022. Significant amendments of Civil Procedural Law were enacted in 2024 by Art 4 of Law 5108/2024, which abolished the Courts of Peace and transfered their competences to the Courts of First Instance. See also Law 5134/2024 that amended respectively the provisions of the Code of Civil Procedure on the competence of Courts.

(8) See Art 6 of Law 4640/2019. This provision exempts from compulsory mediation matrimonial disputes that concern divorce, annulment of marriage, and the recognition of the existence or non-existence of marriage. Moreover, according to Art 1514 para 2 GrCC, no mediation is required in cases regarding parental responsibilities if there has been domestic violence. See in more detail below II D 3 b.

(9) See Art 7 of Law 4640/2019.

administrative authorities, (10) notaries, (11) attorneys, (12) or even leaving it to the parties to decide, thus increasing the scope of private autonomy. (13) De-judicialisation pertains mostly, but not exclusively, to cases initially falling within the non-contentious jurisdiction.

II. Family law

6 As family law is sensitive to social change, the relevant provisions of the Greek Civil Code have been amended considerably over the years towards guaranteeing gender equality, (14) protecting the interests of minors and vulnerable adults, (15) enhancing private autonomy, (16) as well as regulating the use of new technologies on human reproduction. (17) There are also special laws, outside the Civil Code on particular issues, such as the 'cohabitation agreement' (*σύμφωνο συμβίωσης*), which is a form of registered partnership between persons of different or of the same sex, (18) and gender identity. (19)

7 Because of the need for clarity and certainty in family relations, family law presents certain characteristics that deviate from the general provisions of civil law: (20) declarations of will that aim at the establishment of family law relations are formal, must be made in person and may not be subject to conditions. Moreover, as a rule, with a few deviations introduced by recent legislation, a court ruling is still required for the termination of family law relations. The role of courts also extends to the regulation of family law relations, especially in matters of parental responsibilities, as well as to

---

(10) See esp Arts 61ff of Law 4182/2013 on the curatorship of vacant estates and in more detail below III C 4.

(11) See esp Art 22 of Law 4509/2017 that amended Art 1441 GrCC on divorce by mutual consent. See also below II A 3 a.

(12) See Law 5095/2024 on the enhancement of the competence of lawyers, which, among others (in Arts 3ff), assigns lawyers the competence to decide on the issuance of a certificate of succession if there is no dispute. See below III B.

(13) See Art 1514 GrCC, as amended by Law 4800/2021 on the possibility of parents to regulate the exercise of parental responsibilities after divorce by written agreement. See in more detail below II D 3 b.

(14) Law 1329/1983.

(15) Law 2447/1996.

(16) See Art 22 of Law 4509/2017 on divorce by mutual consent, Law 4800/2021 on the relations between parents and children that amended the Civil Code. See below II A 3.

(17) See esp Laws 3089/2002 and 3305/2005, as amended by Law 4958/2022.

(18) Law 4356/2015.

(19) Law 4491/2017.

(20) See, among others, Apostolos Georgiades, *Oikogeneiako Dikaio* (hereinafter: *OikD*) (3rd edn, Sakkoulas 2022) § 3 nr 16.

granting authorisation for specific legal acts, regarding, for instance, the administration of the estate of a minor or of an incapacitated adult, or the commissioning of a surrogate mother. Within this general framework, family law is abound with rules of mandatory law.

8 In family law cases, the law reserves a significant role for the public prosecutor. The public prosecutor may, among others, file for the annulment of a defective marriage, (21) has to be notified for certain applications for non-contentious proceedings and may appeal such court decisions, (22) may themself be an applicant before the court in non-contentious proceedings, (23) may adopt interim measures on the exercise of parental responsibilities of a child in cases of emergency (24) and can appoint a legal guardian for unaccompanied minors. (25)

9 Social services in practice play a limited role in Greece in the regulation of family law relations. Law 2447/1996 provided that in each Court of First Instance, a social service unit should be established (26) with advisory and decision-making powers, (27) but these units were never actually established. (28) Their tasks have been assigned to other, existing, social services (29) which nevertheless do not have adequate means to cover all needs. To address this problem, a special provision has been enacted (30) according to which, even when the law provides that the social services should submit to the court a report on a specific case, the court may proceed to the adjudication of the case even if no such report has been submitted.

---

(21) Art 1378 GrCC.

(22) Arts 748, 760 and 761 GrCCP.

(23) See, eg, Art 1666 GrCC on the right of the public prosecutor to initiate the procedure for the placement of an adult in the protective regime of 'judicial assistance' (*δικαστική συμπαράσταση*). See below IV C 1.

(24) Art 1532 para 4 GrCC.

(25) Art 61 IA of Law 4939/2022, as amended by Art 17 of Law 4960/2022. On guardianship of minors in general, see below II D 4 a.

(26) Art 49 of Law 2447/1996.

(27) Art 50 of Law 2447/1996.

(28) According to Art 52 of Law 2447/1996, a Presidential Decree should regulate the details regarding the staffing and organisation of these social service units, but this has not been issued and thus these units are not in place.

(29) See, for instance, Art 1 of Presidential Decree 226/1999 (as amended by Law 4538/2018) on reports for the adoption of minors and Art 1 of Presidential Decree 250/1999 on 'judicial assistance' (*δικαστική συμπαράσταση*), which is a protective regime for adults. See below IV C 1.

(30) Art 19 para 4 Law 2521/1997.

A. *Divorce and legal separation*

1. *Preliminary remarks: a brief look into the process of de-judicialisation*

In Greece, there are two possibilities available for persons to formalise their relationship. The first is marriage, which, since February 2024, may be concluded between persons of different or of the same sex. (31) The second possibility, which is also possible for persons of different or of the same sex, is the so-called cohabitation agreement (*σύμφωνο συμβίωσης*) which is a form of registered partnership. (32) Both marriages and registered partnerships may be annulled by court decision if they are defective. (33) This is the case if the parties did not comply with certain conditions set out in the law for their conclusion. (34) Furthermore, both marriages and registered partnerships can be dissolved, either by the death of one of the parties or by 'divorce', which is a term technically reserved only for the dissolution of marriage. (35) **10**

The social and moral changes in the last decades have led to a constant liberalisation of divorce, (36) while the rules on the dissolution of the registered partnership are even more flexible than divorce. (37) The two types **11**

(31) Art 1350 GrCC, as amended by Art 3 of Law 5089/2024 on 'Equality in Civil Marriage'. According to Art 10 of Law 5089/2024, same-sex marriages of Greeks performed abroad before the entry into force of this Law, in accordance with the law of the place where they were performed, are recognised as existing already from the moment they were performed, unless one of the spouses has in the meantime contracted a new valid marriage, the non-existence of the marriage has already been recognised by an irrevocable decision of a Greek court or the marriage has been dissolved or annulled.

(32) Law 4356/2015.

(33) Art 1376ff GrCC on the annulment of marriage and Art 3 of Law 4356/2015 on the annulment of a registered partnership.

(34) On these conditions, see Arts 1350ff GrCC and Art 2 of Law 4356/2015 on registered partnerships.

(35) Divorce is regulated in Arts 1439–1441 GrCC, while the dissolution of registered partnerships is regulated in Art 7 of Law 4356/2015.

(36) A contested divorce has been facilitated by Art 14 of Law 3719/2008 that amended Art 1439 GrCC so that now a two-year separation of the spouses (instead of four, as initially provided in the law) is sufficient as a ground for a divorce. As to divorce by mutual consent, the initial version of Art 1441 GrCC (of 1983) provided a minimum duration of marriage of one year, as well as the declaration of the will of both spouses to end their marriage in two court sittings held at least six months apart. In 2012, divorce by mutual consent was facilitated by Art 3 of Law 4055/2012 that amended Art 1441 GrCC, in that the minimum duration of marriage decreased to six months and the procedure before the court was completed in a single sitting. Since the last amendment of Art 1441 GrCC by Law 4509/2017, divorce by mutual consent is non-judicial. See below II A 3 a.

(37) See below II A 3 b.

of divorce in Greece are contested divorce and divorce by mutual consent. Out-of-court procedures are currently provided for divorce by mutual consent as well as for the dissolution of registered partnerships, with or without the consent of the other registered partner. The dissolution in both cases takes effect when the relevant notarial deed is filed at the civil registry. (38) It is hardly conceivable that the same case is pending before a judicial and non-judicial authority. In practice, this would only occur when an application for a contentious divorce has been filed while at the same time the parties negotiate a divorce by mutual consent. (39) Since there is no rule that precludes such parallel proceedings, marriages are dissolved either by the irrevocable court decision on divorce or by the filing of the notarial act on the dissolution of marriage to the civil registry, whichever occurs first.

2. *Proceedings before the court*

a) *Contested divorce*

12 Since 1983, the regulation of divorce is no longer based on fault. Setting aside cases where one of the spouses has been declared missing by a court decision, (40) the only ground for contested divorce is the irretrievable breakdown of the marriage. If the spouses have been living separately for more than two years, there is a non-rebuttable presumption of an irretrievable breakdown of marriage. (41) In practice, most contested divorces are issued on this basis. (42) If this is not the case, it is on the plaintiff to prove that the marriage has irretrievably broken down for a reason which is due

---

(38) See Art 1441 para 5 GrCC for divorce and Art 7 para 2 of Law 4356/2015 for the dissolution of the registered partnership.

(39) In divorce by mutual consent, both spouses have to sign the divorce agreement, regardless of who initiates the proceedings. In a registered partnership the law does not provide for any court proceeding for its dissolution. On the de-judicialised procedure to dissolve a registered partnership see below II A 3 b.

(40) When the decision becomes irrevocable, the person is presumed to be dead (Art 785 GrCCP, 48 GrCC). However, according to Art 1440 GrCC, if the person who has been declared missing was married, this marriage can only be dissolved with a court decision. The process followed is this of a contentious divorce, although there is in fact no dispute.

(41) See Art 1439 para 3.

(42) See for statistics <https://www.statistics.gr/documents/20181/16314203/%CE%A3%CF%84%CE%B1%CF%84%CE%B9%CF%83%CF%84%CE%B9%CE%BA%CE%AD%CF%82+%CE%94%CE%B9%CE%B1%CE%B6%CF%85%CE%B3%CE%AF%CF%89%CE%BD+%28+2017+%29.pdf/c6722cda-7c31-4f55-9eaa-6177db8cdcd7?t=1555059288837> accessed 3 June 2025.

either to the defendant or to both spouses. (43) Bigamy, adultery, abandonment, domestic violence (44) or plotting against the plaintiff's life constitute rebuttable presumptions of such a breakdown. (45)

13 The procedure is initiated by a claim submitted by one of the spouses. The law explicitly provides that such cases are exempted from compulsory mediation. (46) The competent court for contentious divorces is the single member Court of First Instance of the domicile of the defendant or of the last common residence of the spouses. (47) The special rules of the Code of Civil Procedure on matrimonial proceedings (family disputes) apply. (48) The marriage is dissolved as soon as the court decision that grants the divorce, which is constitutive in nature, becomes irrevocable. (49)

14 The dissolution of marriage by divorce has an important impact on the matrimonial relations of the spouses. While, according to the default matrimonial property regime, (50) the property of each spouse is separate during the marriage, after divorce, the law entitles each spouse to claim part of the increase in the property of the other spouse which occurred during the marriage and can be attributed to their own contribution. (51) Moreover, under very restrictive conditions, one ex-spouse may be liable to pay maintenance to the other ex-spouse. (52) In matters regarding the relations between the spouses and their children, it is not the divorce that brings about changes, but rather the fact that the parents live apart. (53) All these claims can, but do not need to, be joined to the divorce claim. (54) After the divorce,

---

(43) Art 1439 para 1 GrCC.

(44) Law 3500/2006.

(45) Art 1439 para 2 GrCC.

(46) Art 6 para 1 a of Law 4640/2019.

(47) Arts 17 as well as 22 and 39 GrCCP.

(48) Art 592 para 1 GrCCP.

(49) Art 1438 GrCC. Court decisions against which it is not possible to file an appeal or revision are irrevocable.

(50) Art 1397 GrCC. The alternative regime provided by the law is the regime of common property, regulated in Art 1403 ff GrCC. It has nevertheless practically hardly any significance, since very few couples make use of this option. See below II E 1.

(51) Art 1400 GrCC. It is (rebuttably) presumed (in Art 1400 para 1 sent 2) that this contribution amounts to one-third of the increase in the property of the other. See below II E 1.

(52) Art 1442 GrCC.

(53) See Art 1513 GrCC. See in more detail below II D 3 b.

(54) According to Art 218 GrCCP, this is possible if all claims are subject to the same type of proceedings (see also on family disputes, Art 610 GrCCP). In the case in question, the rules for special proceedings for family disputes (Art 592 GrCCP) are applicable. It is debated whether the claim by which one spouse claims their contribution to the increase of the property of the other is subject to the provisions of Art 592ff GrCCP. In the affirmative is the

the ex-spouse has no succession rights by law in the estate of the other spouse. Since marriage as a rule has no impact on the name of the spouses, neither has its dissolution. (55)

b) *Annulment of defective marriage or registered partnership*

15 A marriage or a registered partnership can be annulled if it is defective. A marriage or a registered partnership may be void in the case of non-compliance with the conditions to marry or conclude a registered partnership that pertain to age and to the capacity to enter into legal acts, or in the case of an impediment to marry or conclude a registered partnership. (56) The impediments refer to the existence of a previous marriage or registered partnership and to kinship by blood, adoption, or affinity. (57) These provisions are valid both in marriages and in registered partnerships, with the exception of kinship by affinity. While in the case of a registered partnership the impediment refers only to relatives in a direct line (parents, children) of a former spouse or registered partner, (58) in marriage it extends to further relatives such as siblings, the nephews/nieces, and uncles/aunts of the former spouse or registered partner. (59) This has led to the condemnation of Greece by the European Court of Human Rights in the case *Theodorou & Tsotsorou v Greece*. (60) Moreover, the marriage or the registered partnership is voidable in the case of mistake regarding the identity of the other spouse or partner or in the case of duress. (61)

16 Defective marriages and registered partnerships have all the legal consequences as those for valid marriages and partnerships, until they are annulled

---

prevailing opinion in case-law: see decisions of the Greek Court of Cassation (Areios Pagos. Hereinafter: AP) 106/2021, Isokratis; AP 1548/2022, Nomos. On this issue, see Georgiades, *OikD*, § 13 nr 44, with further references.

(55) There is only one exception to this rule: according to Art 1388 para 3 GrCC, as amended by Art 28 of Law 3719/2008, each spouse may add the surname of the other spouse to their own, upon joint declaration in the registry of civil status. If a marriage is dissolved because of divorce, it is considered that this declaration has been revoked. On the change of surname, see below IV A 2.

(56) Art 1372 para 1 GrCC, Art 3 of Law 4356/2015.

(57) Arts 1354–1357 GrCC, Art 2 of Law 4356/2015.

(58) Art 2 para 2 b of Law 4356/2015.

(59) Art 1357 GrCC.

(60) App No 57854/15 (ECHR, 5 September 2019).

(61) See Arts 1374–1375 GrCC for marriage and Art 2 para 2 of Law 4356/2015 that states that the relevant provisions on the annulment of marriage also apply to registered partnerships.

by an irrevocable court decision. (62) The same procedural rules that are applicable in the case of contested divorces also apply for an annulment. (63) The proceedings may be initiated by either spouse or registered partner, and, in the case of void marriages or partnerships, by other persons who have a legitimate interest due to family connections in the annulment of the marriage or partnership or by the public prosecutor. (64) While in a voidable marriage the law sets a specific deadline within which the claim must be filed, (65) no such deadline is in place if the marriage is void. The practical significance of annulment, as opposed to dissolution, is that, unless provided otherwise in the law, the effects of annulment are *ex tunc*. (66)

3. *De-judicialised proceedings*

a) *Divorce by mutual consent*

17 It is estimated that around 80% of divorces in Greece are divorces by mutual consent. (67) This type of divorce was initially pronounced by a court, in non-contentious proceedings but this changed in December 2017, (68) with the introduction of notarial divorce by mutual consent as the only form of divorce by mutual consent.

18 The procedure for divorce by mutual consent is the following. (69) The spouses, each of whom has to be represented by a different lawyer, proceed to a written agreement or joint digital declaration on the dissolution of their marriage. If they have minor children, they must also submit an additional agreement, valid for at least two years, that regulates who exercises parental care, the place of residence of the child, the contact of the child with the parent who does not reside with the child, and the amount due as child support. These agreements are then submitted to a notary, who draws up the

---

(62) It is nevertheless disputed if this decision is constitutive in nature (this is the prevailing opinion: see Efi Kounougeri-Manoledaki, *Oikogeneiako Dikaio* (hereinafter: *OikD*) (9th edn, Sakkoulas 2024) nr 211; Thanasis Papachristou, *Oikogeneiako Dikaio* (hereinafter: *OikD*) (P.N. Sakkoulas 2014) 60) or declaratory (Georgiades, *OikD*, § 6 nr 30).

(63) Disputes regarding the registered partnership are also subject to the special provisions on family disputes of Art 592 GrCCP. See also Georgiades, *OikD*, § 22 nr 39.

(64) Art 1378 GrCC, Art 3 para 1 of Law 4356/2015.

(65) Art 1380 GrCC.

(66) Art 1381 GrCC as well as Georgiades, *OikD*, § 6 nr 45; Athina Kotzampasi, *Egcheiridio Oikogeneiakou Dikaiou* (hereinafter: *EOikD*) (3rd edn, Sakkoulas 2023) 75.

(67) <https://www.statistics.gr/documents/20181/dfad21dd-7c31-de8b-e264-c94d650c880b> accessed 3 June 2025.

(68) Art 22 of Law 4509/2017.

(69) Art 1441 GrCC.

notarial deed on the dissolution of marriage, validates the additional agreements on the children and incorporates them into the deed. After the parties and their lawyers sign the notarial deed, this is filed at the Civil Registry and the marriage is dissolved. The agreements regarding children are enforceable, just like a court ruling.

19 The consequences of the divorce by mutual consent are the same as those of contested divorce. Some issues, such as the exercise of parental responsibilities if the spouses have common children, are (necessarily) regulated in the divorce by mutual consent. For those consequences that are not regulated, the spouses can file separate claims. It is debated whether the spouses may incorporate in the divorce further agreements regarding their children (eg, on the regulation of their contact with grandparents). (70) As regards their matrimonial property relations, after a recent decision of the plenum of the Greek Court of Cassation (*Άρειος Πάγος*. Areios Pagos, hereinafter: AP), it is no longer disputed that, within the general settlement of such relations during the negotiations for a divorce by mutual consent, each spouse may waive the right to accrued gains of the other spouse, but this agreement only enters into effect once the marriage is indeed dissolved by divorce with mutual consent. (71) There is also no doubt that the spouses may waive their own right to maintenance after divorce, since the relevant provisions are not mandatory law. (72)

20 Although the procedure for a divorce by mutual consent is undoubtedly quick and cost-efficient, it presents two significant problems. The first lies in its purely contractual nature, due to which the general provisions of civil law on juridical acts apply. If, according to these provisions, the spouses' agreement is void, it does not have any legal effects, even after it is filed at the registry, (73) leading thus to legal uncertainty on the dissolution of the marriage.

21 The second and more important problem in practice is that at no point in the procedure is there any control as to whether the agreement of the spouses

---

(70) According to Georgiades, *OikD*, § 19 nr 29 and Kounougeri-Manoledaki, *OikD*, nr 697, this is not possible. Contra I S Spyridakis, *Oikogeneiako Dikaio* (hereinafter: *OikD*) (3rd edn, Sakkoulas 2020), nr 77.4.4; Ioannis Katras, 'To Synainetiko Diazygio meta ton N. 4800/2021' (2021) Elliniki Dikaiosyni (hereinafter: EllDni), 1050, 1057; S Ioakeimidis, 'Oi Proypotheseis, i Diadikasia kai i Prosvoli tou Synainetikou Diazygiou meta ton N. 4509/2017' (2018) Nomiko Vima (hereinafter: NoV), 989, 1000.

(71) AP (full bench) 6/2019, Nomos.

(72) Georgiades, *OikD*, § 21 nr 1; Kounougeri-Manoledaki, *OikD*, nr 721; Eustratiou, in Apostolos Georgiades (ed), *Syntomi Ermineia Astikou Kodika* (hereinafter: *SEAK*) (Vol II, P.N. Sakkoulas 2013) Art 1442 nr 7.

(73) Georgiades, *OikD*, § 19 nr 38ff; Kounougeri-Manoledaki, *OikD*, nr 685ff.; Kalirroi Pantelidou, 'To Symvolaiografiko Diazygio' (2018) NoV, 821, 825.

serves the best interests of their child. (74) The notary is certainly not competent to perform such an assessment. It is therefore up to the parents, whom the legislator seems to trust too much. Moreover, even though parents must hear their children before deciding on matters pertaining to parental care, (75) there is no guarantee by the law that they will actually do so. Therefore, concerns have been raised as to the compatibility of this regulation with the Constitution. (76) As a solution, it has been proposed in the literature and also accepted by case-law that parents can proceed to court for the regulation of parental care at any point in time, even before the expiry of the initial agreement, if this does not serve (or no longer serves) the best interests of the child. (77)

b) *Dissolution of registered partnership*

22 The main difference in the regulation of marriage and registered partnership is that the latter is easier to dissolve. The dissolution of a registered partnership always occurs out-of-court. It is effected by notarial deed and it develops its results once the deed is filed in the Civil Registry. The declaration before the notary may be by mutual consent or unilateral. The unilateral declaration takes effect three months after an invitation is served to the other partner to proceed to the consensual dissolution of the partnership. All declarations must be in person. However, unlike divorce by mutual consent, for the dissolution of the registered partnership, it is not necessary for the partners to be represented by lawyers. Moreover, if the partners have common children, the conclusion of an agreement on parental responsibilities and maintenance of the children does not amount by law to a condition for the dissolution of the partnership. Parental responsibilities can be

(74) On the best interest, as a leading principle of the regulation of child law, see below II D 2.

(75) Art 1511 para 4 GrCC.

(76) See the report of the Scientific Committee of the Hellenic Parliament, <https://www.hellenicparliament.gr/UserFiles/7b24652e-78eb-4807-9d68-e9a5d4576eff/m-adiat-epist.pdf> accessed 3 June 2025, pp 7–8; Pantelidou, NoV 2018, 822-823; Ioakeimidis, NoV 2018, 997.

(77) See the decision of the single member Court of First Instance of Thessaloniki 4620/2020, EllDni 2020 1719 ff; Georgiades, *OikD*, § 19 nr 24; Kounougeri-Manoledaki, *OikD*, nr 700; Pantelidou, NoV 2018, 826; Katras, EllDni 2021, 1054. Contra Athina Kotzampasi, 'Mia Proti Apotimisi tou N. 4800/2021 gia tin Epimeleia kai tin Epikoinonia ton Paidion meta to Diazugio – me Eidikoteri Anaphora Kurios sto Synainetiko Diazygio kai stin Kaki Askisi tis Gonikis Merimnas' (2022) Armenopoulos (hereinafter: Arm), 5, 8.

regulated by agreements of the parents or by court order, as is the case in a contentious divorce. (78)

23 Because the personal and property relations of the partners are mainly modelled on the pattern of marriage, granting the partners somehow more freedom as to the regulation of their property relations, (79) the consequences of the dissolution of a registered partnership are quite similar to those of divorce.

4. *Few remarks on cross-border cases*

24 The rules of the Greek Code of Civil Procedure on international jurisdiction apply when neither EU Regulations nor any other international convention apply, or when such texts refer to the national rules of the State on international jurisdiction. Regarding divorce and annulment of marriage in particular, the Greek rules on international jurisdiction are applicable in cases of residual jurisdiction, according to Article 6 of Regulation 2019/1111.

25 As a rule, Greek courts have international jurisdiction for both Greek nationals and foreigners if they would have territorial jurisdiction for the case in question. (80) The territorial jurisdiction of a court in civil law cases in adversarial proceedings is based in principle on the domicile of the defendant. (81) Specifically, disputes on divorce as well as the annulment of marriages and registered partnerships can also be brought before the court of the place of the spouses' last common residence. (82) Greek law also adopts excessive jurisdiction for persons of Greek nationality. (83) To the contrary, unless international jurisdiction is established based on Regulation 2019/1111, according to the Greek Code of Civil Procedure, Greek courts have no jurisdiction over divorce and annulment of marriage if both spouses are foreigners or if the law of the nationality of either spouse does not recognise the jurisdiction of another State over these disputes. (84) The procedural law that courts apply is always *lex fori*. (85) When the same case is pending both before a Greek court and a foreign court, and provided that

---

(78) See below II D 3 a.

(79) See in more detail below II E 2.

(80) Art 3 GrCCP.

(81) Art 22 GrCCP.

(82) Art 39 GrCCP.

(83) Art 601 GrCCP in combination with 592 para 1 GrCCP.

(84) Art 605 GrCCP.

(85) This is considered to be a general legal principle. See Konstantinos Kerameus, Enforcement in the International Context (Recueils des Cours de l'Académie de Droit International de La Haye, Vol 264, 1997) 183, 377–379. See also AP 1127/2020, Nomos; AP 717/2006, Nomos; AP 803/2000, Nomos.

the rules of the Greek Code of Civil Procedure are applicable, the *lis pendens* principle does not apply. (86)

26 The same principles seem to apply to international jurisdiction also in out-of-court proceedings for divorce by mutual consent. (87) In the literature it has been pointed out that problems might arise in the (unlikely) scenario that there is international jurisdiction for the divorce, but the applicable law is not Greek law, in which case the notary must inform the parties and abstain from the drafting of the notarial deed. (88) In practice, though, in such a case the spouses will have designated Greek law as applicable, according to Article 5 of Regulation 1259/2010, so the problem will not arise.

27 Divorces from other EU Member States are recognised in Greece, regardless of whether they are judicial or non-judicial, if the applicant submits to the competent Greek authority the certificate provided for in Article 36 of Regulation 2019/11 (or Article 39 of the previous Regulation 2201/2003). (89) In Greece, the body competent to issue certificates as referred to in Article 36(1) is the court that issued the decision or the authority (notary) that issued the document. (90)

28 Finally, the same provisions of the Greek Code of Civil Procedure apply as regards the international jurisdiction for the annulment of registered partnerships. (91) A registered partnership is dissolved in out-of-court proceedings and, according to the unilateral conflict of laws rule of Article 13 para 1 of Law 4356/2015, the provisions of this Law always apply to all registered partnership agreements concluded in Greece.

B. *Parenthood*

29 The rules on the establishment of parenthood are included in the Greek Civil Code. (92) These adhere to the traditional rules according to which, the crucial factor for the establishment or (retroactive) dissolution of parenthood is the existence (or non-existence) of a biological link and they are, therefore,

---

(86) See AP 717/2006, Nomos, according to which, the domestic legal order grants priority to domestic jurisdiction, and therefore the lis pendens objection presupposes that the same case has been brought before more domestic, and not foreign, courts. See also AP 386/2001, Nomos.

(87) Report of the Scientific Committee of the Parliament, p 10. Cf. Katras, EllDni 2021, 1054.

(88) Katras, Ellni 2021, 1054.

(89) <https://www.ypes.gr/diazygio/> accessed 3 June 2025.

(90) < https://e-justice.europa.eu/pdf-export/5974_en> accessed 3 June 2025.

(91) M Psarra, 'Symfono Symviosis' (Chapter 4B) in Chrysafo Tsouka (ed), *Oikogeneiako Diethnes Dikaio* (Nomiki Vivliothiki 2016) nr 25 (p 165).

(92) Arts 1463ff GrCC.

based on the concepts of motherhood and fatherhood. Exceptions to this have been introduced for children born through methods of medically assisted reproduction, (93) where the will of the persons to have a child, and the social-emotional bond that is thus created, prevails over biology. (94) Entries in birth certificates or other relevant certificates have merely an evidentiary effect and do not establish parenthood if the conditions of substantive law are not met. (95)

30 Since February 2024, when Greece introduced same-sex marriage, there is the possibility of same-sex parenthood, which can be undoubtedly established though adoption. (96) The new Law did not amend the provisions on the establishment of kinship. Since the law does not provide for the establishment of 'double' motherhood or 'double' fatherhood, it remains unclear if same-sex parenthood could be established at birth, by an analogous application of the existing provisions. Given that, according to the rather prevailing opinion in the literature, same-sex female married couples will have access to medically assisted reproduction, (97) there are many voices in favour of the establishment of parenthood of both spouses already at birth. (98) It nevertheless remains unclear whether this will be accepted in practice. The issue is even more controversial when it comes to same-sex

---

(93) Law 3089/2002, which amended the provisions of the Greek Civil Code on the establishment of parenthood.

(94) For the notion of 'social-emotional' kinship, see Ioannis Deliyannis, 'Idrysi kai Amfisvitisi tis Syggeneias kata to Elliniko Dikaio' (1992) EllDni, 1. For the use of this notion in the framework of (heterologous) artificial reproduction, see the Explanatory Memorandum of Law 3089/2002, Point II 1 (p 4) and also in detail Kounougeri/Manoledaki, *OikD*, nr 915 ff.; Georgios Lekkas, 'Iatrikos Ypovoithoumeni Anaparagogi kai Syggeneia sto Elliniko Dikaio. Kathierosi tis Koinonikosynaisthimatikis Syggeneias i tis Teknopoiias horis Syggeneia' in Thanasis Papachristou and Efi Kounougeri-Manoledaki (eds), *Oikogeneiako Dikaio ston 21o Aiona* (Sakkoulas 2012) 57.

(95) Art 12 of Legislative Decree 344/1976.

(96) Art 1545 GrCC provides that spouses may proceed to joint adoption, while it is not disputed that one of the spouses may also adopt the child of the other spouse. On adoption, see below II C.

(97) See Lina Papadopoulou, 'Epektasi tis Emfylis Isotitas stin Oikogeneia', TA NEA (Athens, 26 January 2024) 8. See also Georgios Lekkas, 'Isotita ston Politiko Gamo kai Symferon tou Paidiou' (2024) Chronika Idiotikou Dikaiou (hereinafter: ChrID) 161, 165-166; Virginia Peraki, 'Apoktisi Teknon kai Idrysi Syggeneias entos Gamou Omofylon' (2024) EllDni, 427, 432; Athina Kotzampasi, 'Ermineftika Zitimata tou N. 5089/2024 gia tin Isotita ston Politiko Gamo' (2024) EllDni, 395, 400; Katerina Fountedaki, 'Proti Proseggisi tou Nomou 5089/2024 gia tin Isotita ston Politiko Gamo' (2024) EllDni 2024, 412, 421; Eleni Zervogianni, 'Eggama Zevgaria Gynaikon kai Iatrikos Ypovoithoumeni Anaparagogi: Prosvasi kai Themeliosi Syggeneias' (2024) ChrID 248; Kounougeri-Manoledaki, *OikD*, nr 810 ff.

(98) See L. Papadopoulou, Fountedaki, Zervogianni, Kounougeri-Manoledaki op.cit. (fn 97).

married male couples, who could only have children by medically assisted reproduction if they commission a surrogate. (99)

The establishment of legal parenthood has consequences for the name and citizenship of the child as well as maintenance, and succession rights. Moreover, legal parents are holders of the right and obligation of parental care (*γονική μέριμνα*). (100) No parental rights are recognised to persons other than the legal parents, such as stepparents. The latter may only have a right to contact the child (recognised by law as late as 2021) if their relationship with the legal parent is dissolved. (101) **31**

1. *Motherhood*

Maternal descent is in principle *ipso iure* established by birth; the woman who gave birth to the child is the child's mother, irrespective of whether she is genetically related to the child or not, as will be the case in egg donation. (102) An exception to this rule has been introduced in the case of surrogacy, which is permitted in Greece and comprehensively regulated. Briefly, surrogacy presupposes a gratuitous agreement, concluded in writing between the intended parents and the surrogate (or also her spouse if she is married). This contract is then authorised by the court if it is proven that the intended mother is medically unable to carry a child herself and that the surrogate is, in view of her state of health, fit to go through the pregnancy, while since May 2025 both the surrogate and the intended mother have to be domiciled in Greece. (103) If surrogacy has been authorised by the court, the **32**

---

(99) See on this issue, Nikos Koumoutzis, 'Iatriki Ypovoithisi tis Anaparagogis se Omogyla Zevgi Antron' (2024) ChrID, 168 and Eleni Zervogianni, 'Prosvasi Eggamon Zevgarion Antron stin Iatrikos Ypovoithoumeni Anaparagogi' (2024) EfAD, 223, who both plead in favour of the access of male married couples to medically assisted reproduction. On the question as to whether men are eligible for surrogacy, see below fn 139.

(100) See below II D.

(101) Art 1520 para 2 GrCC. See below II D 5.

(102) Art 1463 GrCC. In Art 1460 GrCC the law explicitly excludes the establishment of legal parenthood with the donor of genetic material.

(103) Art 1458 GrCC. For further details, see Eleni Zervogianni, 'Surrogacy in Greece' in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kann (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019) 147. The condition that both women should be domiciled in Greece is meant to prevent reproductive tourism. It was provided in the initial version of Art 8 of Law 3089/2002, which was however amended by Art 17 of Law 4272/2014, that provided that it is sufficient that either the intended mother or the surrogate have domicile or temporary residence in Greece. In May 2025 Art 46 para 2 of Law 5197/2025 reintroduced the initial provision of Art 8 of Law 3089/2002. The provision that the surrogate has her domicile in Greece can be important for the prevention of trafficking. However, as to the intended mother the provision is against EU Law. See Zervogianni, 'Lessons Drawn from

legal mother of the child already at the time of birth is the intended mother. (104) This is stated in the birth certificate of the child, without any reference to the surrogate, and it holds even if the genetic material used is not of the intended mother but of a third person. (105) Thus in cases of surrogacy, it is the will of the parties, as stated in the surrogacy agreement, and not birth, which is decisive for the establishment of legal motherhood.

33 There is nevertheless one possibility to contest maternity, namely if the egg that has been fertilised was from the surrogate. (106) Either the surrogate or the intended mother may file a claim for the challenge of maternity before the competent court within six months from birth. (107) The claim is tried according to the special rules of the Code of Civil Procedure on family disputes and succeeds if it is proven that the child is genetically connected to the surrogate. In such cases, the court may, and usually will, order a medical expert examination, ie a DNA test. (108) Once the court decision that accepts the claim, which is constitutive in nature, becomes irrevocable, the child is considered a child of the surrogate already from birth. (109) A challenge to motherhood may bring about changes as to the legal fatherhood of the child as well. (110)

2. *Fatherhood*

34 Fatherhood is either inferred from the marriage or cohabitation agreement (registered partnership) with the mother or is established by recognition of the child by the father. Such recognition can be voluntary or judicial (by means of a court ruling). (111) The legal consequences of recognition are

---

the Regulation of Surrogacy in Greece, Cyprus, and Portugal – or a Plea for the Regulation of Commercial Gestational Surrogacy' (2019) International Journal of Law, Policy and the Family 160, 165, with further references.

(104) See Art 1464 para 1 GrCC.

(105) See Art 20 para 1 of Law 344/1976 on Civil Registry Certificates, as amended.

(106) See Art 1464 para 2 GrCC.

(107) See Art 1464 para 2 GrCC. Competent is the single member Court of First Instance of the place where the defendant is domiciled. The defendants in this case are the surrogate (and her spouse if she is married) and the child, if the claim is filed by the intended mother, or the intended mother (and her spouse if she is married) and the child if the claim is filed by the surrogate. See Art 609 para 2 GrCCP; Georgiades, *OikD*, § 28 nr 10, 11.

(108) Art 607 GrCCP.

(109) See Art 1464 para 3 GrCC.

(110) See below II B 2.

(111) Art 1463 GrCC.

basically the same, irrespective of whether it has been voluntary or judicial. (112)

a) *Children born to married parents or to registered partners*

If the mother of the child is married to a man or in a registered partnership with a man at the time of birth, the husband or registered partner of the mother is presumed to be the father of the child. (113) The same holds if the mother was married to a man or in a registered partnership with a man in the previous 300 days before the birth. (114) **35**

This *ipso iure* establishment of paternity may be challenged if it transpires that the husband or partner of the mother is not the biological father of the child. (115) Nevertheless, this challenge to paternity is subject to restrictions, which are intended to protect the so-called 'social family'. To this end, the law enumerates the persons who have a right to challenge paternity. (116) These are the spouse or the registered partner of the mother, and if he has died or is incapacitated, his parents; the child's mother; the child themself, and the man who claims to be the child's biological father, provided that the latter was in a steady relationship with the mother at the time of conception and that, at that time, the mother was (factually) separated from her husband. (117) If the presumed father (spouse or registered partner of the mother) accepts the child as his own, although he has reasons to believe that he may not be the biological father, he can no longer challenge paternity himself, (118) but this does not have an impact on the rights of other persons **36**

(112) A difference arises as to the exercise of parental care when fatherhood has been established by judicial recognition in a procedure where the father acted as the defendant (Art 1515 para 2 GrCC) See below II D 3 b.

(113) Art 1465 GrCC and Art 9 of Law 4356/2015.

(114) Ibid.

(115) Art 1467 GrCC, which is applicable also in case the parents have concluded a 'cohabitation agreement' (Art 9 of Law 4356/2015).

(116) Art 1469 GrCC.

(117) Art 1469 para 5 GrCC. The right of the biological father to contest the paternity of the child was recognised as late as 1997 (see Art 19 of Law 2521/1997, that amended Art 1469 GrCC). The regulation is very controversial. See AP (full bench) 18/2009 NoV, 2010, 719. See also the relevant case note by Lampros Karelos, 'I Alitheia os Themelio tis Oikogeneiakis Enotitas kai Eirinis (2012) NoV, 146. In favour of the restoration of biological truth already since 1992, Christina Stampelou, Ta Tekmiria Patrotitas apo Gamo kata ton Astiko Kodika (Ant N Sakkoulas 1992) 151. The ECtHR ruled in *Marinis v Greece* App no 3004/10 (ECHR, 9 October 2014), that the application of the Greek provision did not violate the ECHR in the case in question.

(118) Art 1471 para 2 nr 1 GrCC.

to do so. No one can challenge paternity if the father gave his consent to medically assisted reproduction with donor gametes. (119)

37 Just like the challenge of maternity, a court procedure is followed to challenge paternity and the same procedural rules apply. The holder of the right to challenge paternity files the claim before the competent court within a specific deadline, which is in most cases tight. (120) The claim succeeds if it is proven that the child is not genetically connected to the spouse (or registered partner) of the mother. In such cases, the court may order a DNA test. (121) Once the court decision, which is of a constitutive nature, becomes irrevocable, the paternity between his child and the mother's spouse or registered partner is disestablished *ex tunc*. (122) If the claim has been brought by the person who claims to be the biological father of the child, the same decision leads to the establishment of fatherhood between the claimant and the child. (123)

b) *Children born to parents who are neither married nor in a registered partnership*

38 If the child's mother is neither married nor in a registered partnership, paternal descent can be established only by means of recognition by the father. This recognition may be either voluntary or judicial.

39 Voluntary recognition is made by a declaration of the father's will that the child is his. The declaration is irrevocable, made in person, free of conditions, and is subject to the form of a notarial deed. For the recognition to take effect, the mother of the child must consent to it, also by notarial deed, unless she has died or is legally incapacitated, in which case no consent is necessary. (124) Special rules apply in cases where an unmarried (different-sex) couple, who have also not entered into a registered partnership, undergo medically assisted reproduction. The law provides that the unmarried partners must grant their consent to medically assisted reproduction by notarial deed. Once this is done, the consent of the man to medically assisted reproduction is considered as a declaration of the voluntary recognition of

---

(119) Art 1471 para 2 nr 2 GrCC.

(120) On the deadlines, see Art 1470 GrCC.

(121) Art 607 GrCCP.

(122) Art 1472 para 1 GrCC.

(123) See Art 1472 para 2 GrCC. This decision amounts to a judicial recognition of paternity. A problematic issue though is that in such cases it has not been proven that the claimant is indeed biologically the father of the child, but rather that the mother's spouse or partner is not the father.

(124) Art 1475 para 1 sent 2 GrCC.

the child that will be born, and the consent of the woman to the medically assisted reproduction is considered as consent to the voluntary recognition by the man. (125)

40 Voluntary recognition of paternity can be challenged before the court. The persons who may file such a claim are enumerated in the law and are basically those who did not participate in the recognition of paternity, including the child themself and the parents of the mother, if the recognition proceeded without her consent because she was dead or incapacitated. (126) The only reason to challenge the voluntary recognition is that the person who proceeded to it is not the genetic father of the child. (127) This is not possible in cases of medically assisted reproduction, when the man has granted his consent to the use of donor sperm. (128) The procedure is regulated in the same manner as a challenge to paternity.

41 Because voluntary recognition of paternity is purely contractual in nature, the general provisions on the declarations of will apply. There are thus instances where the recognition does not bring about its effects because it is void (eg if it is against *bonos mores* or amounts to circumvention of the law (129)) or is voidable and then annulled (in the case of mistake or deceit). (130)

42 If there is no voluntary recognition, either because the biological father does not submit such a declaration or because the mother does not consent to the father's declaration, either of them, and the child as well, may file for so-called judicial recognition before the court. (131) The special proceedings for family disputes apply. (132) Paternity is established by court ruling if it is proven that the man is biologically connected to the child. The court ruling is constitutive in nature and develops its effects *ex tunc* once it is irrevocable. (133) In cases of medically assisted reproduction with gametes of a third donor, there is no possibility to establish the paternity of the donor by means

---

(125) Art 1475 para 2 GrCC.

(126) Art 1477 GrCC.

(127) Ibid.

(128) Art 1478 para 2 GrCC.

(129) See AP 556/2023 Qualex, which ruled that the recognition of the child by a man who knew that the child could have never been his own (the child was born years before this man met the child's mother) is void. See also Pournaras, in *SEAK*, Arts 1475-1476 nr 27; Georgiades, *OikD*, § 27 nr 9.

(130) AP 562/2020, Nomos; Pournaras, in *SEAK*, Arts 1475-1476 nr 26; Georgiades, *OikD*, § 27 nr 9.

(131) Art 1479 GrCC.

(132) Art 592 GrCCP.

(133) Georgiades, *OikD*, § 27 nr 52-53; Kounougeri-Manoledaki, *OikD*, nr 1104.

of judicial recognition. (134) The donor's relation to the child is not legally protected in any respect.

43 Once fatherhood is established through recognition, the child has, in all respects, the status of a child born in marriage vis-à-vis both parents and their relatives, unless the law provides otherwise. (135) Currently, deviating provisions exist only as regards the surname of the child. (136) In the case of subsequent marriage of the child's parents, the same provisions apply as in cases of children born to married parents. (137) In the past, there were further differences also regarding the right of the father of the child born to an unmarried mother to exercise parental responsibilities, but these difference no longer hold, unless the recognition was judicial and against the will of the father. (138)

3. *Brief remarks on cross-border cases*

44 Law 5089/2024 on Equality in Marriage introduced a special provision on the recognition of kinship that has been established in a foreign country. According to Article 11 of this Law, a parent(s)-child relationship that has been registered in public documents or in a court decision of a third country is recognised in Greece, irrespective of the sex of one or both parents and irrespective of whether the relationship could be established in this way according to domestic law. If the establishment of parenthood is based on a court decision, this decision shall be recognised in accordance with the provisions on the recognition of court decisions. This provision is especially important for the recognition of the parenthood of male couples who have had a child by a surrogate and established paternity in a foreign country, given that according to the prevailing opinion in Greece, which since May 2025 has been expressly formulated in the Law, surrogacy is not accessible to men. (139)

---

(134) See Art 1479 para 2 GrCC. See also Art 1460 GrCC.

(135) Art 1484 GrCC.

(136) Art 1506 GrCC for children born outside marriage and Art 1505 GrCC for children born to married parents. See also below IV A 2.

(137) Art 1473 GrCC.

(138) Art 1515 para 2 GrCC. See in more detail below II D 3 b.

(139) Although the letter of the law (Arts 1456, 1458 GrCC) provides that only spouses, different-sex couples and single women may have access to medically assisted reproduction (including surrogacy), there have been two published court decisions in Greece that authorised surrogacy by a single man (decisions 2827/2008 of the single member Court of First Instance of Athens, ChrID 2009, 816 and 13707/2009 of the single member Court of First Instance of Thessaloniki, ChrID 2011, 267). The rationale of these decisions was that if a single woman may override nature by having a child through medically assisted reproduction

45 Generally, according to the rules of the Greek Code of Civil Procedure, the international jurisdiction of a Greek court is established if this court would have territorial competence for the case in question, which is, in principle, decided on the basis of the domicile of the defendant. (140) In disputes on legal parenthood (eg, recognition that there is – or that there is not – a parent-child relationship, or challenge to paternity, maternity or voluntary recognition) in particular, according to Article 601 para 2 of the Greek Code of Civil Procedure, Greek courts have jurisdiction if the father, the mother or the child is Greek, even if they do not reside in Greece, irrespective of whether they are plaintiffs or defendants. (141) Moreover, according to Article 608 GrCCP, a claim for the recognition that there is, or that there is not, a parent-child relationship may be also brought before the court of the district where the plaintiff is domiciled. As to applicable procedural law and *lis pendens,* the same applies as in cases regarding divorce and annulment of marriage. (142)

46 Finally, as regards the authorisation of surrogacy, which is decisive for the establishment of motherhood between the child and the intended mother and is a non-contentious proceeding, (143) Greek courts were competent to hear such cases if either the intended mother or the surrogate had her domicile or temporary residence in Greece, but since May 2025 a temporary

---

(since she also needs sperm), equality considerations lead to the acceptance of the same possibility for single men (who will need donated eggs and a surrogate). Nevertheless, the first of these decisions was quashed by the Court of Appeals (see decision 3357/2010 of the Athens Court of Appeals, NoV 2012, 1437), on the grounds that according to Art 1458 GrCC, surrogacy is possible when there is a medical impossibility to bear children, while men have a structural, not medical, impossibility and therefore no issue of discrimination arises. A subsequent decision of the multi member Court of First Instance of Thessaloniki in 2017 (decision 8641/2017 EfAD 2017, 945) followed the decision of the Court of Appeals and denied authorisation to a single man. However, the issue is still not settled in case-law. A recent decision of the multi member Court of First Instance of Korinth (decision 17/2022 EllDni 2024, 588) granted authorisation to a single man to proceed to surrogacy. In May 2025, Art 46 para 1 of Law 5197/2025 amended Art 1458 GrCC by adding a sentence that states that the impossibility to carry a child which is due to the person's gender does not amount to medical impossibility.

(140) See above II A 4, fn 80–81.

(141) Kounougeri-Manoledaki, *OikD*, nr 1091 with further references.

(142) See above II A 4.

(143) Art 799 GrCCP.

residence is no longer enough. (144) Thus, in fact, Greek courts are competent to authorise all surrogacy procedures that are performed in Greece. (145)

C. *Adoption*

1. *Adoption of minors*

47 The regulatory framework for adoption was fundamentally revised in 1996. (146) Unlike the previous legal regime, adopted minors now integrate fully into the family of the adoptive parent and enjoy the same status as biological children. (147) Private adoption is legal in Greece, in the sense that adoptive parents may seek an adoptive child independently, and not through a public adoption agency. This possibility though evidently raises concerns as it may in fact lead to the sale of children.

48 A court decision, issued in non-contentious proceedings, is always required for adoption. (148) The case can be filed before any Greek single member Court of First Instance, (149) while the public prosecutor is also notified. (150) Since 2018, in all adoption cases, it is necessary for the prospective adoptive parents to follow a preliminary procedure with social services that assess their general adequacy to adopt. (151) In court, the parties are represented by their lawyers. The judge ascertains that the legal conditions for adoption are met and that adoption serves the best interests of the child. More specifically:

49 The adoptive parents have to be either married couples (including same-sex spouses, after Law 5089/2024) or single persons. (152) According to the prevailing opinion before the enactment of Law 5089/2024, persons who had concluded a registered partnership could not adopt a child. (153) This

---

(144) Art 8 Law 3089/2002 as amended by Art 17 of Law 4272/2014, and amended again, back to its original version by Art 46 para 2 of Law 5197/2025. See on this issue above fn 103.

(145) Haris Pampoukis, Idiotiko Diethnes Dikaio (Nomiki Vivliothiki 2020) nr 743.

(146) Law 2447/1996.

(147) Art 1561 GrCC.

(148) Art 1549 GrCC and Art 800 GrCCP.

(149) Art 800 GrCCP.

(150) Art 748 para 2 GrCCP.

(151) Arts 20 ff of Law 4538/2018.

(152) See Art 1545 GrCC that specifically refers to the joint adoption of a minor only for spouses.

(153) See Kounougeri-Manoledaki, *OikD*, nr 1826; Saitakis, To Neo Symfono Symbiosis (Nomiki Vivliothiki 2016) 81 with reference to the Minutes of the Parliament during the discussion of the bill. Contra: Georgiades, *OikD*, § 36 nr 36; single member Court of First Instance of Syros 90/2020, ChrID 2020, 666.

approach is now called into question. (154) Irrespective thereof, both minimum (30) and maximum (60) age limits are set for the adoptive parent (155) to ensure their capability to take good care of the child. Moreover, the age difference between the adoptive parent and the child should not be less than 18 years or more than 50 years. (156) Nevertheless courts often deviate from the maximum age limits, stating that it is in the best interests of the child to be adopted by the applicant, even if the latter is older than stipulated in the law. (157) In the case of joint adoption by spouses, it suffices that one of them fulfils the conditions of the law for adoption. (158)

50 For the adoption to proceed, the consent of the adoptive parent(s) and of the biological parent(s) of the child is necessary, with a few exceptions stipulated in the law, in which the adoption can proceed even without the consent of the biological parent(s). (159) If the adoptive parent is married, the spouse's consent is also necessary. If the adoptee is older than 16 (160) they must also consent to the adoption. Children younger than 16 have the right to be heard anyway. (161) If the adoptive parent has further children, they will be also heard by the judge. (162)

51 To conclude whether the adoption serves the best interests of the adoptee, the court takes into consideration the relevant individualised report of the social services regarding the adoption of the specific child by the applicant. (163) Because the procedure is non-contentious, the court may also, on

---

(154) See Kounougeri-Manoledaki, *OikD*, nr 1827.

(155) Art 1543 GrCC.

(156) Art 1544 GrCC.

(157) See, among many others, AP 1632/2014, Nomos; Court of Appeals of Thessaloniki 21/2023, Nomos; multi member Court of First Instance of Thessaloniki 25358/2007, Art 2008, 65.

(158) Art 1545 para 2 GrCC.

(159) Art 1552 GrCC.

(160) The age after which the consent of the adoptee themself is necessary for the adoption is disputed. According to Art 1555 GrCC, this age is 12 years old. However, according to Art 800 para 2 sent 2 GrCCP, which is a more recent legal provision, this age is set at 16. The age of 16 is also mentioned in Art 606 para 1 GrCCP that relates to disputes regarding adoption (eg, for the dissolution of adoption). Therefore, according to the rather prevailing opinion, the provision of the Code of Civil Procedure has implicitly amended this of the Civil Code. See Kounougeri-Manoledaki, *OikD*, nr 1439-1440. Cf. Plevri, in Haroula Apalagaki and Stelios Stamatopoulos (eds), O Neos Kodikas Politikis Dikonomias (Nomiki Vivliothiki 2022) Art 606 nr 2. Contra Georgiades, *OikD*, § 36 nr 32, referring still to the age of 12.

(161) Art 1555 para 2 GrCC. See in more detail, Kounougeri-Manoledaki, *OikD*, nr 1470 ff.

(162) Art 1556 GrCC.

(163) Arts 1557-1558 GrCC.

its own motion, order any measure appropriate for the establishment of facts. (164)

52 The legal nature of adoption is 'mixed' because it is based on the declaration of the will of the parties, but it is pronounced by a court decision, which is constitutive in nature. (165) Thus the juridical nature of adoption prevails. The general provisions of civil law on defective legal acts do not apply. If the consent of any party is defective, it is possible to appeal the decision. (166) Moreover, until the decision becomes final, meaning that it cannot be, or that it can no longer be, appealed by ordinary means, it is possible for each party involved to recall their consent. (167) Once the decision is final, legal parenthood is established between the adoptive parent(s) and the adoptee, while at the same time the bonds of the child with the biological family are completely broken. (168) Thus the child is fully integrated in the family of the adoptive parent(s). (169) The adoption records are sealed, but once the child reaches majority, they have the right to information on their biological parents. (170)

2. *Adoption of adults*

53 Adoption of adults is allowed in Greece, but, since 1996, it is subject to rather restrictive conditions. This is due to the abuse of the institution of adoption in the past, to cover relations of a different nature, especially sexual. The adoptive parent must be either a relative by affinity or a prior foster parent of the adoptee. (171) The adoptive parent must be at least 40 years old and have an age difference from the adoptee of at least 18 years. (172) As an adult, the adoptee consents to the adoption themself, but if they are married, the spouse must consent as well. (173)

54 As to the procedure and the nature of the court ruling, the same provisions hold as in the adoption of a minor. However, the consequences of the

---

(164) Art 744 GrCCP.

(165) Georgiades, *OikD*, § 36 nr 2. Cf. Kounougeri-Manoledaki, *OikD*, nr 1485-1486.

(166) Art 1569 GrCC. See also Georgiades, *OikD*, § 36 nr 2 and § 38 nr 11; Kounougeri-Manoledaki, *OikD*, nr 1488 ff.

(167) Georgiades, *OikD*, § 36 nr 35.

(168) Arts 1560-1561 GrCC.

(169) See, however, below fn 237 on Art 1567 GrCC on the assignment of the exercise of parental care after divorce or annulment of marriage in cases where one spouse has adopted the biological child of the other spouse.

(170) Art 1559 GrCC. On the so-called secrecy of adoption, see in detail, Kounougeri-Manoledaki, *OikD*, nr 1477 ff.

(171) Art 1579 GrCC as last amended by Art 51 of Law 4837/2021.

(172) Art 1582 GrCC.

(173) Art 1583 GrCC.

adoption of an adult differ. Adoption of an adult is a simple, not full, adoption. (174) Once the decision of the court becomes final, the adult acquires an 'extra' parent, while maintaining all relations with their family of origin. (175) The practical significance of adult adoption pertains to maintenance and succession rights. As to the right of maintenance, the adoptive parent has priority over the biological parent. (176)

3. *Dissolution of adoption*

55 Both the adoption of a minor and of an adult can be reversed after the final court decision that accepted the application for adoption if a revision or other extraordinary remedy is filed and succeeds. (177) This can be the case if the conditions of the law were not met or if the consent of the involved parties was defective. If, despite such problems, the court decision becomes irrevocable, all defects of the adoption are overcome. (178)

56 Nevertheless, both the adoption of a minor and the adoption of an adult (179) may be dissolved either by operation of law or by court decision. Adoption is dissolved by operation of law if the adoptee and the adopted child marry, (180) even though their marriage is void and can be annulled by court decision, (181) or if the adoptee recognises the child as their own, either voluntarily, or judicially. (182) The recognition of the child by another man, after the adoption, does not have any impact on the adoption. (183)

57 The dissolution of adoption by court decision can either occur by mutual consent of the adoptive parent and the adoptee, (184) or in adversarial proceedings. The dissolution of adoption by mutual consent is a particularity of the Greek legal system and is modelled on the pattern of the initial regulation of the Civil Code on divorce by mutual consent. (185) More

---

(174) Art 1584-1585 GrCC.
(175) Art 1584 GrCC.
(176) Art 1587 GrCC.
(177) Georgiades, *OikD*, § 38 nr 1.
(178) Georgiades, *OikD*, § 38 nr 3.
(179) Art 1580 GrCC.
(180) Art 1576 GrCC.
(181) Arts 1360, 1372 para 1, 1378, 1380 GrCC.
(182) Georgiades, *OikD*, § 38 nr 33; Kounougeri-Manoledaki, *OikD*, nr 1518; Papachristou, *OikD*, p 245. Contra Spyridakis, *OikD*, nr 157.2.4.
(183) Georgiades, *OikD*, § 38 nr 33; Kounougeri-Manoledaki, *OikD*, nr 1519; Peraki, in *SEAK*, Art 1561 nr 13.
(184) Art 1573 GrCC.
(185) On the initial regulation (of 1983) of the divorce by mutual consent, see above fn 36.

specifically, provided that the adoptee has reached majority, and the adoption has lasted for at least one year, the adoptive parent and the adoptee can agree to dissolve the adoption. To this end, they must file a joint application to the court. The procedure is non-contentious. Both parties, represented by lawyers, declare their willingness to terminate the adoption twice before the court, in two separate sessions, which take place at least six months apart. (186) If the conditions of the law are met, the court pronounces the dissolution of adoption. In spite of the de-judicialisation of divorce by mutual consent, there has been no discussion regarding the de-judicialisation of the dissolution of adoption by mutual consent. In practice, instances of dissolution of adoption by mutual consent are very seldom.

58 Adoption may be also dissolved when just one of the parties wishes to terminate it if there are important reasons for the dissolution, which are listed in the law. The adoptive parent has the right to apply for the dissolution of adoption if the adoptee has attempted to murder them or their spouse or children, if the adoptee has willingly caused bodily injury to the adoptive parent, or has willingly committed a serious criminal offence against the adoptive parent or their spouse. (187) The right of the adoptee to dissolve the adoption exists if the adoptive parent is no longer the holder of the right of parental care or has been deprived by court decision of the right to exercise parental care. (188) If the adoptee is older than 16, (189) they can bring the claim for the dissolution of adoption themself, otherwise a special guardian is appointed by the court. (190) The public prosecutor or the court, on its own motion, may also initiate such proceedings. The grounds for the dissolution of adoption of an adult through adversarial proceedings pertain to the grounds of disinheritance or to those that justify the withdrawal of a donation because of ingratitude. (191)

59 Both in case of dissolution of adoption by mutual consent and of unilateral dissolution, the court decision is constitutive in nature and develops its effects when it becomes irrevocable. (192) The dissolution of adoption takes effect *ex nunc*. (193) It leads to the termination of legal kinship between the

---

(186) Art 1573 GrCC.

(187) Art 1571, with references to Arts 1537, 1532 and 1840 GrCC.

(188) See below II D 3 b.

(189) Art 606 GrCCP. However, Art 1572 GrCC refers to the age of 12. On this issue, see above fn 160.

(190) Art 1517 GrCC. See below II D 4 a.

(191) Art 1588 referring to Arts 1840, 1841 and 505 GrCC.

(192) Art 1575 GrCC.

(193) Ibid.

adoptee and the adoptive parent. In the case of dissolution of the adoption of a minor, their legal bonds with their family of origin revive. (194)

4. *Reconstitution of a dissolved adoption*

60 A further particularity of the Greek law on adoption is that an adoption that has been dissolved by court decision may be re-constituted anew, by court decision, if the grounds that had led to its dissolution no longer exist. The applicable provisions are in principle the same as those for the constitution of the initial adoption, except for the age limits, which no longer hold. (195) Moreover, if the minor has reached majority, the adoption can be reconstituted without the consent of the biological parents. The effects of the new adoption, which come about as soon as the relevant court decision becomes final, are those of the initial adoption. Thus, in case an adoption of a minor was dissolved and then reconstituted after the minor reached majority, it will develop, *ex tunc*, the effects of the adoption of a minor, meaning that it will be a full adoption. (196)

5. *Brief remarks on cross-border cases*

61 In 2009, Greece ratified the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. (197) Thus, in intercountry adoptions that fall under the scope of the Convention, the rules of the latter apply in combination with the relevant national rules.

62 International jurisdiction of Greek courts in cases of adoption is broad. According to Article 3 of the Code of Civil Procedure, which applies if there is no deviating provision in a European regulation or international convention, Greek courts have international jurisdiction in all cases where they have territorial competence. Furthermore, Article 800 of the Code of Civil Procedure states: 'Any Single Member Court of First Instance of the Territory is competent to carry out the adoption. The Greek courts have jurisdiction for the adoption if the adopter or adoptee is of Greek nationality, even if they do not have their habitual residence in Greece. In this case, the courts of the capital of the state shall have jurisdiction.' On these bases, it is accepted that international jurisdiction for adoption is based either on the habitual resi-

(194) Ibid.
(195) Art 1578^{A} GrCC.
(196) Georgiades, *OikD*, § 38 nr 29; Peraki, in *SEAK*, Art 1578^{A}, nr 14.
(197) Law 3765/2009.

dence or on the nationality of the adoptive parent or the adoptee. (198) Greek courts always follow Greek procedural law and the *lis pendens* principle does not apply if a procedure is pending abroad. (199)

63 As to the applicable law, Article 23 para 1 of the Civil Code, provides: 'The substantive conditions for the establishment and termination of adoption are governed by the law of each party's nationality.' Foreign law does not apply if it is against the Greek public order. (200) According to case-law, foreign rules that provide for the simple adoption of minors (201) or for the prohibition of the adoption of adults are against public order. (202) On a more general note, in cases of international adoption, Greek courts appear to invoke the public order argument rather often to exclude the application of a foreign law that may not allow for a specific adoption. This approach has, however, been rightly criticised. (203)

64 As a rule, foreign court decisions on adoption can be recognised following the provisions of the Greek Code of Civil Procedure. These provisions distinguish between recognition of contentious and non-contentious foreign court decisions. (204) This issue is decided based on *lex fori*. (205) The recognition of non-contentious decisions does not require a ruling by a Greek court. However, concerns of legal certainty often lead the adoptive parents to seek a court decision on recognition. This is possible by the analogous application of Article 905 para 4 CCP GrCC on the recognition of *res judicata* from a foreign court decision (in contentious proceedings)

---

(198) Koronaios, 'Yiothesia' (Chapter 11) in Chrysafo Tsouka, *Diethnes Oikogeneiako Dikaio* (Nomiki Vivliothiki 2016) 403, 440 (nr 68).

(199) See above II A 4.

(200) Art 33 GrCC.

(201) Court of Appeals of Thessaloniki 543/2013, Nomos; single member Court of First Instance of Thessaloniki 758/2016; multi member Court of First Instance of Agrinio 5/2017, Nomos.

(202) AP 2084/2009, Nomos. See further Metallinos, in Apostolos Georgiades (ed), *Syntomi Ermineia Astikou Kodika* (hereinafter: *SEAK*) (Vol I, 2nd edn, P.N. Sakkoulas 2023) Art 33 nr 29.

(203) Koronaios, in Tsouka (ed), Ch.11 nr 32 (pp 419-420).

(204) In the former case, Art 323 GrCCP is applicable, while in the latter, Art 780 GrCCP. On this issue, see in more detail, Koronaios, in Tsouka (ed), ch 11 nr 81 in fine.

(205) The issue as to whether the proceeding is contentious or not is decided based on the lex fori. See Elli Krispi-Nikoletopoulou, 'Anagnorisis Dedikasmenou ex Apofaseon Allodapou Dikastiriou Aforosis eis tin Prosopikin Katastasin' (1972) NoV, 1, 8; Dimitrios Tsikrikas, 'I Anagnorisis Allodapon Apofaseon tis Ekousias Dikaiodosias kata to Autonomo Imedapo kai Diethnes Symvatiko Dikaio' (1991) Dike, 593, 596-597; Panagiotis Giannopoulos, I Anagnorisi Allodapon Apofaseon Ekousias Dikaiodosias stin Elliniki Ennomi Taxi (Ant N Sakkoulas 2003) 213; Court of Appeals of Athens 623/2021, Nomos; Court of Appeals of Athens 600/2017, Nomos; Court of Appeals of Thessaloniki 72/2020, Nomos.

concerning personal status. (206) The term 'court' in this provision is interpreted broadly and thus it is accepted that the same procedure on recognition can also apply if the competent foreign authority was an administrative one, and not a court. (207)

65 In intercountry adoptions that fall within the scope of application of the Hague Convention, the recognition is automatic. According to Article 23 of the Convention: 'An adoption certified by the competent authority of the state of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States.'

66 In any case, the State can refuse the recognition if it is contrary to its public policy. (208) The Greek Supreme Court (*Areios Pagos*) had ruled that this is the case when a monk adopts, (209) but this led to the condemnation of Greece by the European Court of Human Rights. (210) The Athens Court of Appeals also recently ruled that the recognition of a foreign court decision regarding the adoption of a child by a married same-sex couple is against public policy. (211) However, the legislator put an end to this approach by the introduction of Article 11 para 2 of Law 5089/2024 on equality in marriage that explicitly states that in the case of adoption by spouses of the same sex or adoption of a child of one spouse by the other same-sex spouse which has been effected abroad under the law of the place where it was effected, the adoption shall be recognised in accordance with the provisions in force for the recognition of court decisions from the time it was effected, without prejudice to Article 23 of the Civil Code. (212)

---

(206) See Athens Court of Appeals 2204/2023, Nomos; Athens Court of Appeals 2435/2024, Nomos. See also Koronaios in Tsouka (ed), Ch 11 nr 81, who also discusses the issue if Art 905 para 4 GrCCP applies in combination with Art 323 GrCCP on the recognition of decisions in adversarial proceedings, or in combination with Art 780 GrCCP.

(207) Koronaios in Tsouka (ed), Ch 11 nr 82; Athens Court of Appeals 2123/2022, Nomos; Piraeus Court of Appeals 141/2017, Arm 2019, 120; single member Court of First Instance of Athens 786/2016, Nomos (all referring to the recognition of an administrative act on the change of name).

(208) Art 24 of The Hague Convention.

(209) AP (full bench) 17/2008, Nomos.

(210) *Negrepontis - Giannisis v Greece* App no 56759/08 (ECHR 5, December 2013): violation of Art 8 of the ECHR.

(211) Athens Court of Appeals 503/2020, Nomos; Athens Court of Appelas 2204/2023 Nomos. Cf. also Athens Court of Appeals 623/2021, Nomos.

(212) See Athens Court of Appeals 2435/2024, Nomos.

D. *Parental responsibility*

1. *General remarks*

67 Under the term 'parental responsibility' it is possible to include, under Greek law, two discrete rights: first, the right of parental care (*γονική μέριμνα*), which is assigned to the legal parents of the child and comprises the 'personal care' of the child (*επιμέλεια*) that pertains to the child's upbringing, education, supervision, and determination of place of residence, (213) the administration of the child's property, and the child's legal representation. (214) Second, the right to contact the child (*δικαίωμα επικοινωνίας*), which is granted not only to the parent that does not reside with the child, but to further persons as well, such as grandparents, siblings and others who have developed a social-emotional bond of a family nature with the child. (215)

68 These rights are granted by law to the parents not just to serve their own legal interests, but to serve the best interests of the child. For this reason, they are referred to as 'functional rights' (*λειτουργικά δικαιώματα*) and, at the same time, constitute a right and a duty for their holder. (216) The parent cannot be compelled to exercise parental responsibilities, but the non-exercise may lead to negative legal consequences, which may go as far as the loss of the right. (217) There is thus a degree of state supervision as to the exercise of parental responsibilities. At a practical level, however, this supervision is rather inadequate, due to the understaffing of social services. (218) When the adoption of measures is necessary to protect the child, the law often relies on close relatives, (219) as well as on the public prosecutor to bring the case before the court. (220)

69 Parental care, or parts of it, may be assigned to third parties if the parents are not able to exercise them themselves. (221) These parties may be guardians,

---

(213) Art 1518 GrCC.

(214) Art 1510 GrCC.

(215) Art 1520 GrCC.

(216) See the wording of Arts 1510 and 1520 GrCC. See also Georgiades, *OikD*, § 30 nr 2 and § 31 nr 26; Kounougeri-Manoledaki, *OikD*, nr 1195 ff. and nr 1311.

(217) See below II D 3 b.

(218) See above II - introductory remarks to family law. The law specifically provides for the supervision of foster parents (Art 1665 GrCC) and of the guardian (Art 1645 GrCC) by social services. The supervision of foster parents is regulated in more detail in Art 13 of Law 4538/2018.

(219) See, for instance, Arts 1532, 1537, 1601, 1602 GrCC.

(220) On the role of the public prosecutor in family law see above II - introductory remarks to family law.

(221) Art 1589 GrCC.

who are always appointed by the court, or foster parents, to whom only the everyday care of the child may be assigned either by contract with the parents, or by court decision. (222) Both the guardian and the foster parents are subject, according to the law, to supervision by social services. (223)

70 Although the role of the court remains central in matters of parental responsibility, in recent years there have been noticeable trends towards the de-judicialisation of specific areas thereof. Most importantly, after the reform of family law in 2021, the role of the court has become subsidiary as regards the regulation of the exercise of parental care after separation, divorce, or annulment of the parents' marriage. (224)

2. *The best interests of the child and the right of the child to be heard*

71 The protection of the best interests of the child is a fundamental principle of Greek family law. This rationale runs through the whole body of family law legislation. (225) The imperative to protect the best interests of the child is explicitly addressed to all parties who take decisions relating to the child, be it their parents, guardians, or judges. The decision which serves the best interests of the child is assessed on a case-to-case basis, considering all particularities in respect of a specific child. In an effort to combat gender bias, in 2021, the legislator proceeded to a partial definition of the best interests of the child by providing that their protection is served in particular by the effective participation of both parents in the child's upbringing and care. (226)

72 The shaping of specific family law institutions is also oriented to the protection of the best interests of the child, even when there is no relevant explicit reference. Two characteristic cases are worth mentioning: first, the law provides that in the case of a conflict of interests between the child and either of the parents who exercise parental care, a special guardian is appointed by the court. (227) Second, the right of the parents to administer the child's property is restricted by mandatory provisions according to which, for the validity of certain acts, which could be potentially harmful for the interests of the child, such as the transfer of ownership on immovables or

(222) See below II D 4.
(223) See above fn 218.
(224) See below II D 3 b.
(225) This is explicitly mentioned in Art 1 of Law 4800/2021 that amended the provisions of the Civil Code on parental responsibilities.
(226) Art 1511 para 2 GrCC.
(227) Art 1517 GrCC. On guardianship, see below II D 4 a.

the waiver of inheritance, a court authorisation is necessary. (228) The authorisation is granted in non-contentious judicial proceedings. (229)

73 Directly linked to the protection of the best interests of the child is the obligation to hear the child before any decision relating to parental care and to consider the child's opinion, depending on the latter's maturity. (230) This is an obligation both for the parents, who exercise their duties in a faulty way if they do not fulfill it, (231) and for the judge, in case court proceedings have been initiated. Since there are no special family courts, however, it is doubtful whether judges have adequate training or receive any support from social services in hearing the child.

3. *Parents as holders of parental care*

74 Parents must exercise parental care strictly in person, assigning only specific tasks to others (232) while any third person who assumes parental responsibilities against the will of either parent is considered to interfere with this parent's right. (233) Within this framework, there is hardly any room for 'social' parents, such as stepparents, to exercise parental responsibilities. The social parent is not entitled to take any decision, not even in everyday matters. Thus, if the child needs medical treatment, the social parent is not entitled to consent to the treatment, not even in cases of emergency. (234) In short, the legal status of the partner of the legal parent is akin to that of a babysitter. (235)

a) *The joint exercise of parental care as a rule*

75 As a rule, both (legal) parents, married or not, automatically have the right to exercise parental care, and they must do so jointly and in the best interests

---

(228) Arts 1526, 1624, 1625 GrCC.

(229) Art 797 GrCCP.

(230) Art 1511 para 4 and Art 612 GrCCP.

(231) See Ladogiannis, in *SEAK*, Art 1511 nr 7.

(232) See, however, the provision on contractual foster case below II D 4 b.

(233) Kounougeri-Manoledaki, *OikD*, nr 1196; Georgiades, *OikD*, § 30 nr 4.

(234) According to Art 12 para 2 of Law 3418/2015 (Code of medical ethics), only the persons who exercise parental care may grant this consent. In extremely urgent cases, the doctor may act without any consent in order to prevent an imminent danger to the life of the child.

(235) Virginia Peraki, 'Dynatotites Askisis Gonikis Merimnas se Tekna Omofylon Syntrofon' (2020) EfAD 2020, 568, 573; Eleni Zervogianni, 'Social Parenthood in Greece' in Clare Huntington, Courtney G. Joslin and Christiane von Bary (eds), *Social Parenthood in Comparative Perspective* (NYU Press 2023) 170, 174.

of the child. (236) This rule holds as a principle also after the separation, divorce or the annulment of the parents' marriage or registered partnership. (237) The joint exercise of parental care of both parents was reinforced by Law 4800/2021 that amended the relevant provisions of the Civil Code. In respect to children born to unmarried parents, the law, before this amendment, recognised a priority to the mother as to the exercise of parental care, (238) while a court decision on the exercise of parental care was necessary after the divorce or annulment of the parents' marriage. (239) In practice though, quite often, if the parents were in agreement as to the exercise of parental care, they did not apply to the court for the regulation. Their agreement was not legally binding, but for as long as it existed, the exercise of parental care was de facto regulated.

When both parents exercise parental care jointly, if one of the parents decides alone, they are considered to be exercising parental care in a faulty way. (240) This does not hold if the decision pertains to usual, everyday matters or in emergencies. (241) Moreover, in cases of separation, divorce or annulment of the parents' marriage, as well as in the case of a child born to unmarried parents, each parent may by themself claim maintenance for the child from the other parent (or third party). (242) If the parents cannot reach a joint decision, they can apply to the court, which then decides the issue, not necessarily following the opinion of one of the parents. (243) This procedure

(236) Art 1510 GrCC and (new) Art 1515 GrCC. The joint exercise of parental care of children born to unmarried parents has recently been introduced by Law 4800/2021. Before this Law, the father who had recognised the child could exercise parental care only if the mother was no longer a holder of the right of parental care (eg, because she died) or for whatever reason was not able to exercise parental care, if the mother agreed to the joint exercise of parental care with the father or if the exercise of parental care was assigned to him by court decision (Art 1515 paras 1, 2 GrDD before the reform of 2021).

(237) Art 1513 GrCC. However, see above II A 3 a on the necessary agreement of the parties in the case of divorce by mutual consent. Moreover, Art 1567 introduces an exception to this rule when one of the spouses has adopted the biological child of the other spouse, in which case, after divorce or annulment of marriage, it is the biological parent that exercises parental care, unless the court decides otherwise on the basis of an important reason. The constitutionality of this provision is nevertheless questionable. See Nikos Koumoutzis, 'I Rythmisi tis Askisis tis Gonikis Merimnas meta to Diazygio, tin Akyrosi tou Gamou i ti Diakopi tis Symviosis tou Fysikou kai tou Thetou Gonea' (2005) ChrID, 84, 87.

(238) See above fn 236.

(239) See Art 1513 GrCC, before its reform by Law 4800/2021.

(240) See below II D 3 b.

(241) Art 1516 GrCC.

(242) Art 1516 para 2 GrCC.

(243) Art 1512 GrCC. See Ladogiannis, in *SEAK*, Art 1512 nr 5; Georgiades, *OikD*, § 30 nr 25.

before the court is contentious and is tried according to the special proceedings for family cases. (244) However, even after the court decision, the parents may agree on a different decision. (245)

b) *Deviations from the rule of joint exercise of parental care*

77 Except for ordinary and urgent matters, which each parent may decide alone, (246) there are further instances where only one parent exercises sole parental care, at least in part. More specifically:

78 If one of the parents is not in a position to exercise parental care, either for factual reasons (eg, due to serious illness) or for legal reasons (eg, due to legal incapacity), the other parent exercises parental care alone, whereby a parent who is not yet of age always has the right to exercise the personal care of the child. (247) This effect is by operation of the law, without the need for a court decision.

79 Moreover, if fatherhood has been established by judicial recognition against the will of the father, the father does not exercise parental responsibility or substitute for the mother in exercising it, unless there is such an agreement between the parents or a court decision that rules in this direction. This decision can be issued at the request of the father, under the condition that the best interests of the child so require. (248)

80 Deviations from the rule of joint exercise of parental care may also arise, either by agreement of the parents or by court judgment, in all instances where the parents do not live together. This can happen after separation, divorce, or annulment of the parents' marriage (249) or in the case of children born to unmarried parents. (250) The possibility of parents to conclude a written agreement to regulate the exercise of parental care themselves after divorce is seen as a novelty of Law 4800/2021, which enhances the private autonomy of the parties and renders the role of the court subsidiary.

81 In particular, the new provisions of the Civil Code provide that if the parents do not live together, they may regulate the joint exercise of parental care or even deviate from it in any way they wish, by a written agreement valid for

---

(244) Art 592 para 3 b GrCCP. In such cases, the law provides a compulsory initial mediation session (Art 6 of Law 4640/2019).

(245) Ladogiannis, in *SEAK*, Art 1512 nr 5; Georgiades, *OikD*, § 30 nr 25.

(246) See above II D 3 a.

(247) Art 1510 para 4 GrCC.

(248) Art 1515 para 2 GrCC.

(249) Art 1514 GrCC.

(250) Art 1515 para 1 GrCC.

at least two years. (251) For the conclusion of this agreement, they do not need to be represented by lawyers. The general rules on contracts apply. Thus, the parents' agreement may be void if either party did not have the legal capacity to enter into the contract or if the agreement is against *bonos mores* (eg, because the agreement of one of the parties was induced with a payment), or voidable, in the case of mistake, deceit or duress. In the latter case, the agreement holds until it is annulled by a final court decision. (252)

82 The agreement is binding and thus there is no room for unilateral changes. The non-compliance of either parent to the agreement amounts to faulty exercise of parental care if the parent acted with culpability. (253) If one of the parents wishes to re-negotiate the agreement, they should notify the other parent, before the expiry of the initial agreement. If the parents manage to conclude a new agreement, the new agreement will take effect after the expiry of the initial one; if they do not manage, the default rule of joint exercise of parental care applies. (254) If no parent declares their will to re-negotiate the existing agreement, the latter is prolonged. The agreements in question are not enforceable, unless the parents have concluded them before a notary, in accordance with the legal provisions that apply in the case of divorce by mutual consent. (255)

83 Similarly to the parents' agreement in a divorce by mutual consent, there are no guarantees that the child will actually be heard or that the agreements serve the best interests of the child. The legislator seems to trust that the parents will conclude the best agreement for the child, and indeed in most cases they will. However, either parent may initiate the re-negotiation of the agreement if the agreement is not (or is no longer) in the best interests of the child. If the parties do not reach a new agreement, even after mediation, the case can be decided by the court. (256) It is worth noting that if the agreement is against the best interests of the child from the beginning, it would seem that both parents have acted against the best interests of the child, so their behaviour, irrespective of culpability, amounts to faulty exercise of parental

---

(251) According to Art 1514 GrCC, the date of the conclusion of the document must be certain. To this end, the date is ascertained by a public authority or by a notary.

(252) See Arts 154, 157, 184 GrCC.

(253) Art 1532 para 2 a GrCC.

(254) Georgiades, *OikD*, § 30 nr 50.

(255) Georgios Lekkas, I Epimeleia tou Paidiou kata ton Astiko Kodika (Sakkoulas 2021) nr 420. For divorce by mutual consent, see above II A 3 a.

(256) Art 1514 para 2 GrCC.

care, and thus also the public prosecutor or close relatives may bring the case before the court. (257)

84 The regulation of the exercise of parental care may also be brought before the court if the joint exercise of parental care is not workable in practice and the parents cannot reach any agreement. (258) The intermediary step before applying for the regulation of parental care by the court is mediation, which is mandatory, unless there have been instances of family violence. (259)

85 Once the case is brought before the court, the judge has a wide range of options in deciding the case. After considering all specificities of the case in question, including any prior agreements of the parties, the court may proceed: (260) a) to the distribution of parental care between the parents, either by distributing the tasks among them (functional distribution) or by ordering that the parents will alternate in the exercise of parental care, each for a specific period of time (temporal distribution); b) adhere to the rule of joint exercise of parental care and specify how particular issues, the handling of which could lead to disputes of the parents, should be dealt with; c) assign the sole exercise of parental care to one of the parents. In such a case, the right of parental care of the other parent is rendered inactive, but this can change subsequently if the circumstances change; d) assign parental care to a third person, who will actually be a guardian of the child. (261) This option presupposes that the judge considers both parents unfit to exercise parental care, (262) because, for instance, they concluded an agreement for the exercise of parental care that was manifestly against the child's best interests. (263) e) send the case back to the mediator; order an expert report or the adoption of any other suitable measure. Such suitable measures may refer, for example, to the supervision of the parents in the exercise of parental care by social services or to mandatory sessions of the parents and the child with a psychologist. (264) The aforementioned procedure on parental care is contentious and the special proceedings for family disputes apply. (265) The court is therefore, as a rule, obliged to seek the settlement of the parties before trying the case. (266)

---

(257) Lekkas, I Epimeleia tou Paidiou, nr 427.
(258) Ibid.
(259) Art 1514 para 2 GrCC. On family violence, see Law 3500/2006.
(260) Art 1514 para 3 GrCC.
(261) Georgiades, *OikD*, § 30 nr 59; Kounougeri-Manoledaki, *OikD*, nr 1264.
(262) Ibid.
(263) Lekkas, I Epimeleia tou Paidiou, nr 427.
(264) Georgiades, *OikD*, § 30 nr 63.
(265) Art 592 para 3 GrCCP.
(266) Art 611 GrCCP.

86 Parental care is also exercised by one parent alone if there is a court decision that has deprived the other parent of the right to exercise parental care because of faulty exercise of parental care. (267) This is the case if the parent, irrespective of culpability, does not, or cannot, fulfill their duties that derive from parental care (268) and does not act in the best interests of the child. The Civil Code lists indicatively instances of faulty exercise of parental care, referring, among others, to the non-compliance with court decisions or agreements on the exercise of parental care or the right to contact, to the disruption of the child's emotional bond with the other parent, and to the non-payment of child support. (269) These proceedings are non-contentious (270) and may be initiated by the other parent, close relatives of the child or the public prosecutor. Because the procedure is non-contentious, the court may seek evidence on its own motion. (271) The court may, instead of depriving the parent of the right to exercise parental care, adopt any other adequate measure. (272) In urgent cases, the public prosecutor may order measures which are necessary for the corporal and mental protection of the child that are implemented until the court decides the case. (273)

87 Any court decision on parental care is subject to revocation or reform by a subsequent judgment in the case of a change of circumstances or on the request of either parent, close relatives of the child or the public prosecutor. (274)

88 Even in cases where there are deviations from the joint exercise of parental care, the law provides that certain issues that are of utmost importance must be decided jointly by both parents, provided that they are both holders of the right of parental care, irrespective of who exercises parental care. This approach, known as 'theory of the core of parental care' (*θεωρία του πυρήνα της γονικής μέριμνας*) has been developed by case-law since the 1990s (275) and has been codified as Article 1519 GrCC in 2021. The decisions that pertain to the core of parental care are those on the first name of the child, on the child's religion, on health issues that are neither ordinary nor urgent,

(267) Art 1532 GrCC.
(268) Georgiades, *OikD*, § 32 nr 6 ff; Kounougeri-Manoledaki, *OikD*, nr 1344 ff.
(269) Art 1532 para 2 GrCC.
(270) Georgiades, *OikD*, § 30 nr 86; Kounougeri-Manoledaki, *OikD*, nr 1392.
(271) Art 744 GrCCP.
(272) Art 1532 para 3 GrCC.
(273) Art 1532 para 4 GrCC.
(274) Art 1536 GrCC.
(275) See, among others, AP 1321/1992, EllDni1994, 376; AP 1005/2006, EllDni 2006, 1531; Athens Court of Appeals 2405/2018, EfAD 2018, 936; Piraeus Court of Appeals 538/2015, Nomos.

as well as those decisions on the child's education that can have a decisive impact on the child's future (eg, if the child will be enrolled in a Greek school or in a school where Greek is taught as a foreign language). (276) The same article provides further that the parent with whom the child resides may not change their residence if this change would substantially affect the right of contact of the parent with whom the child does not reside, unless there is a written agreement between the parents or the court has allowed the relocation at the request of this parent. (277) Moreover, the parent who does not exercise parental care always has the right to be informed on the person and property of the child. (278)

89 Finally, there is evidently no room for the joint exercise of parental care if the other parent is no longer a holder of the right of parental care. A parent forfeits the right of parental care by operation of the law in rather rare cases, when they have been sentenced to at least one month's imprisonment for an offence committed with intent and concerning the life, health, and morals of the child. (279)

4. *Exercise of the duties of parental care by persons other than the parents*

a) *Guardianship*

90 Taking aside guardianship of unaccompanied minors that is governed by a specific legal framework, (280) according to which the public prosecutor appoints a guardian for the minor, in all other cases, where the provisions of the Greek Civil Code on guardianship (*επιτροπεία*) apply, it is the court that places a minor under guardianship and appoints a guardian. More specifically:

91 If the child's parents have died, the court has deprived both parents of the right to exercise parental care, or for other reasons no parent is able to fulfil these duties towards the child, the minor shall be placed under guardianship by court decision. (281) Like parental care, guardianship encompasses the care of the child, the administration of their property and their representation. Guardianship may also be partial and thus combined with parental care, as, for example, when only the administration of the child's property is

(276) Art 1519 para 1 GrCC.
(277) Art 1519 para 2 GrCC.
(278) Art 1519 para 3 GrCC.
(279) Art 1537 GrCC.
(280) See Arts 66 ff of Law 4939/2022. See also above fn 25.
(281) Art 1589 GrCC.

assigned to the guardian and the remainder of the duties stay with the parents. (282) Guardianship may also pertain to a very specific case, when a special guardian is appointed because of a conflict of interests between the child and the parents. (283) If a parent who has not been deprived of the exercise of parental care has expressed a preference, in the form provided in the law, regarding the appointment of a particular person as a guardian, this person will be appointed as guardian by the court, unless they are not fully legally capable, deny the appointment, or the best interests of the child require that another person be appointed as guardian. (284) In urgent cases, an interim guardian is appointed, again by the court. (285)

92 Evidently, the legislator trusts the guardian less than the child's parents; in order to ensure the protection of the interests of the child, the law provides that the guardian is subject to control by a supervisory council, which is also appointed by the court and in principle is comprised of members of the child's broader family and friends of their parents. (286) Social services shall assist the supervisory council by providing it, when requested, with information on the way the guardian performs their duties or on the personal situation of the minor. (287) A court authorisation is also necessary for certain transactions of the guardian. (288)

93 Although contractual guardianship does not exist in Greek law, there is one instance where it is on the parents' initiative that the procedure on the appointment of a guardian is put into motion. (289) More specifically, the parents may declare before the court that, because of an important reason, they withdraw from the exercise of parental care and request the assignment of parental care to another person that they may also indicate. If the court accepts this request, the person to whom the exercise of parental care is assigned is a guardian. (290) Thus, although there will often be an agreement between the parents and the third person who accepts to assume the child's care, there can be no guardian without a court decision appointing them.

94 The proceedings for the appointment, replacement, and removal of a guardian, as well as of the members of the supervisory council, are non-conten-

---

(282) Georgiades, *OikD*, § 42 nr 4 and 22-25.

(283) Art 1517 GrCC.

(284) Art 1592 GrCC.

(285) Art 1601 GrCC.

(286) Arts 1634 and 1642 GrCC.

(287) Art 1645 GrCC. See also Art 26 para 1 of Law 4538/2018.

(288) Art 1624 GrCC. The authorisation is granted in non-contentious judicial proceedings (Art 797 GrCCP).

(289) Art 1535 GrCC.

(290) Georgiades, *OikD*, § 42 nr 4; Ladogiannis, in *SEAK*, Art 1535 nr 10.

tious. Competent is the court of the child's habitual residence. (291) The court can act on its own motion or at the request of whoever has a legal interest, even at the request of the minor themself, if they are at least 16 years old. (292) The State prosecutor has to be notified as well. (293) The guardian assumes their duties as soon as the court decision regarding their appointment as guardian is served to them, (294) unless they do not accept the appointment. (295)

b) *Foster care*

95 Foster care (*αναδοχή ανηλίκου*) constitutes a supplementary institution to parental care and guardianship. (296) The foster parents act as representatives of the legal parents (or of the guardian), are entrusted with the daily care of the child and the handling of emergencies, (297) but the child's legal relationship with their parents or guardian remains, in principle, unaltered. The fundamental decisions regarding the child rest with the parents. (298) In recent years, the demand for foster families has increased considerably, because it promotes the de-institutionalisation of minors. (299)

96 A child may be placed in foster care either by court decision, if the parents or the guardian are not able to properly care for the child, (300) or contractually. In the latter case, the child's legal parents jointly, (301) acting

(291) Art 796 para 1 GrCCP.

(292) Art 742 GrCCP.

(293) Art 748 para 2 and 796 GrCCP.

(294) Georgiades, *OikD*, § 43 nr 1.

(295) Art 1599 sent 1 and 1592 para 1 sent 3 GrCC.

(296) It is regulated in Arts 1655-1665 GrCC, while a comprehensive legal framework of foster care is provided in Arts 5 ff of Law 4538/2018.

(297) Arts 1655 and 1659 GrCC. This also includes the consent to the medical treatment of the minor in everyday or urgent cases, see Fountedaki, in *SEAK* Arts 1656-1659 nr 4; Georgios-Alexandros Georgiadis, Anadochi Anilikou (Sakkoulas 2019) nr 421.

(298) See, in detail, G.-A. Georgiadis, Anadochi Anilikou, nr 354 ff.

(299) On this issue in English, see Agallopoulou, 'The Institution of Foster Care for Minors in Greece' (2010) The International Survey of Family Law, 149.

(300) For the parents, see Arts 1532 para 2 and 1533 para 3 GrCC and above II D 3 b. For the guardian, see Arts 1607 para 2 and 1608 GrCC. In extremely urgent cases, the child may be placed to a foster family by an order of the public prosecutor, which holds until there is a court decision (Art 1532 para 4 GrCC).

(301) This holds also when only one of the parents has the sole exercise of parental care, because the issue pertains to the so-called 'core of parental care'. See G.-A. Georgiadis, Anadochi Anilikou, nr 297 with further references. Cf. new Art 1519 GrCC and above II D 3 b. If the parents disagree, the court will decide, according to Art 1512 (Georgiades, *OikD*, § 45 nr 23).

in the best interests of the child, conclude such an agreement in writing with the foster parent (302) for as long as they wish. (303) Contractual foster care is also possible for children in guardianship. In such a case though, the guardian needs court authorisation to proceed to the conclusion of the foster care agreement. (304)

97 Placement in foster care by contract can thus be seen as a further de-judicialised procedure in family law. This is not a new development though. Contractual foster care existed traditionally in Greece. What is new is that, following Law 4538/2018, this process is thoroughly supervised by social services that also hear the child before the conclusion of the written contract. (305) Contractual foster care does not seem to be in line with the principle of the strictly personal exercise of parental care. More precisely, a question which arises is the following: if it is possible for the parents to assign the everyday care of the child to someone else in its totality, why is it still considered impossible for a parent to assign the everyday care of the child to a social parent, who lives with the child, together with this parent? (306) This argument should be understood as a case for the possibility of the parent to assign parts of parental care to the social parent and not as a case against contractual foster care.

98 Contractual foster care can never go beyond the everyday care of the child. However, if the child is well integrated in the foster family and the child's bonds with the legal parents have weakened, or if the legal parents are considered unfit, (307) the court may assign to the foster parents further parental responsibilities, which are thus removed from the child's parents, and even appoint the foster parents as guardians of the child. (308)

---

(302) Art 1655 GrCC, Arts 10 and 11 of Law 4538/2018. Before the enactment of Law 4538/2018, if a child lived with a person other than a legal parent, a foster care agreement could be inferred from that living arrangement. With the passage of Law 4538/2018, informal arrangements are no longer considered valid foster care agreements and instead are treated under the doctrine of *negotiorum gestio* (Arts 730 ff GrCC). See Fountedaki, in *SEAK*, Art 1655 nr 14; G.-A. Georgiadis, Anadochi Anilikou, nr 333.

(303) In such a contractual arrangement, the legal parents can revoke the agreement at any time (Art 1662 GrCC).

(304) Art 1607 para 1 GrCC.

(305) Art 1665 GrCC, Art 13 of Law 4538/2018.

(306) Zervogianni, 'Social parenthood in Greece', 179.

(307) Art 1532 GrCC. See above II D 3 b.

(308) Art 1660 GrCC.

5. *The right to contact*

99 The legal parent who does not reside with the child has the right (and obligation) to contact the child, (309) which is seen as a distinct right, independent of parental care. (310) The right to contact guarantees the preservation of a relationship between the parent and the child through regular communication and visits, including the stay of the child at the home of the parent with whom the child does not reside. After its recent amendment in 2021, the new Article 1520 GrCC explicitly stipulates that the contact with the non-residing parent should be as extensive as possible, and it is presumed to amount to one-third of the total time of the child, unless it is in the interests of the child to restrict contact. (311)

100 The right of contact of the non-residing parent can be regulated either by written agreement between the parents or by the court, in both cases after having heard the child. (312) Agreements between the parents always exist in the case of divorce by mutual consent, since they constitute a prerequisite of the procedure of non-contentious divorce. (313) Hence, just like in cases regarding the exercise of parental care, the role of the court is subsidiary. When contact is regulated by a court decision, the procedure that is followed is the same as that regarding the regulation of the exercise of parental care. (314)

101 In 2021, the legislator adopted steps to reinforce the right of contact of the non-residing parent. Restrictions have been introduced as to the unilateral decision of a parent to change the child's place of residence if this would have an impact on the right of the other parent to contact the child. (315) In addition, according to the new provision of Article 1518 para 4 GrCC, each parent is obliged to preserve and strengthen the child's relationship with the other parent, their siblings and the other parent's family, especially when the parents do not live together, or the other parent is deceased. In this spirit, it is thus further provided in the law that the disruption of the emotional bond of the child with the other parent and their family amounts to faulty exercise

---

(309) Art 1520 GrCC.

(310) This means that a parent who forfeits the right of parental care (see on this issue above II D 3 b) is not automatically deprived of the right to contact the child. See Georgiades, *OikD*, § 31 nr 30; Kounougeri-Manoledaki, *OikD*, nr 1309; Stampelou, Prosopikotita kai Oikogeneiakes Scheseis (Ant N Sakkoulas 2010) 64; Samara, To Dikaioma Prosopikis Epikoinonias me to Aniliko Tekno (Nomiki Vivliothiki 2010) 30.

(311) For the amendment, see Art 13 of Law 4800/2021.

(312) Art 1520 para 3 GrCC.

(313) See above II A 3 a.

(314) See above II D 3 b.

(315) Art 1519 para 2 GrCC. See above II D 3 b.

of parental care. (316) The new provision Article 1532 para 2 GrCC also mentions explicitly that the culpable violation of the terms of the parents' agreement or the court decision regarding the contact of the child with the non-residing parent and the obstruction of this contact in any way amounts to faulty exercise of parental care. (317) At the same time, the law rules that the non-exercise of the right to contact by the non-residing parent is also an instance of faulty exercise of parental care (provided that the non-residing parent participates in the exercise of parental care). (318) Moreover, according to Article 1520 para 3 GrCC, if the parent who has the right to contact misuses or abuses this right, the parent with whom the child resides can file for amendment of the regulation on contact in court.

102 The practical problems as to the enforcement of the right of contact of the non-residing parent remain unsolved, even after the last reforms of 2021. Greece has been repeatedly condemned by the European Court of Human Rights for violations of Article 8 of the ECHR, in cases relating to the infringement of the right to contact. (319) These judgments actually show that such problems cannot just be solved by court proceedings. What would be necessary would be the support of social services, which currently are not able to deal with the issue adequately.

103 An important innovation of Law 4800/2021 has been that it extended the right of contact to further persons to align Greek law with the case-law of the European Court of Human Rights. (320) Already according to the previous legal regime, grandparents had a right to contact, while case-law had extended the right to siblings as well. (321) The new Law assigned the right to contact also to persons who have developed a social-emotional bond of family nature with the child, such as stepparents and former foster parents, if contact is proven to be in the best interests of the child. Nevertheless, still no protection is granted to persons who have not had a chance to develop a social-emotional bond with the child yet, for instance, a biological father who

---

(316) Art 1532 para 2 β GrCC.

(317) Art 1532 para 2 γ GrCC. For the legal consequences of faulty exercise of parental care, see above II D 3 b in fine.

(318) See above II D 3 b.

(319) See, among others, *Kosmopoulou v Greece* App no 60457/00 (ECHR, 5 February 2004); *Fourkiotis v Greece* App no 74758/11 (ECHR, 16 June 2016); *I.S. v Greece* App no 19165/20 (ECHR, 23 May 2023).

(320) *Nazarenko v Russia* App no 39438/13 (ECHR, 16 July 2015); *Fatkhutdinov v Russia* App no 36335/18 (ECHR 29 September 2020); *V.D. and Others v Russia* App no 72931/10 (ECHR 9 April 2019).

(321) Single-member Court of First Instance of Thessaloniki 7466/2005, Nomos.

does not meet the conditions to bring a suit for the challenge of the child's legal fatherhood. (322)

6. *Brief remarks on cross-border cases*

104 International jurisdiction of Greek courts in cases regarding parental responsibilities may only be established according to the provisions of the Greek Code of Civil Procedure, on the basis of Article 14 of Regulation 2019/1111, when no court of a Member State has jurisdiction pursuant to Articles 7 to 11, and provided that no other relevant international convention (such as the Hague Convention of 1996 on Jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, (323) or also bilateral conventions between Greece and other countries) applies.

105 The applicable provisions of the Greek Code of Civil Procedure in disputes regarding parental responsibilities (adversarial proceedings) are the same as those in disputes on legal parenthood. (324) As regards non-contentious proceedings, such as the appointment of a legal guardian for a minor or the granting of an authorisation to the guardian for specific legal acts, the court of the habitual residence of the minor is, as a rule, competent. (325) Especially as regards the appointment of a guardian for a minor, if the minor has Greek citizenship, but no habitual residence in Greece, the court of the minor's last habitual residence in Greece has international jurisdiction, or otherwise the court of Athens. (326)

106 The certificates referred to in Articles 36(1) and 66 of Regulation 2019/1111 are granted by the court that issued the decision or by the authority (notary) that issued the document. (327)

107 Agreements of the parties pursuant to the provisions of Greek substantive law, such as those pertaining to the exercise of parental responsibility after divorce or on contractual foster care, can be concluded if Greek law is applicable.

---

(322) *Anayo v Germany* App no 20578/07 (ECHR, 21 December 2010); *Schneider v Germany* App no 17080/07 (ECHR, 15 September 2011). On the possibility of the biological father to challenge paternity, see above II B 2 a.

(323) Law 4020/2011.

(324) See above II B 3. On the application of Art 601 para 2 GrCCP also in disputes on parental responsibilities, see Georgiades, *OikD*, § 30 nr 85; E. Kanellopoulou, 'Scheseis metaxy Goneon kai Teknon' (Chapter 8) in Chrysafo Tsouka (ed), *Diethnes Oikogeneiako Dikaio* (Nomiki Vivliothiki 2016) 319 (nr 29).

(325) Arts 796 para 1 sent 1 and 797 GrCCP.

(326) Art 3 and Art 796 para 1 sent 3 GrCCP.

(327) < https://e-justice.europa.eu/pdf-export/5974_en > accessed 3 June 2025.

E. *Matrimonial property regimes*

1. *In marriage*

108 The default matrimonial property regime in Greece is that of participation in acquests. (328) Alternatively, spouses can opt for a community property regime instead. (329) Such an agreement between the spouses is subject to the form of a notarial deed, which is then registered in a special public register. (330) Nevertheless, in practice, very few couples make use of this option, (331) and it will, therefore, not be explored further here.

109 As regards the participation in acquests, it rests on the main rule that the property of each spouse is separate during marriage, (332) but, at the same time, there is a sharing mechanism aiming at the protection of the financially weaker spouse. In particular, upon annulment or dissolution of marriage as well as when the spouses have been separated for more than three years, the law entitles each spouse to claim part of the increase in the property of the other spouse which occurred during the marriage, to the extent that they can prove that this increase can also be attributed to their own contribution. (333)

110 The rules on the claim of each spouse to the increase of the property of the other spouse are mandatory law. (334) It is not possible for either spouse to waive this claim before the claim is born, ie, before the dissolution of marriage by divorce, the annulment of the marriage or the completion of the three-year separation period. An exception to this is accepted, according to the plenary of *Areios Pagos* (Greek Court of Cassation), when the waiver is part of the negotiations for a divorce by mutual consent and provided that the marriage is indeed dissolved by mutual consent. (335) The general rules on juridical acts apply to the waiver as well, so it can be challenged on the same grounds as any other juridical act.

111 This type of dispute is subject to mandatory mediation, (336) meaning that the court does not try the case before an initial mediation session has been

---

(328) Art 1397 GrCC.

(329) Arts 1403-1415 GrCC.

(330) Art 1403GrCC.

(331) See Papachristou, *OikD*, p 123, who mentions that between 1989 and 2014 only 32 couples opted for the community property regime.

(332) Art 1397 GrCC.

(333) Art 1400 GrCC.

(334) Georgiades, *OikD*, § 13 nr 18; Kounougeri-Manoledaki, *OikD*, nr 400.

(335) AP (full bench) 6/2019, Nomos.

(336) This is the case if the disputes are tried in the special proceedings of family disputes. On this issue, see above fn 54. On the mandatory initial mediation sitting in family law disputes, see Art 6 of Law 4640/2019.

completed. If mediation is successful, the mediator drafts a protocol of the agreement that the parties then sign. The agreement can be enforceable once it is filed at the Registry of the competent Court of First Instance. (337) If mediation is not successful, and if the case is also not settled before the court, (338) the court tries the case according to the special proceedings in family disputes. (339)

112 In practice, the success of the claim is often prevented because of evidentiary difficulties. To address these difficulties, there is a legal presumption that, unless proved otherwise, the claimant has contributed to the increase of the property of the other spouse and that this contribution amounts to one-third of the increase in the property of the other. (340) This provision is nevertheless insufficient to address the evidentiary problems. Because Greek law does not recognise a claim of each spouse to acquire information on the property of the other spouse, (341) the claim is often dismissed as too vague.

2. *In registered partnerships*

113 The same provisions that apply in marriage apply in principle also to a registered partnership, unless the partners agree otherwise when concluding the partnership agreement. (342) However, the law on registered partnership provides two restrictions to such agreements of the parties: the first is that any deviating agreement regarding their property relations should be in line with the principles of equality and solidarity. (343) The second is that registered partners may not waive their claim to the increase of the property of the other partner during the partnership before the claim is born, that is before the annulment or dissolution of the partnership. (344) These restrictions thus, in fact, leave little room for the partners to regulate their property relations as they wish. It is generally accepted that they could opt for a regime of common property, or that they could agree on a different presumption (eg, 1/2 or 1/4, instead of 1/3 that holds in the case of marriage) on the

(337) Art 8 of Law 4640/2019.

(338) Art 611 GrCCP.

(339) See above fn 54.

(340) Georgiades, *OikD*, § 12 nr 38; Kounougeri-Manoledaki, *OikD*, nr 394.

(341) Eleni Zervogianni, 'I Parochi Pliroforion gia ta Apoktimata ton Syzygon' (2015) EfAD, 297.

(342) It is debated if such an agreement can be concluded also after the conclusion of the partnership agreement. Against this possibility: Georgiades, *OikD*, § 23 nr 9 at fn 9. Contra Maria-Efraimia Gerasopoulou, H Ennomi Schesi ton Syntrofon apo to Symfono Symviosis (Sakkoulas 2021) nr 318.

(343) Art 5 para 2 sent 1 of Law 4356/2015.

(344) Art 5 para 2 sent 2 of Law 4356/2015.

contribution of each partner to the increase of the property of the other partner, or that no such presumption should apply. (345)

3. *Cohabitants (that have not concluded a registered partnership)*

114 Irrespective of the legal recognition of their relationship, persons who simply live together, without being married or in a registered partnership, may contribute to the increase of the property of their partner, either by property transfers or even simply by saving them costs, by providing, for instance, housing or services without receiving any remuneration in return. For a long time, there was a dispute in Greece about whether the provisions on the spouse's claim for the contribution in the increase of the property of the other spouse could apply by analogy. Unlike parts of literature, case-law had been very reluctant to accept this approach, based mainly on the argument that cohabitants decided not to proceed to the legal recognition of their relationship and it would therefore be contradictory to apply provisions on marriage to their relationship. (346) On this basis, the only possibility of one ex-partner to claim from the other one their contribution to the increase of property during the cohabitation would be unjust enrichment. (347) This is now explicitly stated in Article 6 of Law 4356/2015. What is crucial though for the application of this provision is to identify the contributions between the cohabitants that, after the dissolution of their relationship, are without legal cause and are thus considered unjustified. Case-law adopts the following distinction: (348) the costs that one cohabitant saved because the other covered their needs during their common life (eg, housing, basic necessities, leisure) cannot be claimed back, because they still have as a legal cause the will of the partner who proceeded to the contribution without aiming at a counter-performance. This no longer holds for contributions that had as a cause either the expectation that the relationship will continue, or that the

---

(345) Gerasopoulou, H Ennomi Schesi ton Syntrofon, nr 361 ff.

(346) See AP 1926/2013, Nomos; AP 206/2011, Nomos; AP 874/2008, Nomos. See also Georgiades, *OikD*, 1st ed. 2014, § 12 nr 3; Spyridakis, *OikD*, 2006, p 86. Contra (in favour of the application by analogy of Art 1400 GrCC in the cases in question): Georgios Koumantos, Oikogeneiako Dikaio (Vol I, Ant N Sakkoulas, 1988) 19-20; Panagiotis Nikolopoulos, I Axiosi Symmetohis sta Apoktimata ton Syzygon (Ant N Sakkoulas 1993) 77 ff; Pinelopi Agallopoulou, 'Eleftheres Symvioseis' in Genethlion Ap. Georgiadi (Vol I, Ant N Sakkoulas 2013) 3, 17; Konstantinos Panagopoulos, Gamos, Symfono Symviosis kai Eleftheri Enosi (ekd. Katsarou 2010) 186. For the concise presentation of the relevant arguments, see Zafeirios Tsolakidis, 'Lixi tis Eleftheris Enosis kai Apodosi Periousiakon Epauxiseon ton Symbiounton kata ti Diarkeia tis' (2015) EfAD, 98, 100.

(347) Arts 904 ff GrCC.

(348) AP 1751/2014, Nomos.

partners will get married, such as, typically, the transfers of property assets of considerable value or even the work of one partner, without pay, to the business of the other. These last contributions can be claimed back if cohabitation is terminated on the grounds that either there no longer exists a legal cause for maintaining the enrichment, or the legal cause for this contribution did not follow. This dispute is based on the provisions on unjust enrichment and is therefore not considered as pertaining to family matters. Hence ordinary proceedings apply. (349)

III. Succession law (350)

115 The core of substantive rules of Greek succession law is included in the fifth book of the Greek Civil Code (Articles 1710–2035), while the Code of Civil Procedure includes provisions on relevant court proceedings, many of which are non-contentious. (351)

116 A person may become the heir of an estate either by the will of the deceased, which, according to Greek law, may only be included in a testament, which is freely revocable, (352) and not in a contract, (353) or by law. (354) The latter happens in the case of intestate succession (*εξ αδιαθέτου διαδοχή*), as well as in the case of forced heirship (*νόμιμη μοίρα*). (355) There is therefore a tension in Greek succession law between the autonomy of the will of the deceased and the protection of their close family (spouse or partner in a registered partnership, descendants, parents). Forced heirs in Greek law, become heirs of the deceased by force of law, irrespective of their will, and acquire a real right to the estate. (356)

117 Succession law aims at balancing the interests of the deceased, of the members of their family and of other heirs as well as those of the deceased's debtors. The State also participates in the succession of a person, either directly, as an heir either by the will of the deceased, or by law, in the case of intestate succession, if all persons who were previously called to the

(349) A mandatory first mediation sitting is foreseen if the value of the object of the trial is greater than €30,000. See Art 6 of Law 4640/2019.

(350) This chapter represents Greek succession law as of 3.6.2025. It is currently under review and substantial reforms are underway.

(351) Such as the publication of the will, the judicial liquidation of the estate and the issuance of a certificate of succession. See below III A 2, B and C 3.

(352) Arts 1710 and 1763 ff GrCC.

(353) On the prohibition of contracts on inheritance in general, see Art 368 GrCC.

(354) Art 1710 GrCC.

(355) Arts 1813 ff and 1825 ff GrCC respectively.

(356) Art 1825 para 2 GrCC.

succession waived their succession right, (357) or indirectly, through the collection of inheritance tax. To protect all these interests as well as the safety of transactions, there is an increased formality in succession law, while most provisions are mandatory law.

118 Since 1946, when the Greek Civil Code entered into force, there has been no comprehensive reform of succession law. It was only in October 2024 that the Minister of Justice set up a working group for the reform of succession law to fundamentally review it. To date, almost all enacted amendments of succession law have been a side-effect of amendments of family law. Nevertheless, in the last decade, steps have been taken in the direction of the de-judicialisation of succession law procedures. In 2013, the law provided for an administrative procedure for the custody of vacant estates. (358) Very recently, Law 5095/2024 on the enhancement of the competence of lawyers, transferred (partially) to lawyers the competence to issue certificates of inheritance. (359) In spite of these developments, overall, the role of the court remains central for most succession law proceedings. When the proceedings are non-contentious, the public prosecutor may participate in them as well. The Registry of the Court of Inheritance, which is the Court of First Instance of the district in which the deceased had their domicile at the time of death, (360) also plays an important role in succession law, since it is before the Registry of this court that an heir may waive their right to the succession. The working group has the task to examine succession law as a whole and propose significant amendments to it.

A. *Devolution of the estate*

119 The devolution of the estate to the heirs is universal, direct, and automatic. It is universal in the sense that the heirs do not only inherit the assets of the estate, but also the debts of the deceased. (361) It is direct because the estate always passes to the heirs (including forced heirs) at the time of death of the deceased, (362) without any intermediary, even if the heir does not know that the deceased has died or that they are an heir. (363) This devolution to a

(357) The right of the State in intestate succession is established in Art 1824 GrCC.
(358) See below III C 4.
(359) See below III B.
(360) Art 810 GrCCP. On the abolishment of Courts of Peace in 2024 see above fn 7.
(361) Art 1710 GrCC.
(362) Art 1711 sent 3 GrCC.
(363) An exception to this is the acquisition of real rights on immovables, for which registration in the land register is required (Arts 1846 and 1193 GrCC). However, as soon as this registration is made, its effects are retroactive (Art 1199 GrCC).

specific heir is reversed retroactively if this heir waives the succession, usually when there are debts that exceed the assets of the estate, given that, in Greek law, the heirs are liable for the debts of the estate also with their personal property. (364) After the waiver of the succession by the heir, and since there can be no estate without an heir, the next heir is called to the succession, again, by legal fiction, at the time of death of the deceased. (365) Finally, the devolution of the estate to the heirs is automatic because there is no need for any legal act to transfer the assets and debts of the deceased to the heir, but this takes place by operation of the law. (366)

1. *Acceptance or waiver of succession*

120 The estate passes to the heirs by operation of the law at the time of death of the deceased. This initial acquisition of the estate by the heir is reversed if the heir subsequently waives their right to the succession. Namely, if an heir does not wish to participate in the estate, usually because the debts exceed the assets, (367) they can waive their right within a specific time limit, which is in principle four months after the heir has been informed that the deceased has died and that they are called to the deceased's succession. (368) If the deceased had a will, this period does not begin before the publication of the will. If the heir does not waive the succession within this specific period, it is considered, by legal fiction, that they have accepted it. (369) The acquisition of the estate by an heir is thus only finalised when the heir can no longer waive the succession. Until this finalisation, the creditors of the estate may not bring a claim against the heir for debts of the estate. (370) More specifically:

121 The waiver of the estate is a unilateral juridical act, which is declared before the Registry of the Court of Inheritance. It is irrevocable, not subject to conditions, and has to be made either in person or by a representative granted a power of representation by a notarial deed specifically for the

(364) Art 1901 GrCC.

(365) Art 1856 GrCC.

(366) Art 1846 GrCC.

(367) See above III - introductory remarks to succession law.

(368) Art 1847 GrCC. However, the deadline for minors has been extended by a special legal provision (Art 35 of Law 4786/2021) to one year after they reach majority. This provision leads to considerable practical problems. See also below III C 4.

(369) Art 1850 sent 2 GrCC.

(370) Art 1858 GrCC. See also Art 265 GrCCP, according to which, if an heir who has still the right to waive the succession right has been sued by a creditor of the estate, they may request the hearing to be postponed until the time limit for the waiver of the succession has expired.

waiver of the succession. (371) The heir forfeits the right to waive the estate if they previously accepted the succession. (372) Moreover, the waiver of succession is void if it precedes the death of the deceased. (373) Along the same lines, contracts on the waiver of the estate of a living person are void, (374) with few exceptions, the most important of which refers to the possibility of each registered partner, when concluding the 'cohabitation agreement', to waive their future forced share in the succession of the other partner. (375)

122 The acceptance of a succession, on the other hand, is, in principle, not subject to form. It can be explicit, implicit or by legal fiction. The explicit acceptance of the estate is realised by a unilateral legal act, which is not addressed to anyone else and is not subject to form. (376) An implicit acceptance can be inferred by actions of the heir, such as the submission of a declaration for inheritance tax or the filing of an application for a certificate of succession. (377) The acceptance is fictional, as mentioned above, if the heir does not waive the succession within the deadline provided in the law. However, for the heir to acquire real rights on the immovables of the estate, a registration in the land registry is required. (378) In such a case, the acceptance of the estate must be evidenced by a public document. This document was typically a notarial deed. After Law 5095/2024 entered into force, lawyers may also draft such documents. (379) A certificate of succession may also be registered instead. (380) This registration is not subject to any deadline and it develops its effects retroactively, since the time of death of the deceased. (381)

123 The acceptance of succession is formal and subject to a deadline only when the heir wishes to exclude their liability for the debts of the succession with their own personal property. This can be achieved by means of acceptance of an inheritance with the benefit of an inventory (*αποδοχή με το ευεργέτημα της απογραφής*), in which case the estate and the personal property of the heir do

(371) Art 1848 GrCC.

(372) Art 1849 GrCC. On the explicit and implicit acceptance of the succession, see below, in this section.

(373) Art 1851 GrCC.

(374) Art 368 GrCC.

(375) Art 8 sent 2 of Law 4356/2015.

(376) Apostolos Georgiades, *Klironomiko Dikaio* (hereinafter; *KlirD*) (3rd edn, P. N. Sakkoulas 2023) § 38 nr 14.

(377) See below III B.

(378) Art 1846 GrCC.

(379) Art 11 of Law 5095/2024, that amended Art. 812 GrCCP.

(380) Art 1195 GrCC.

(381) Art 1199 GrCC.

not merge and the liability of the heir is limited to the estate they inherited. (382) This form of acceptance is subject to the same form and deadline as the waiver of succession. (383) The heir that has accepted with this benefit has certain obligations, the most important of which is to draw up an inventory of the estate. (384) This inventory is 'judicial' in the sense that it is ordered by the court, in non-contentious proceedings, at the request of whoever has a legal interest in the inventory or by the court *ex officio*. (385) The inventory is then drawn up by a notary, in collaboration with two expert valuers, all appointed by the court. (386) If the heir does not comply with the abovementioned obligations, they forfeit the benefit and are liable for the debts with their personal property as well. Special legal provisions, though, that aim at the protection of persons who are not legally capable, provide that minors and adults that have been placed under the protective legal regime of 'judicial assistance' always accept the succession with the benefit of inventory (387) and do not forfeit this benefit before the expiry of one year from the acquisition of full legal capacity. (388) Moreover, the law also provides that when the State becomes an heir of a person, it always inherits with the benefit of inventory and never forfeits this benefit. (389)

124 Both the acceptance (including the acceptance by legal fiction) (390) and the waiver of the succession are voidable and may be annulled by court decision (in contentious proceedings) if they have been the result of mistake, deceit, or duress. The relevant special provisions of the law of succession apply in parallel to the general rules on voidable legal acts. Thus, in cases of mistake, annulment is only possible if the mistake is material. Nevertheless, the law explicitly states that a mistake concerning the assets or liabilities of the estate is immaterial. (391) Case-law accepts that the heir's mistake regarding the duration of the deadline to waive the succession or the results of not waiving the succession within this deadline constitute material mistakes. (392) Thus inequitable results seem to be avoided in many cases in an indirect way.

---

(382) Arts 1902, 1904 GrCC.
(383) Art 1902 sent 1 GrCC.
(384) Art 1903 GrCC.
(385) Art 838 GrCCP. See also Georgiades, *KlirD*, § 43 nr 23.
(386) Art 840 GrCCP.
(387) Arts 1527, 1678 para 3 GrCC.
(388) Art 1912 GrCC.
(389) Art 118 of the Introductory Law to the Greek Civil Code (EisNAK).
(390) Art 1857 para 4 GrCC.
(391) Art 1857 para 3 GrCC.
(392) See Georgiades, *KlirD*, § 38 nr 36; Niki Psouni, Klironomiko Dikaio (hereinafter; *KlirD*) (6th edn, Sakkoulas 2023) 120-121 with further references.

The annulment of the waiver of the succession is considered as an acceptance of succession. However, the annulment of the acceptance is not considered to be a waiver, because the waiver, unlike the acceptance, is subject to form. In such cases, according to the rather prevailing opinion in case-law, soon after the court decision that annulled the acceptance of the succession became final, the heir must proceed to the declaration of the waiver of the succession before the Registry of the Court. (393) **125**

On issues of international jurisdiction, Regulation 650/2012 applies. The provisions of the Regulation prevail over the relevant rules of the Greek Code of Civil Procedure that are no longer deemed applicable. (394) As to *lis pendens* though, Article 17 of the Regulation, which provides for the stay of the proceedings of any court other than the court first seized, applies only when the case is pending before the court of another Member State. If this is not the case, the national rules apply, which does not lead to a stay of the proceedings. (395) **126**

2. *The publication of the will*

In Greek law, a person may appoint their heirs only by will, which is always revocable. (396) Joint wills or contracts on inheritance do not produce any legal effects. (397) **127**

After the death of a person, wills are published by the competent Court of First Instance, in a non-contentious proceeding. (398) Whoever is in the possession of a private will (*ιδιόγραφη διαθήκη*), (399) and in the case of a public or secret will, the notary (400) must bring it before the court for publication. The content of the will is included in the protocol of the court session and the will is then filed in a public register. (401) The court does not delve into any substantial issues, such as the examination of the validity of the will. If the will is in the possession of a Greek Consulate abroad or if the person who is in possession of a private will lives abroad, it is the Consul who **128**

(393) See Flampouras, in *SEAK*, Art 1856 nr 11, with further references to case-law. The issue is nevertheless disputed. See Georgiades, *KlirD*, § 38 nr 36; Psouni, *KlirD*, p 122.
(394) Pampoukis, Idiotiko Diethnes Dikaio, nr 934 (p 739).
(395) See above II A 4.
(396) Art 1710, 1763 ff GrCC.
(397) Arts 1710, 1717 and 368 GrCC.
(398) Art 807 GrCCP. On the abolishment of Courts of Peace see above fn 7.
(399) Art 1774 GrCC.
(400) Art 1769 GrCC.
(401) Arts 1771 ff GrCC and 807 ff GrCCP.

proceeds to the publication of the will and draws up a record of this publication. (402)

129 The publication of the will serves the need for disclosure of the provisions of the will, but it is neither a condition for its validity, (403) nor a prerequisite for the will to take effect. There is also no deadline for the publication of the will, but it is only after the publication of the will that the deadline for (the acceptance or) waiver of the succession begins. (404)

130 Especially in the case of private wills, meaning wills that the testator has written with their own hand, with a date and signature, (405) the court, at the request of the person who submits the will to the court for publication, may declare this will as the authentic will of the testator if is satisfied that there is a great probability that the text and the signature are from the testator themself. (406) The practical significance of this is that, if the authenticity of the will is not contested by anyone in the following five years, after this time the authenticity is presumed, meaning that it is no longer the person who derives rights from the will that has to prove the will's authenticity, but the person who challenges it. (407)

3. *The rights of forced heirs and the validity of the will*

131 The will, just like any other juridical act, may be void or voidable. The reasons that lead to invalidity are numerous, and may either refer to the will as a whole, as in cases of legal incapacity of the testator to draft a will or the non-observance of mandatory provisions on the drafting of a will, or to specific provisions of the will, in which case these provisions have no effect, but the remainder of the will is valid, unless it is established that the testator would not have wanted the will to have any effect without the invalid part. (408) Such instances arise if a specific provision of the will is void because it is too vague, or against the law or *bonos mores*, or its effect is dependent upon a will of a third person. (409) In such instances, the invalidity arises by operation of the law. If there is a dispute regarding the validity or

---

(402) Arts 807 para 2 and 808 paras 2, 3, 6 GrCCP.
(403) Art 1779 GrCC.
(404) Art 1847 para 1 sent 2 GrCC.
(405) Art 1721 GrCC.
(406) Arts 1776 GrCC and 808 para 3 GrCCP.
(407) Art 1777 GrCC.
(408) Art 181 GrCC.
(409) See in detail Georgiades, *KlirD*, § 20 nr 1 ff; Psouni, *KlirD*, pp 873 ff.

invalidity of a will, the relevant court decision is simply declaratory in nature. (410)

132 One of the reasons that may lead to the invalidity of the will is the violation of the rights of forced heirs. Because the rules of the Civil Code on the rights of forced heirs are mandatory, to the extent that the will contravenes these provisions, it is void by operation of the law. (411) Forced heirs acquire a succession right. They have a real right to the estate, (412) meaning that they automatically obtain their share of each and every asset of the deceased, while they are also liable, to the corresponding share, for the deceased's debts. (413)

133 If another heir, usually the one(s) established by the will, does not grant to the forced heir the part of the estate to which they are entitled, the latter may bring a claim before the court, demanding that the defendant recognises their succession right and grants them the corresponding part of the estate. (414) The proceedings are adversary and governed by the general provisions of the Code of Civil Procedure. The prescription of a forced heir's claim is 20 years. (415) This inevitably has a negative impact on the safety of transactions. To address this problem, according to the prevailing opinion in case-law, the nullity of the will because of a violation of the right of a forced heir is a 'relative nullity', in the sense that it is only the forced heir that may invoke it, while the latter may also give up their right to invoke the invalidity of the will, even implicitly, by demonstrating their unwillingness to do so. (416)

134 Because the magnitude of the share of the forced heir is assessed by also taking into account donations and other *inter vivos* gratuities of the deceased, (417) it is possible that the estate is unable to cover the forced share of the heir. This is the case when the deceased has transferred most of their property before their death to third parties. In such a case, the forced heir has to bring a claim before the court to reverse the donations of the deceased, starting with the last donation made (*μέμψη άστοργης δωρεάς*). (418) The procedure is adversary and the judgment that accepts the claim and reverses

---

(410) Georgiades, *KlirD*, § 20 nr 11; Psouni, *KlirD*, p 875.

(411) Arts 174 and 1825 GrCC.

(412) Art 1815 para 2 GrCC.

(413) Art 1885 GrCC. See Georgiades, *KlirD*, § 31 nr 11 ff; Psouni, *KlirD*, pp 434 ff.

(414) Art 1871 GrCC.

(415) There is no special provision on the prescription of this claim and therefore the general provision of Art 249 GrCC applies. See Psouni, *KlirD*, p 1040.

(416) See in more detail, Georgiades, *KlirD*, § 33 nr 34 ff; Psouni, *KlirD*, pp 450 ff.

(417) Art 1831 para 2 GrCC.

(418) Art 1835 GrCC.

the donation is constitutive in nature. (419) Once the donation is reversed, there is no longer a just cause for the recipient of the donation to keep it, so the forced heir can claim it based on the provisions on unjust enrichment. (420)

135 Finally, a will may be voidable in the case of mistake, deceit, or duress. (421) It then develops its effects until it is pronounced void by a court decision, in which case it is treated as void from the outset. The claim can be brought by the person who has an interest in the invalidity of the will within two years from its publication. (422) The right to bring a claim to annul the voidable will is constitutive, (423) and thus the court decision that accepts the claim is also constitutive in nature.

B. *Certificates of succession*

136 Heirs (including forced heirs), reversionary heirs (*fideicommissarii*, *καταπιστευματοδόχοι*) as well as executors of the will can (but do not have to) apply for a certificate of succession (*κληρονομητήριο*). (424) According to the prevailing opinion in case-law, the same holds for those legatees (*κληροδόχοι*) that acquire a real right to the object of the legacy, but not for those who only have a claim against the heir to perform the legacy. (425) The curator or the liquidator of the estate, on the other hand, may not apply for such a certificate. (426)

137 The certificate of succession is a court certificate that states the rights that the holder of the certificate has to the succession as well as any restrictions thereof (for example, legacies, conditions, etc). The certificate of succession has a legitimising function, in that it enables the holder of the certificate to prove their right that derives from the inheritance. This effect is enhanced by the fact that there is a rebuttable presumption that the person who, accord-

---

(419) Georgiades, *KlirD*, § 36 nr 55; Psouni, *KlirD*, pp 545 ff.

(420) Ibid.

(421) Arts 1782-1786 GrCC.

(422) Arts 1787-1788 GrCC.

(423) Georgiades, *KlirD*, § 20 nr 16; Psouni, *KlirD*, p 877.

(424) Art 819 GrCCP. See also Art 1956 GrCC.

(425) A legacy may provide a real right to the legatee only under the conditions of Art 1996 GrCC. If these are not fulfilled, the legatee has merely a claim for the performance of the legacy (Art 1995 GrCC). On the distinction between the two types of legacies in respect of who may apply for a certificate of inheritance, see Georgiades, *KlirD*, § 45 nr 29, 30; Psouni, *KlirD*, pp 969-970; Chelidonis, in *SEAK*, Art 1956 nr 12.

(426) See Georgiades, *KlirD*, § 45 nr 19. Contra I S Spyridakis, *Klironomiko Dikaio* (hereinafter: *KlirD*) (4th edn. Sakkoulas 2018) nr 180.3. For the appointment of the curator and the liquidator of the estate, see below III C 3 and 4.

ing to a certificate, has a right to the succession of the deceased indeed has this right and that this right is not subject to restrictions other than those stated in the certificate itself. (427) Furthermore, third parties who act in good faith and transact with the person named in the certificate of succession as beneficiary are protected, even if it transpires that in fact this person does not have the right that is stated in the certificate. (428) For example, if there is a certificate of succession stating that a specific person is the sole heir of the deceased on the basis of the latter's will, and this person sells and transfers an immovable of the estate to a third party, this third party acquires this property if they acted in good faith, even if it subsequently turns out that the will of the deceased is void and that the true heir is in fact (already since the death of the deceased) someone else.

138 Until recently, the procedure for the issuance of the certificate of succession had been purely judicial. Currently, after Law 5095/2024, it has been partially de-judicialised. The procedure is as follows: for the issuance of the certificate of succession, the heir, legatee or executor of the will has to apply before the Court of Inheritance. (429) There is thus only one court that has competence over such cases. This serves, to a certain extent, as a guarantee that there will be no contradictory certificates of succession. The procedure is simple, in that there is not always the need for a court decision. (430) More specifically, once the court receives the application, it posts it for ten days on its premises. Law 5095/2024 did not amend these rules. De-judicialisation came at a subsequent stage.

139 More specifically: in the past, when the procedure was purely judicial, if no-one objected to the posting of the application, no court hearing would take place. The applicant would provide the judge with all relevant proof, which should derive from public documents. (431) The court could, on its own motion, gather further evidence, in any adequate way. (432) The judge ordered the issuance of the certificate of succession if, and only if, they were satisfied that the facts that the applicant invoked were truthful and that the applicant had the specific right to succession. (433) If another judicial proceeding had been pending between the applicant and a third person who claimed to have a right to the inheritance, the judge could, but did not have

(427) Art 1962 GrCC; Art 821 GrCCP.
(428) Art 1963 GrCC; Art 822 GrCCP.
(429) Art 1956 GrCC as well as Arts 819 and 810 GrCCP.
(430) Art 819 GrCCP.
(431) Art 1958 GrCC (before its amendment by Art 7 of Law 5095/2024).
(432) Art 1959 GrCC (before its amendment by Art 8 of Law 5095/2024). See also Art 759 GrCCP.
(433) Art 1961 GrCCP (before its amendment by Art 10 of Law 5095/2024).

to, suspend the procedure for the issuance of the certificate of succession. (434) The judge could order the issuance of a certificate of succession that certified the rights to the succession only partly, to the extent it was not disputed.

140 After Law 5095/2024, in instances where nobody objected to the issuance of the certificate of succession within the ten days in which the application was posted on the premises of a court, an attorney assumes the function of the judge. Namely, the decision on the issuance of the certificate of succession is assigned to an attorney. The attorney has competence to gather all relevant evidence that certifies the succession right of the applicant and, if they are satisfied that the right exists, they order the issuance of the certificate of succession by the court. (435) It is further provided in the law that the decision of the attorney is subject to third-party appeal, which is then decided by the court. (436) In cases in which a person objected to the issuance of the certificate of inheritance within the ten days that the application had been posted on the premises of the court, the procedure remains judicial.

141 In any case, because, as mentioned above, the certificate of succession creates only a rebuttable presumption of the existence of the holder's succession right, no *res judicata* effects derive from the procedure on the certificate of succession, even when its issuance was ordered by a court decision. Therefore, if another person questions the succession right of the holder of the certificate, they are not prevented from bringing a relevant claim for the recognition of their own succession right before the court. (437) This procedure is adversary, and the general provisions of the Code of Civil Procedure apply. If it transpires that the certificate of succession is inaccurate, there are different procedures that terminate its effect in the future, which are nevertheless all judicial. (438)

142 In cross-border cases, the court's jurisdiction for the issuance of a (Greek) certificate of succession is established on the basis of the provisions of Regulation 650/2012. (439) Thus there is such jurisdiction in principle if the deceased had their last habitual residence in Greece. Moreover, case-law has accepted the issuance of certificates of succession also in cases where the

---

(434) Georgiades, *KlirD*, § 45 nr 53.

(435) Art 3 of Law 5095/2024, that amended Art 819 GrCCP.

(436) Art 6 of Law 5095/2024, that amended Art 824 GrCCP.

(437) Georgiades, *KlirD*, § 45 nr 92.

(438) See Art 1964 GrCC (adversarial proceedings); Art 1965 GrCC (non-contentious proceedings); Art 1966 (by the court on its own motion).

(439) Leda-Maria Pipsou, 'Kanonismos (EE) 650/2012: Pedio Efarmogis, Diethnis Dikaiodosia, Anagnorisi kai Ektelesi Apofaseon, Apodohi kai Ektelesi Dimosion Eggrafon' (2014) Arm, 394, 404; Georgiades, *KlirD*, § 45 nr 37.

deceased had property in Greece, even if they had neither habitual residence in Greece or any other EU Member State, nor the Greek or other EU country citizenship. (440) In intra-European cross-border successions, the issuance of a European Certificate of Succession is possible according to Articles 62ff of Regulation 650/2012.

C. *Administration of estates*

143 It is a basic principle of Greek succession law that upon the death of a person, the property of the deceased passes directly to the heirs. Thus, unlike common law, there is nothing like an intermediate stage of administration of the estate, prior to its acquisition by the heirs. Therefore, it is in principle the heirs that administer the estate, as they administer their own affairs. Deviations from this rule may apply if the deceased had provided in their will for an executor of their will, if there are many debts in the estate, in which case judicial liquidation of the estate may follow, or if there is uncertainty as to the person of the heir, in which cases a curator of the State may be appointed.

1. *The administration of the estate by the heirs*

144 The heirs always acquire the estate already at the time of death of the deceased unless they waive their succession right. (441) A person who wishes to waive the succession right will generally abstain from the administration of the estate because, unless they take measures that are necessary for the preservation of the estate, (442) the acceptance of the succession may be inferred by their behaviour, which then leads to the extinction of their right to waive the succession. (443) If the initial heir waives the succession, the relations between them and the person to whom the estate passes (retroactively), after the waiver of the estate, is governed by the provisions on *negotiorum gestio* (*διοίκηση αλλοτρίων*). (444) The law also provides that the transfer of an asset that could not have been postponed without damage to the estate, as well as any unilateral act of a third party addressed to the initial heir, remain in effect even after the waiver of the estate. (445)

145 If there is more than one heir, the claims and debts of the estate are divided

(440) Athens Court of Peace 277/2019, Nomos, based on Arts 4 and 10 para 2 of Regulation 650/2012.

(441) See above III A 1.

(442) See Art 1859 GrCC.

(443) See above III A 1.

(444) Art 1859 para 1 GrCC. See on *negotiorum gestio* Arts 730 ff GrCC.

(445) Art 1859 para 2 GrCC.

among them in proportion to their shares. (446) In all other assets of the estate, unless the deceased has stipulated otherwise in their will, by assigning specific assets to specific heirs (*εγκατάσταση σε δήλο*), (447) or had concluded a contract with their descendants by means of which the deceased had already distributed their property among them (*νέμηση ανιόντος*), (448) a community of co-heirs is formed. (449) If such community is formed, each heir is entitled to use the common assets, derive benefits from them (eg, part of the rent of an apartment belonging to the estate), participate, together with all other co-heirs, in the decisions regarding their administration, or transfer their share to someone else. (450) The heir is also obliged to contribute to the costs of maintenance, administration and use of the assets of the estate. (451) Each co-heir has a claim for the dissolution of the community of co-heirs at any point in time. (452) The testator cannot prohibit this dissolution for a period longer than ten years after their death. (453) The community may be dissolved either by agreement of all heirs or by a court decision, which is constitutive in nature, (454) at the request of any heir. (455) The rules that apply to the judicial division of the estate among the heirs are the same as those that apply to the division of any common right and may take two main forms. The first one is distribution in natura, which any heir may request. (456) In such a case, if the elements of the estate can actually be divided in parts, without this leading to a decrease of their value (eg, division of a large plot of land), each heir takes one of these parts. (457) Division may also take the form of the creation of distinct property rights to immovable property, such as the establishment of floor ownership on a building of the estate, and the distribution of these rights among the heirs. (458) If no such division is possible, the court may assign the elements of the estate to each heir, in such a way that the value of what each heir receives corresponds to

---

(446) Art 1885 GrCC.
(447) Cf Art 1800 para 2 GrCC.
(448) Art 1891 GrCC.
(449) Art 1884 GrCC.
(450) Arts 787, 788, and 793 GrCC.
(451) Art 794 GrCC.
(452) Art 795 GrCC.
(453) Art 1887 GrCC.
(454) Arts 798 ff GrCC and 479 ff GrCCP. See also Georgiades, *KlirD*, § 49 nr 10; Psouni, *KlirD*, p 1110.
(455) Arts 1884 and 799 GrCC.
(456) Art 1888 GrCC.
(457) Art 480 para 1 GrCCP.
(458) Geordiades, *KlirD*, § 49 nr 27 with further references.

the value of their share of the succession. (459) A special rule holds for the family home of the deceased, according to which, the surviving spouse may request the court assign this to them. If the value of the immovable is greater than the value of the surviving spouse's share in the succession, the latter must pay the difference to the other heirs. (460) Similarly, if there is a business in the estate, and in an effort to protect its viability, the court may adjudicate it to one of the heirs, who will then have to compensate the other heirs. (461) If no division in natura is possible, the estate is sold in a public auction and the heirs receive in money the value of their succession share. (462) The deceased themself may include in their will rules on the distribution of the estate or even assign the distribution of the estate to the reasonable judgement of a third person. (463)

Finally, if the person who administers the estate turns out not to be the deceased's heir, as could occur, for instance, if a will of the deceased is found several years after death, and therefore the intestate succession that had taken place is overturned, the real heir is in principle not bound by the legal acts concluded by the person who had administered the estate upon the death of the deceased, unless the latter had a certificate of inheritance. The real heir has a claim against the initial possessor of the estate not only for the handover of the estate, or for anything else the latter acquired using means from the estate, (464) but also for the benefits they have derived from the estate as well as for compensation for assets of the estate that for any reason cannot be handed over. (465) The extent of the liability of the initial possessor of the estate differs depending on whether they had possession of the estate in good or bad faith and whether or not a claim against them has been raised. (466) Finally, the possessor of the estate may also have a claim against the real heir for the reimbursement of expenditure incurred for the benefit of the estate (including the payment of the deceased's debts). (467)

146

(459) Art 480 para 2 GrCCP.
(460) Art 1889 GrCC.
(461) Art 483 GrCCP.
(462) Art 484 GrCCP.
(463) Art 1890 GrCC.
(464) Art 1872 GrCC.
(465) Arts 1874 ff GrCC. See in more detail, Georgiades, *KlirD*, § 47 nr 43; Psouni, *KlirD*, pp 1031 ff.
(466) Arts 1874, 1876, 1877 and 1877 GrCC.
(467) Art 1875 GrCC.

2. *Administration of the estate by the executor of the will*

147 An executor of a will may be appointed only by the testator in their will. (468) After the death of the deceased, the person who is appointed executor, provided that they are fully legally capable, (469) may accept or renounce this function, by declaration to the Registry of the Court of Inheritance. (470) It is only after the acceptance that the executor can assume their duties.

148 The will of the testator is decisive for the tasks and powers assigned to the executor. The executor may have simply supervising powers, in the sense that they have a claim against the beneficiaries to comply with the provisions of the will, or may have powers to administer the estate themself. (471) In the latter case, it is disputed if the administration consists only in the implementation of the provisions of the will or if it can go beyond this, so that the executor has the power to administer the estate even after all provisions of the will have been executed. According to prevailing opinion, the function of the executor of the will in Greek law is ancillary and thus the executor cannot be vested with such powers. (472) Thus any relevant provision of the will is void, but can take effect as a special kind of legacy (*κληροδοσία*) or as a modus (*τρόπος*), if re-interpreted, taking into consideration the hypothetical will of the testator. (473) In any case, any provision of the will that restricts the right of a forced heir to administer their forced share does not hold. (474)

149 Within this general framework, the executor may proceed to all acts that are necessary for the execution of the will. For certain acts, such as the transfer of immovables, the consent of the heirs is necessary, and, in case of lack of consent, a court authorisation. (475) As a rule, it is the heir and not the executor of the will that acts as a plaintiff and as a defendant in cases referring to the estate, but the executor has the right to intervene in the

---

(468) Art 2017 GrCC.

(469) Art 2018 GrCC.

(470) Art 2019 GrCC.

(471) See Georgiades, *KlirD*, § 25 nr 9 and nr 34-35; Psouni, *KlirD*, pp 772 ff.

(472) See Georgiades, *KlirD*, § 25 nr 10 and Psouni, *KlirD*, pp 773-774 with further references. Contra Ioannis Spyridakis, 'O Diaheiristis Klironomias, Tropos Diaheiriseos, Klirodosia Diaheiriseos i Ektelestis Diathikis?' (1985) NoV 1683, 1685; Dimitra Papadopoulou-Klamari, O Ektelestis Diathikis sto Dikaio tou Astikou Kodika (Ant N Sakkoulas 2005) nr 229 ff.

(473) Georgiades, *KlirD*, § 25 nr 10; Psouni, *KlirD*, pp 773-774 with further references.

(474) Art 1829 GrCC. See also AP 545/2003, Nomos; Georgiades, *KlirD*, § 33 nr 25; Psouni, *KlirD*, p 481. This does not hold when the forced heir is indebted or leads a so-called 'dissolute life'. See Art 1845 GrCC.

(475) Art 2021 GrCC.

proceedings. (476) The judgment of the court in such cases has a *res judicata* effect in respect of the executor of the will. (477) The executor can act as a plaintiff or defendant only in cases that pertain to claims of the estate, which they have the power to administer, (478) in which cases the heir is excluded from being a plaintiff or defendant, but the relevant judgment develops a res judicata effect in respect of the heir as well. (479) The executor of the will is not a party (neither plaintiff nor defendant) in the proceedings on the distribution of the estate, unless the testator has assigned the distribution to them. (480)

3. *Judicial liquidation of the estate*

150 A court may order the 'judicial liquidation' of the estate (*δικαστική εκκαθάριση*) upon petition of the creditors of the estate. (481) In such a case, the estate remains separate from the private property of the heir (*separatio bonorum*). (482) The heir loses the right to administer the estate and this passes to a special liquidator, who is also appointed by the court. The liquidator can be any person with full legal capacity, even a legal person, that has accepted this function. (483) The court may replace the liquidator at their own request, or at the request of the creditors or any other person who has a legal interest in the replacement. (484)

151 The liquidator acts in their own name but in the interests of the heirs and the creditors of the estate. (485) The liquidator invites the creditors to declare their claim against the estate in writing, (486) and applies to the court for the drawing up of an inventory, which is then drafted by a notary, together with two expert valuers, (487) collects the claims and liquidates the assets of the estate and, finally, uses them to pay the creditors, after verifying the claims

---

(476) Arts 2025 para 1 and 2026 GrCC.

(477) Art 327 GrCCP. See also Bechlivanis, in *SEAK*, Arts 2025-2026 nr 6; Georgiades, *KlirD*, § 25 nr 49, 50.

(478) Art 2025 para 2 GrCC.

(479) Art 327 GrCCP; Bechlivanis, in *SEAK*, Arts 2025-2026 nr 7.

(480) Georgiades, *KlirD* § 25 nr 53 with further references. On the distribution of the estate among the heirs, see above III C 1.

(481) Art 1913 GrCC.

(482) Art 1914 GrCC.

(483) Art 1915 GrCC. See also Georgiades, *KlirD*, § 44 nr 60.

(484) Georgiades, *KlirD*, § 44 nr 63.

(485) Georgiades, *KlirD*, § 44 nr 66.

(486) Art 1916 GrCC.

(487) The procedure for the drawing up of an inventory is the same here as in the case of acceptance of succession with the benefit of an inventory. See above III A 1.

that have been declared. (488) If there are insufficient funds to satisfy the creditors in full, the creditors are satisfied commensurably, but the heirs are still liable for the (rest of the) debts of the estate with their personal property. (489) It is only the liquidator that can sue and be sued in proceedings regarding the estate, while the *res judicata* effect of such judgments also extends to the heirs. (490) Judicial liquidation can be of interest to the creditors of the estate if the heir is in debt, to prevent the satisfaction of the heir's personal creditors from the estate, or if the heir manages the estate in a way which is detrimental to the creditors. (491)

152 The procedure to subject an estate to judicial liquidation is non-contentious. Competent is the Court of Inheritance. (492) The creditor that applies must prove their legal interest to judicial liquidation, which usually consists in a reasonable risk that their claim will not be satisfied. (493) It is at the discretion of the court whether to order (or not order) the liquidation. (494) The application may be denied, even when the creditor has proven the risk of non-satisfaction of their claim, if the funds of the estate are so low that they do not suffice to cover the costs of liquidation, while, conversely, the judge may accept the application, even if it is not proven that the satisfaction of the creditor is at stake. (495) The decision of the court that orders the judicial liquidation of the estate is constitutive in nature. (496)

4. *Curatorship of a vacant estate*

153 An estate may be administered by a curator when there is uncertainty regarding the identity of an heir, including the case in which it is not sure whether or not the heir has proceeded to the acceptance of the succession and thus the acquisition of the estate by this heir is finalised. (497) Since 2021, such an uncertainty may arise when the heir is a minor, in which case a special legal rule provides that the deadline for the waiver of succession by

---

(488) Art 1918 GrCC.

(489) Arts 1920 and 1922 GrCC.

(490) Art 327 GrCCP; Georgiades, *KlirD*, § 44 nr 49, 51.

(491) Georgiades, *KlirD*, § 44 nr 4.

(492) Arts 814 para 1 and 810 GrCCP.

(493) Georgiades, *KlirD*, § 44 nr 22.

(494) See the wording of Art 1913 para 1 (The court *can* order...). See also Psouni, *KlirD*, p 1060.

(495) Georgiades, *KlirD*, § 44 nr 27; Psouni, *KlirD*, p 1060.

(496) Psouni, *KlirD*, p 1061.

(497) Art 61 para 3 of Law 4182/2013. On the acceptance of the succession and its significance, see above III A 1.

a minor does not expire until one year after reaching majority. (498) The curator administers the estate until it is ascertained who the heir is. (499) It is not possible to appoint a curator if there is an executor of the will or a liquidator of the estate. (500)

154 Since 2013, the curator of the estate is appointed by an administrative authority, (501) and not by the court, as was previously the case, either *ex officio* or at the request of a public authority or of any person who has a legal interest, (502) such as reversionary heirs (*fideicommissarii*), legatees, creditors of the estate, etc. (503) The administration chooses the curator by drawing lots between persons who are entered in a special registry of curators of estates. These persons are entered in the registry at their own request if they fulfil the criteria that the law provides. (504) In practice, they are often lawyers or notaries. The person who is appointed by the administration must accept their appointment within 15 days from the appointment, otherwise it is presumed that they refused it. (505)

155 The curator exercises a public function and is thus supervised by a public authority. (506) Nevertheless, their duties fall within private law. The curator acts as a representative of the (still uncertain) heir. (507) Hence, juridical acts that the curator concludes have a binding effect for the heir, unless they exceed the power of representation granted to the curator by law. More specifically, the law provides that they have the obligation to ensure that the estate is sealed by a notary, to draw up an inventory, (508) take all necessary conservative measures for the estate, collect the claims and deposit the money in a safe bank. (509) As a representative of the heir, the curator also files before the court the claims that the heir would bring, and is also sued in succession matters. The judgments on these proceedings have a *res judicata*

---

(498) Art 35 of Law 4786/2021.

(499) Art 62 para 3 of Law 4182/2013.

(500) Georgiades, *KlirD*, § 40 nr 13.

(501) The competent administrative authority is either the Secretary General of one of the seven Decentralised Administration Districts of Greece, if there are immovables of the estate only in this district, or, if there are immovables of the estate in more than one district, the Minister of Finance. See Art 1 no 4 and Art 2 paras 3 and 4 of Law 4182/2013.

(502) Art 62 of Law 4182/2013.

(503) See in detail Georgios Lekkas, I Scholazousa Klironomia (Sakkoulas 2016) 190.

(504) Art 16 of Law 4182/2013.

(505) Art 17 para 1 of Law 4182/2013.

(506) Art 17 para 6 of Law 4182/2013. On the competent authority see above fn 501.

(507) Art 1866 GrCC.

(508) On the judicial inventory, see above III A 1 and III C 3.

(509) Art 1866 GrCC.

effect for the heir as well. (510) However, the representative powers of the curator do not prevent the heir from acting on the same matters themself. (511) There is a relation between the curator and the heir that derives from law and which is regulated by Law 4182/2013, as well as by the provisions on mandate contracts, (512) applied by analogy. (513)

156 Furthermore, the curator must ascertain if an heir of the estate exists. If no heir is found within a reasonable period of time, the court, on its own motion or at the request of any person who has a legal interest, such as creditors of the estate, (514) certifies that there is no heir, other than the State. (515) Indeed, because of the basic principle of Greek succession law that there cannot be any estate without an heir, the law provides that in intestate succession, if there are no natural persons who inherit, the inheritance passes to the State. (516) Once the decision of the court that there is no heir becomes final, it creates a rebuttable presumption of the succession right of the State. (517) The proceedings are non-contentious and the court of the last domicile of the deceased before their death is competent to deal with the case. (518)

157 Finally, a curator may also be appointed to conduct a particular court proceeding initiated against the estate before the expiry of an heir's deadline to waive the succession. (519) In such cases, the curator is still appointed by the court. (520)

IV. Status of natural persons

A. *Name changes*

158 While the addition of a further name is usually a simple procedure, the legislator follows a restrictive approach to the change of either the first or surname of a person, which is generally possible in exceptional cases. Given that the name is significant for the identification of a person, the provisions

(510) Art 327 GrCCP.
(511) Georgiades, *KlirD*, § 40 nr 20; Psouni, *KlirD*, p 940.
(512) Arts 713 ff GrCC.
(513) Georgiades, *KlirD*, § 40 nr 21; Psouni, *KlirD*, p 941.
(514) Bechlivanis, in *SEAK*, Art 1868-1869 nr 2.
(515) Art 1868 GrCC.
(516) Art 1824 GrCC in combination with Art 1819 GrCC.
(517) Art 1868 sent 2 GrCC; Bechlivanis, in *SEAK*, Arts 1868-1869 nr 8.
(518) Arts 813, 810 GrCCP.
(519) Art 1858 GrCC.
(520) See Georgiades, *KlirD*, § 40 nr 14-15.

for the change of name aim at striking a balance between the protection of legal certainty and public order, on the one hand, and the right of a person to develop their personality freely, on the other, leaning rather in favour of the former. (521) The regulation differs depending on whether the change refers to the first name or the surname of a person.

1. *Change of first name*

159 Children acquire their first name by means of a joint irrevocable declaration of their legal parents to the Registry of Civil Status. (522) Once the name has been declared, a court decision is necessary for its change.

160 Explicit provisions on the change of first name exist in cases of gender recognition (523) and of the adoption of a minor. In the latter case, the adoptive parents may, with court authorisation, add a first name to the name the adoptee already has, or even, within one year from the adoption, change the adoptee's initial first name, if this is considered necessary in view of the best interests of the child. (524)

161 No specific provisions on the conditions for the change of a person's first name exist, however, in all other cases. There is no doubt that such a change is allowed if it constitutes a correction of an error by obvious oversight. (525) Moreover, the subsequent addition of a second first name is not subject to restrictions. (526) In further cases, the change of name is permissible if there is a particular need justifying the change, and especially where the existing name has justifiably undesirable consequences for the holder of the

(521) See decisions 962/2011, 3667/2012, 1418/2013, 3816/2015, 3166/2017 of the Greek Council of the State (Highest Administrative Court: – *Συμβούλιο της Επικρατείας* – Symvoulio tis Epikrateias, hereinafter: StE), all available at Nomos. See also, in the same line of argumentation, decisions 3718/2008 of the Athens Court of Appeals Nomos; 90/2022 of the Court of Peace or Ioannina; 21/2021 of the Court of Peace of Patras; 34/2019 of the Court of Peace of Ilion and 545/2019 of the Court of Peace of Volos, all published in Nomos, on the change of first name. See also Georgiades, *OikD*, § 29 nr 19.

(522) Art 25 of Legislative Decree 344/1976, as amended.

(523) See below IV B.

(524) Art 1565 GrCC. According to para 2 of the same article, if the child is older than 12, the child's own consent is necessary for the change. However, this age is likely now 16 years old. On the dispute as to the age after which minors participate themselves in such proceedings, see above fn 160. In any case, the court hears the minor and their opinion, taking into consideration the child's maturity.

(525) Art 13 of Law 344/1976. See also Court of Peace of Patras 21/2021, Nomos.

(526) Court of Peace of Patras 21/2021, Nomos.

name. (527) This exception to the rule of 'permanence of the first name' is based on Article 5 para 1 of the Constitution on the right of free development of one's personality. (528) According to case-law, such reasons may constitute a change of religion, (529) confusion in the person's social relations due to the inconsistency between the name stated on the birth certificate and the name used for the same person in everyday life, (530) or the resemblance of the person's first name to a surname. (531)

162 The change of the first name occurs by amendment of the birth certificate and for this a court decision is necessary, which is issued in non-contentious proceedings. (532) The case is filed before the Court of First Instance of the place of the competent Civil Registry and the public prosecutor is also notified. (533) Representation by a lawyer is mandatory. (534) Children younger than 16 have to be represented by their parents. (535) The court decides for the change of the name only if the necessity of the change has been proven. The court ruling is, in fact, considered to constitute a declaratory administrative act, which is neither enforceable against the Registrar nor may it substitute the Registrar's act that is required for the amendment of the birth certificate, but, once the decision is final, the ruling creates an obligation for the Registrar to proceed to the relevant correction. (536) The decision of the Court of First Instance may be appealed by the applicant, even if the application has been accepted, or the public prosecutor. (537)

163 The procedure above is not available to persons for whom no Greek birth certificate has been issued. If these persons change their name abroad, they

---

(527) Athens Court of Appeals 3718/2008, Nomos; Athens Court of Appeals 1661/2005, Nomos; Court of Peace of Patras 21/2021, Nomos; Court of Peace of Ioannina 90/2022, Nomos; Court of Peace of Ilion 34/2019, Nomos; Court of Peace of Volos 545/2019, Nomos.

(528) Ibid.

(529) See decision 430/2003 of the single-member Court of First Instance of Patras, Nomos; single-member Court of First Instance of Thessaloniki 32576/2007, Nomos; Court of Peace of Patras 21/2021.

(530) Court of Peace of Ioannina 90/2022, Nomos.

(531) Court of Peace of Patras 21/2021, Nomos.

(532) Art 782 GrCCP. See also Arts 13 and 14 of Legislative Decree 344/1976.

(533) Arts 782 GrCCP and 748 GrCCP. On the abolishment of the Courts of Peace see above fn 7.

(534) Art 94 GrCCP.

(535) Art 742 GrCCP. On the parents as representatives of their children, see Art 1510 GrCC and Arts 63 and 64 GrCCP.

(536) Court of Appeals of Thessaloniki 2571/1996, Nomos; Court of Peace of Ioannina 90/2022, Nomos; Court of Peace of Patras 21/2021, Nomos, with further references. If the Registrar does not proceed to this change, another court procedure must be initiated against them (Art 791GrCCP).

(537) Art 761 GrCCP.

may then proceed to the recognition of this change in Greece. (538) Finally, persons of Greek origin who have Greek citizenship by naturalisation may proceed to the 'Hellenisation' of their first (and last) name (meaning rendering their original name Greek) if they wish, by a relatively simple administrative procedure. (539)

2. *Change of surname*

164 The change of the surname may be contingent upon the change of the personal or family status of a person or may be due to other, important, grounds, that are decided on a case-by-case basis.

165 The instances in which the surname is changed as a result of a change in the personal or family status of a person are gender recognition, marriage or divorce, and change in legal parenthood. More specifically:

166 In the case of gender recognition, the change of the surname may be necessary, because in Greek, the endings of male and female last names usually differ. This change is made with the same court decision that recognises the person's gender. (540)

167 Marriage, as a rule, does not change the surname of the spouses; each spouse retains the surname they had before marriage. (541) This rule, which was introduced in 1983 to support the emancipation of women, was relativised in 2008, when the law was amended to allow for the possibility for one spouse to add to their surname the surname of the other spouse. (542) This does not necessarily lead to a common surname for the whole family, since it is possible, and usual in practice, that only one of the spouses (typically the woman) takes a double surname. For the addition of the surname of the other spouse to one's own surname, a common declaration of both spouses before the Registrar is necessary. Each spouse may unilaterally revoke this declaration at any time. In the case of divorce or annulment of marriage, but not in the case of death of the other spouse, the declaration is considered revoked. (543)

168 As regards legal parenthood, children who are born to unmarried parents, who have also not concluded a registered partnership, take the surname of their mother. If paternal descent is established, the surname of the father can be added to the surname of the child, within one year of the recognition,

---

(538) See Art 780 GrCCP. On the recognition, see also above fn 206-207.
(539) See sole Art para 2 of Legislative Decree 2573/1953.
(540) See below IV B.
(541) Art 1388 para 1 GrCC.
(542) Art 28 of Law 3719/2008, that added a third paragraph to Art 1388 GrCC.
(543) Art 1388 para 3 GrCC.

while, if both parents proceed to a joint declaration before the Registry of Civil Status, the child may take the surname of the father as their sole surname. (544) If no recognition takes place but the child's mother marries, her spouse – the step-parent – may grant his surname to the child if both the mother and the child consent. (545) The declaration of the mother's spouse as well as the consent of the mother and of the child (546) are irrevocable and are subject to the form of a notarial deed. In this last case, the general provisions on juridical acts apply to these declarations. (547)

169 Adoption also brings about changes in the surname of the adoptee. In the case of adoption of a minor, the adoptee takes, by mandatory law, the surname of the adoptive parent as their sole surname, but once the adoptee reaches majority, they can add to this surname the surname of their family of origin. (548) In the case of the adoption of an adult, the adult takes the surname of the adoptive parent and may add to this the surname they had before the adoption. (549)

170 Conversely, if parental descent is disestablished, as it happens when the paternity of a child born within marriage is successfully challenged or the adoption dissolved, the child may no longer have the surname of the person to whom they are no longer connected. (550)

171 Finally, the name of children born to married parents, or parents that have concluded a registered partnership, is decided upon the relevant declaration of the spouses or partners at the time they concluded the marriage or registered partnership. (551) This declaration is irrevocable, but the general provisions on legal acts apply; thus, it may be void, in which case, it does not have any legal effect, or voidable, in which case, after its annulment by court decision, it is regarded as void from the outset. In such a case, according to the prevailing opinion, the surname is decided based on the default rule that applies when no such declaration of the spouses or registered partners

---

(544) Art 1506 GrCC.

(545) Ibid.

(546) The consent of the child is given by a special guardian according to Art 1517 GrCC, because of a conflict of interests.

(547) Ladogiannis, in *SEAK*, Art 1506 nr 4.

(548) Art 1563 GrCC; Peraki, in *SEAK*, Art 1563 nos 1 and 2.

(549) Art 1586 GrCC.

(550) Georgiades, *OikD*, § 26 nr 49 for the challenge of paternity and Art 1577 GrCC for the dissolution of adoption.

(551) Art 1505 GrCC for marriage and Art 4 of Law 4356/2015 for registered partnerships.

exists. (552) Thus, the child takes the surname of both partners, in alphabetical order. (553)

172 In all other cases, the rules regarding the change of surname are restrictive and contingent upon the existence of a serious reason for such a change. This reason is assessed on a case-by-case basis. Such reasons may constitute the obstruction of a person's social life because, for instance, the surname has an offensive meaning, is very difficult to pronounce or has a bad reputation because of criminal actions of someone else, or may be psychological, as in the case of serious rupture of the relations between a child and the parent whose name the child has. (554) Because the decision of the parents on the surname of their children is irrevocable, it has been debated in case-law whether this procedure of changing one's surname may also apply when children born to married parents wish to acquire the surname of the other parent. According to the prevailing opinion in case-law, which is now stated in an explicit legal provision, this is indeed possible if it is considered necessary because of serious reasons. (555)

173 Unlike the change of first name, however, a change to a surname occurs through an administrative procedure and falls under the competence of a mayor. (556) The applicant must be registered in the registry of the municipality where they apply and state the reasons for the change of the last name. Persons with Greek citizenship by naturalisation, provided that they are of Greek origin, may apply in the same procedure, for the 'Hellenisation' of their surname. (557) If the mayor accepts the change, the Registrar has to note the change in the civil registry, (558) and, in case the latter refuses the change,

---

(552) Ladogiannis, in *SEAK* 1505 nr 11, 12 with further references to case-law.

(553) For children born to married parents, see Art 1505 GrCC, as amended by Law 5089/2024, and for children born to parents that have concluded a registered partnership, see Art 4 of Law 4356/2015. Before its recent amendment, Art 1505 GrCC provided, as a default rule, that children take the surname of their father. This provision had raised concerns as to its constitutionality, given gender equality (Art 4 para 2 of the Greek Constitution).

(554) See StE 1852/2016 and 3166/2017, both in Nomos.

(555) See StE 337/2019 (with minority opinion); StE 459/2020 and now, explicitly, Art 34 of Law 4674/2020, according to which, the provision of Art 1505 of the Civil Code does not prevent the change of the surname of the child in application of the administrative procedure provided for in Legislative Decree 2573/1953, provided that there are serious reasons justifying this change.

(556) See Legislative Decree 2573/1953, in combination with Ministerial Decision Φ.42301/12167/28.6.1995 and Art 94 of Law 3852/2010.

(557) Single Art para 2 of Legislative Decree 2573/1953. See also above IV A 1 for the change of first name.

(558) Art 14 of Legislative Decree 344/1976.

a non-contentious court procedure against the Registrar follows. (559) On the contrary, if the mayor dismisses the application, the applicant can challenge this decision, based on the relevant provisions of the law on challenging administrative acts. (560)

174 If the surname of a person has been changed by an act of a foreign authority, this has to be recognised in Greece. Nevertheless, because, according to Greek law, the change of surname occurs through an administrative channel and not by court decision, the exact procedure to be followed for such a recognition is unclear and different courts follow different approaches. (561)

175 Once the surname has been changed, the change must be noted in the relevant acts of the civil registry within a month from the change. (562) The change of the surname of a person brings about the change of the surname of this person's minor children. (563) The same does not hold for adult children. Moreover, a special provision exists in cases of the adoption of adults, in which case, according to the law, only the children of the adoptee that were born after the adoption take the surname that the adoptee acquired after the adoption. (564)

B. *Gender recognition*

176 In Greece, gender is understood as a binary distinction. All persons are either male or female. Until 2017, the gender of a person was defined on the basis of this person's biological characteristics. In 2017, a new law on 'gender identity' (*ταυτότητα φύλου*) provided for the possibility of a person to change their registered gender with the sole criterion being the way in which this person perceives themself. Thus, gender re-assignment, or, according to the terminology of Greek law, 'correction of the registered gender', is no longer contingent on the prevailing biological gender characteristics. (565)

177 The proceedings for the correction of a person's registered gender are judicial and non-contentious. The correction follows the same procedure as

---

(559) Art 791 GrCCP.

(560) <https://mitos.gov.gr/index.php/%CE%94%CE%94:%CE%91%CE%BB%CE%BB%CE%B1%CE%B3%CE%AE_%CE%B5%CF%80%CF%89%CE%BD%CF%8D%CE%BC%CE%BF%CF%85_%CF%83%CF%84%CE%BF_%CE%94%CE%B7%CE%BC%CE%BF%CF%84%CE%BF%CE%BB%CF%8C%CE%B3%CE%B9%CE%BF> accessed 3 June 2025.

(561) See Apostolos Anthimos, 'Allagi Eponymou stin Allodapi kai Anagnorisi stin Ellada' (2019) Arm 201.

(562) Art 14 of Legislative Decree 344/1976.

(563) Ladogiannis, in *SEAK*, Art 1506 nr 15.

(564) Art 1584 GrCC.

(565) See the decision 418/2016 of the Athens Court of Peace, Nomos (issued before Law 4491/2016) as well as the emphatical reference in the Explanatory Report of Law

the change of the first name, regulated in Article 782 GrCCP. Therefore, what was mentioned above (566) regarding the procedure before the court, the possibility of filing an appeal, the nature of the decision, as well as the impossibility of persons who do not have a Greek birth certificate to apply before the court, holds in gender correction cases as well.

178 The conditions for gender re-assignment are the following: the person who requests the correction of their registered sex to match their gender identity should be, in principle, an adult. (567) Before the introduction of same-sex marriage in Greece, the law also stipulated that the person should be unmarried. This provision, the rationale of which was evidently to prevent instances of same-sex marriages, was criticised in the literature, (568) but it has now been abolished. (569) It is not necessary for the person to have undergone any previous medical intervention. Moreover, the law does not require the assessment of the applicant's physical or mental health. (570) Minors older than 17 may request such a change, provided that their parents explicitly give their consent. The same holds also for minors older than 15, but in this case the minor's health is assessed by an interdisciplinary committee, comprised of doctors of different specialisations, a psychologist and a social worker who needs to submit a positive opinion as regards the change. (571) The applicant has to declare in person the will to correct the registered gender before a judge, but behind closed doors. (572)

179 Once the court decision becomes final, the birth certificate of the applicant is altered. (573) The first name and surname of the applicant are also changed to correspond to the new gender. The applicant states in the application the first name they wish to have, after the gender correction, and the form of the surname is adapted to the corrected gender. (574) All further legal documents of the applicant are also changed. (575) What does not change is the birth certificate of the applicant's children, in which the initial name of their parent

---

4491/2017. See also decisions of the Athens Court of Peace 195/2020, Nomos; Court of Peace of Patras 65/2019, Nomos; Court of Peace of Serres 131/2018, Nomos.

(566) IV A 1.

(567) Art 3 para 1 of Law 4491/2017.

(568) See, among others, Nikos Koumoutzis, 'I Agamia os Proypothesi gia tin Anagnorisi Tautotitas Fylou' (2022) ChrID, 487.

(569) Art 14 of Law 5089/2024, which amended Art 3 para 3 of Law 4491/2017.

(570) Art 3 para 4 of Law 4491/2017.

(571) Art 3 para 2 of Law 4491/2017.

(572) Art 4 para 2 of Law 4491/2017.

(573) Art 14 of Law Decree 344/1976.

(574) Art 4 para 1 of Law 4491/2017.

(575) Art 4 para 3 of Law 4491/2017.

is stated. (576) The birth certificate of the person whose gender has been reassigned can only be changed one more time, back to the original gender, in the same procedure. (577)

180 Because a court decision is necessary for gender recognition, the procedure may last for more than one year and is also costly. It is for this reason that, according to the Report on the National Strategy for LGBTQ+ Equality of 2021, (578) the legislator should consider rendering this proceeding an administrative one.

c. *Protection of adults*

1. *Measures for the protection of adults ordered by the court*

181 According to Greek law, adults who are partly or totally unable to take care of their affairs themselves may be placed under a protective regime called 'judicial assistance' (*δικαστική συμπαράσταση*). This institution was introduced into the Greek Civil Code in 1996, (579) abolishing the previous regime, and its main principle, as stated in the Explanatory Report of the law, is that the legal capacity of the adult should not be limited more than is deemed necessary for the person's own protection. (580) The main provisions on the protection of adults by means of limitation of their legal capacity are the following:

182 For the restriction of the legal capacity of an adult, a court decision is required, which is issued in non-contentious proceedings, initiated at the request of the adult themself, of their close family (spouse, parents, or children), of the public prosecutor or by the court *ex officio*. (581) The Court of First Instance of the habitual residence of the adult is competent to hear the case. (582) The procedure takes place behind closed doors. (583) Social services must submit a report on the necessity of the adoption of measures by

---

(576) Art 5 para 2 of Law 4491/2017. After the introduction of same-sex marriage in Greece, which renders the establishment of same-sex parenthood possible, at least through adoption, this provision no longer seems reasonable.

(577) Art 4 para 4 of Law 4491/2017.

(578) <https://www.primeminister.gr/wp-content/uploads/2021/06/ethniki_statigiki-_gia_thn_isothta_ton_loatki.pdf> accessed 3 June 2025, p 50.

(579) Law 2447/1996 that amended Arts 1666 ff GrCC.

(580) See point I 4 of the Explanatory Report, published in Ioannis Deliyannis (ed), Pepragmena tis Nomoparaskevastikis Epitropis gia ti Metarrythmisi ton Thesmon tis Yiothesias kai tis Epitropeias (Vol II, Sakkoulas 1996) 76 ff.

(581) Art 1667 GrCC.

(582) Art 801 para 1 GrCCP.

(583) Art 802 para 3 GrCCP.

the court, but the procedure continues even when no such report has been submitted. In any case, the court must hear the adult. (584) As in all cases of non-contentious proceedings, the court decides based on all evidence provided by the parties, including expert reports, while it may also seek further evidence *ex officio*.

183 Depending on the specific case, the court may place the adult under 'privative judicial assistance' (*στερητική δικαστική συμπαράσταση*), in whole or in part, or under 'concurrent judicial assistance' (*επικουρική δικαστική συμπαράσταση*), in whole or in part. (585) More specifically: if an adult is placed under 'privative judicial assistance', regarding all or certain juridical acts, they do not have the legal capacity to conclude these juridical acts in their own name. It is only the judicial assistant (*δικαστικός συμπαραστάτης*), who is also appointed by the court, that can conclude these acts, as the adult's legal representative. If an adult is placed under 'concurrent judicial assistance', regarding all or certain juridical acts, they may still conclude these acts themself, under the condition that the judicial assistant has given their prior consent. A combination of the two types of judicial assistance is also possible. The court decision that restricts the legal capacity of the adult takes effect once it is issued by the Court of First Instance, while, for the appointment of the judicial assistant, a final decision is required. In the meantime, the court appoints an interim judicial assistant. (586)

184 The provisions on guardianship apply by analogy to cases of judicial assistance. The judicial assistant is always appointed by the court. The adult may express their will for the appointment of a specific person as their judicial assistant, and this person shall indeed be appointed, unless the court rules that this person is not well suited for this role. (587) The judicial assistant has to act in the best interests of the adult and is controlled by a supervisory board, composed of relatives and friends of the adult, also appointed by a court ruling. (588) As is the case of guardianship, (589) for certain actions of the judicial assistant, no special formalities are required (eg, ordinary administration of the adult's property), while for others, in cases of 'privative judicial assistance', the permission of the supervisory board or of the court is needed (eg, the permission of the supervisory board is necessary for actions

(584) Arts 802 para 2, 804 para 1 GrCC.
(585) Arts 1676-1679 GrCC.
(586) Art 1672 GrCC and Art 805 GrCCP.
(587) Art 1669 GrCC.
(588) Art 1682 GrCC.
(589) Art 1682 and Art 1611 ff GrCC.

which go beyond the scope of the ordinary administration; for the transfer of ownership of real property, the judicial assistant has to obtain the prior authorisation of the court, after the supervisory board has been heard, etc).

185 The court decision that places a person under judicial assistance may be appealed. (590) It may also be revisited if the conditions of the adult change. (591) In any case, the validity of the legal acts concluded by the adult is always assessed based on the rules set out in the court decision that is in effect at the time of the transaction, with no regard to their actual mental capacity. (592) Thus, a juridical act that the adult concludes on their own is void if this person is under privative judicial assistance, even when the adult had been fully aware of their actions and the juridical act is beneficial for them. This rule serves the safety of transactions but ultimately limits the capacity of the adult more than what is necessary for their protection. In this respect it is incompatible with the UN Convention on the rights of persons with disabilities of 2006, (593) which Greece ratified in 2012. (594) The institution of judicial assistance thus needs to be revisited. Indeed, since June 2024 a working group, appointed by the Minister of Justice, has been working to this aim.

186 The court may also decide on measures other than the limitation of the adult's legal capacity that are necessary for the latter's protection. More specifically, the court may assign to the judicial assistant the care of the person of the adult (partly or in whole), who should at the same time enable the adult to handle their personal relations on their own insofar as this is possible, in view of their personal limiting conditions. (595) Finally, the law provides for the hospitalisation of an adult in a mental health institution against their will if this is deemed necessary. This requires a court authorisation and is performed according to the provisions of special laws. (596)

---

(590) Art 761 GrCCP.

(591) Art 1685 GrCC, Art 758 GrCCP.

(592) Art 1683 sent 3 GrCC.

(593) Sotirios Kotronis, 'To Arthro 12 tis Diethnous Symvasis gia ta Dikaiomata ton Atomon me Anapiria kai i Epidrasi tou sto Elliniko Dikaio ton Prosopon' (2019) Epitheorisi Europaikou Dikaiou, 329, 335. See also Pinelopi Agallopoulou, 'Zitimata Dikastikis Symparastasis. I Diadikasia enopion tou Dikastiriou kai i Symvatotita ton Apotelesmaton tis Dikastikis Symparastasis me ti Diethni Symvasi tou OHE gia ta Atoma me Anapiria' (2016) EfAD, 105.

(594) Law 4074/2012.

(595) Art 1680 GrCC.

(596) Art 1687 GrCC; see esp Art 95 ff of Law 2071/1992.

2. *Powers of representation granted by an adult in the case of future incapacity*

187 Generally, in Greek law, an adult may grant to another person powers of representation, either in general or for a specific transaction, by means of a unilateral juridical act. (597) In principle, such a declaration is not subject to formal requirements, unless the conclusion of the juridical act for which the power of representation is granted is subject to form, and, thus, the declaration granting the power of representation is subject to the same form. (598) A power of representation that has been granted to another person does not necessarily cease in the event of subsequent lack of capacity of the grantor. More specifically, according to the law, the power of representation is terminated in the case of death or subsequent lack of capacity of either the grantor (599) or the holder of the power, unless it has been stipulated otherwise. (600) What is decisive is the interpretation of the will of the person who granted the power of representation, taking into consideration all relevant circumstances.

188 Due to the lack of special provisions, though, a crucial issue is whether the decisions on personal welfare and medical treatment of the adult may be assigned to another person by powers of representation. Since the right of an adult to decide on their own on these issues is derived from the inalienable right of their personality, conferring such power to decide to someone else can be seen as against *bonos mores*. The appointment of 'health care proxies' is thus not considered possible in Greek law *de lege lata*. (601) When a person is not legally capable to consent themself to a medical procedure, the law provides that, if no 'judicial assistant' has been appointed by the court for this person, consent shall be granted by the closest members of their family. (602) Who these closest members of the family are is decided on a

---

(597) Art 216 GrCC.

(598) Art 217 para 2 GrCC.

(599) An adult lacks capacity, in the sense of this provision, if they are placed by court decision in 'privative judicial assistance'. See Pournaras, in *SEAK*, Arts 222-223 nr 8. It is then up to the judicial assistant to protect the interests of the incapacitated adult (see above IV C 1).

(600) Art 223 GrCC.

(601) Katerina Fountedaki, 'Plirexousioi Ygeias kai Diathikes Zois. To Rythmistiko Elleimma tou Ellinikou Pikaiou' in Omilos Meletis Iatrikou Dikaiou kai Vioithikis, Epiloges tou Asthenous kai Iatrikes Apofaseis sto Telos tis Zois (Sakkoulas 2016) 13, 20. In October 2024, the Laboratory for the Research of Medical Law and Bioethics of Aristotle University of Thessaloniki issued a proposal for the amendment of the Law in this direction, available at <https://medlawlab.web.auth.gr/nomothetiki-protasi-schetika-me-tin-plirexoysiotita-gia-themata-ygeias/> accessed 3 June 2025.

(602) Art 12 para 2 β ββ of Law 3418/2015 (Code of Medical Ethics).

case-to-case basis. Finally, no institution equivalent to the 'living will' exists in Greece. Thus, the expressed will of a person regarding their future medical treatment, when the former will not be legally capable to decide for themself, is not legally binding. (603)

3. *Brief remarks on cross-border cases*

189 In July 2022, Greece ratified the Hague Convention of 2000 on the International Protection of Adults. (604) Thus, the rules of the Hague Convention apply regarding international jurisdiction as well as applicable law and powers of representation. According to the same Convention, measures of protection that have been adopted in one contracting State are recognised by operation of law in all other contracting States of the Convention. Measures that have been adopted by third countries are recognised in Greece according to the relevant provisions of the Code of Civil Procedure. (605)

V. Conclusions

190 Greece is still trying to find its place in the de-judicialisation trend. Admittedly, there is no relevant comprehensive concept in place. Certain procedures, such as the voluntary recognition of a child born to unmarried parents, contractual foster care, the waiver of succession and the change of surname had traditionally been regulated in out-of-court proceedings. In recent years, numerous amendments have been introduced, and further changes are planned, in the direction of de-judicialising further procedures, aiming at the acceleration of justice, but also, to the extent that the issue is left for the parties to decide, to an increase of private autonomy.

191 The most eminent example of de-judicialisation is the notarial divorce, also when the spouses have children, while in the same spirit, some years later the possibility of parents who do not reside together to conclude agreements on the exercise of parental responsibility was introduced. In spite of the practicability of these solutions, concerns have been expressed regarding the lack of guarantees that the child will be heard and that the agreement of the parents, which is not controlled beforehand by any authority, will actually

---

(603) Art 29 para 2 of Law 3418/2005 provides that the doctor takes into account the wishes expressed by the patient, even if, at the time of the operation, the patient is unable to repeat them, reflecting the provision of Art 9 of Convention of Oviedo on Human Rights and Biomedicine, which Greece ratified by Law 2619/1998.

(604) Law 4898/2022.

(605) Arts 780, 905 GrCCP. The issue is the same as in adoption, for which see above II C 5.

serve the child's best interests. Indeed, the legislator seems to trust parents too much and a re-consideration of the relevant provisions would be advisable. Moreover, the issuance of certificates of succession has been assigned to lawyers in cases when no dispute seems to arise.

192 De-judicialisation could also go forward with the assignment of further procedures, which are currently judicial, but non-contentious, to administrative authorities, such as gender reassignment, change of first name, or court authorisations, while there are already discussions, on a political level, about assigning the publication of wills to notaries. This presupposes though that these authorities have sufficient resources to perform these additional tasks and, when necessary, the competence to assess all relevant facts. Especially when it comes to family law cases, it is necessary, also irrespective of de-judicialisation, that the State invests in well-functioning social services.

193 In cases with foreign elements, de-judicialisation may lead to complications to the extent that, unlike courts, which can undoubtedly decide based on foreign law, when applicable, notaries and administrative authorities do not necessarily. Rules that align international jurisdiction with applicable law seem to be the best fit for de-judicialised proceedings.

IRELAND

by *Kathryn O'Sullivan*

I. Introduction

Before turning to consider the administration of justice in Ireland in relation **1**
to family and succession law matters, it is first necessary to understand the basic elements of the Irish legal system – particularly given its distinctiveness in a European context. Unlike most of continental Europe, a common law legal system applies in Ireland. (1) Where applicable, European Union (EU) law is the highest-ranking source of law: pursuant to Article 29.4.6° of the Irish Constitution (*Bunreacht na hÉireann*), EU law prevails in situations of conflict with Irish law. The most important domestic source of law is the Constitution of Ireland followed by legislation as enacted by the legislature. The final source of law is common law. Common law is judge-made law which has developed through the courts over hundreds of years applying the doctrine of precedent. (2)

Article 5 of the Irish Constitution identifies Ireland as a 'sovereign, indepen- **2**
dent, democratic state'. Pursuant to Article 6, the Constitution apportions the powers of government between the legislature, executive and judiciary. Legislative power is vested in the Parliament (*Oireachtas*) which consists of the President of Ireland and the two Houses of the Parliament: the House of Representatives (*Dáil Éireann*) and the Senate (*Seanad Éireann*). (3) Executive power is exercised by the Irish Government, which is headed by the Prime Minister (*Taoiseach*), and is responsible to the House of Representatives. (4)

Judicial power is administered by independent judges who are required **3**
under Article 35.2 of the Constitution to exercise their judicial functions subject only to the Constitution and the law. Articles 34 to 38 establish the core features of the Irish judicial system and the five tiers of courts: District Court, Circuit Court, High Court, Court of Appeal and Supreme Court. While the Circuit Court and the District Court enjoy limited jurisdiction, all

---

(1) For more on the Irish legal system, see Raymond Byrne et al, *Byrne and McCutcheon on the Irish Legal System* (7th edn, Bloomsbury 2021) chapter 1.

(2) The doctrine of precedent involves lower courts following the decisions of superior courts, see *O'B v Patwell* [1994] 2 ILRM 465. For more, see Raymond Byrne et al, *Byrne and McCutcheon on the Irish Legal System* (7th edn, Bloomsbury 2021) chapters 12–17.

(3) Article 15.

(4) Article 28.

remaining courts have full jurisdiction in criminal and civil matters. (5) Article 34.1 provides that, save for special and limited cases, justice must be administered in public. However, many family law disputes are heard *in camera* (in private) within the generalist court system. No specialist family law courts exist at present. (6)

4 Like other common law jurisdictions, Ireland operates an adversarial court system. Thus, where parties to a civil dispute cannot reach an out-of-court settlement, a trial in a court of law may be sought. Evidence is gathered by the parties to the dispute. Once all the formal documentation has been filed, the disclosure of documents – so-called 'discovery' – must take place within the framework set out in Order 31, rule 12 of the Rules of the Superior Courts 1986 (as amended). At the trial of action, a judge, having reflected on the evidence advanced by both sides, delivers a judgment, all the while seeking to ensure the just and unbiased administration of justice. (7) There are two types of legal counsel: barristers and solicitors. While solicitors may represent their clients in court proceedings, many do not engage in court advocacy in the Superior Courts. It has been observed: 'In relation to proceedings in the High Court, Court of Appeal and Supreme Court, in particular, the tendency remains for solicitors to instruct a barrister (counsel) to appear in court'. (8)

5 Notwithstanding that 'there has been a growth in the number of quasi-judicial or adjudicative bodies or regulators' in Ireland (9) – with such bodies finding their constitutional legitimacy via Article 37.1 – few areas of Irish family law have seen the administration of justice devolved to such non-judicial authorities. As a default, access to justice is usually ensured through the mainstream courts system. (10) While many common law jurisdictions have introduced non-judicial bodies to deal with typical family law disputes

---

(5) See Raymond Byrne et al, *Byrne and McCutcheon on the Irish Legal System* (7th edn, Bloomsbury 2021) chapters 4–7. Note, in certain circumstances, when the District Court is dealing with children under the age of 18, it is known as the Children Court. See <https://www.courts.ie/children-court>.

(6) Reform is on the horizon, however, see below.

(7) Jury trials, although common in relation to criminal matters, are not typically used for civil law cases and are rarely required for family law or succession law issues.

(8) Raymond Byrne et al, *Byrne and McCutcheon on the Irish Legal System* (7th edn, Bloomsbury 2021) at [3.111]. They note, 'this also occurs frequently in Circuit Court and District Court cases. The solicitor's primary function in such circumstances is to prepare the relevant documentation for the court hearing'.

(9) Raymond Byrne et al, *Byrne and McCutcheon on the Irish Legal System* (7th edn, Bloomsbury 2021) at [8.02]. Administrative law is the area of law concerning the regulation and control of such adjudicative bodies and regulators.

(10) A notable exception is the Adoption Authority of Ireland, see below.

(such as the calculation of child maintenance), no such agencies or bodies have been established in Ireland. (11) Instead, Irish law remains characterised by the premium it places on the exercise of judicial discretion to deal with almost all family law issues including divorce, property division and parental responsibility.

6 In succession law, disputes relating to the administration and distribution of estates also continue to be exclusively resolved by the Irish judiciary through the mainstream courts system. However, the Probate Office, an office attached to the High Court, plays an important role in addressing many non-contentious issues associated with the administration of estates. It is staffed by court officials as opposed to the judiciary and, to this extent, could potentially be considered 'non-judicial'.

7 The continued importance of the courts in determining many common disputes has caused a significant strain on the Irish judicial system, prompting long delays and ever rising costs. While it is open to people to represent themselves in litigation, given the complexity of the legal procedures involved, most litigants and respondents engage legal representation. However, it has been observed that 'the high cost of legal services is a real barrier to effective access to justice for the majority of individuals [...]. So, in reality, the law [...] is open to all who can afford the services of solicitors and barristers'. (12)

8 Conscious of these difficulties, many legislative provisions emphasise the importance of attempting alternative dispute resolution in the first instance (13) and various judgments of the Superior Courts have highlighted

---

(11) The potential for the introduction of a 'State Child Maintenance Agency' was recently investigated, see Department of Social Protection, *Child Maintenance Review Consultation Process* (2021) <https://www.gov.ie/en/consultation/3a0eb-public-consultation-on-child-maintenance-review/> accessed 31 October 2024. However, the potential for such an agency was vetoed. For a critique of this decision, see Kathryn O'Sullivan, 'Child Maintenance Review Group Report: A Critique & Call for Reform' (2023) 26(2) Irish Journal of Family Law 37–44.

(12) Raymond Byrne et al, *Byrne and McCutcheon on the Irish Legal System* (7th edn, Bloomsbury 2021) at [9.01]. See Anne Egan, 'Are Fathers Discriminated Against in Irish Family Law: An Empirical Study' (2011) 14(2) Irish Journal of Family Law 38 for a consideration of how costs can prove a barrier to accessing justice in relation to family law disputes. However, note the continued role of the Legal Aid Board, which provides free legal representation to those meeting certain eligibility criteria, including a means test. Family law constitutes the biggest category of cases for which civil legal aid is given. See Legal Aid Board, *Annual Report* (2021) 26.

(13) See the Mediation Act 2017 below.

the benefits of parties reaching out-of-court settlements. (14) However, despite the rhetoric, several key areas of Irish family and succession law are specifically designed to allow the courts the maximum latitude to provide bespoke justice having regard to the individual circumstances of each case, resulting in a high degree of uncertainty and hindering the ability of parties to reach a settlement in the shadow of the law. Moreover, even where a settlement is reached on all matters, Irish divorce law, for example, demands that any such agreement is subject to judicial approval before any decree is ordered by the courts.

II. Family law

9 To understand how Irish family law is administered, it is first necessary to reflect a little on how this body of law has developed in recent times. Although the *marital* family specifically receives special protection under Article 41 of the Irish Constitution, few legislative measures historically existed to regulate family law issues or provide meaningful protection to vulnerable family members in Ireland. Reflecting the importance of Catholic teaching throughout the 20th century, marital breakdown was stigmatised and a ban on divorce was applied under the Irish Constitution from 1937–1996. (15) While the Guardianship of Infants Act 1964 introduced important measures relating to the guardianship and custody of children, and empowered a court to make orders for child maintenance where parents no longer resided together, it was not until the introduction of the Family Law (Maintenance of Spouses and Children) Act 1976 that a meaningful effort was made to enact a comprehensive maintenance law regime in Ireland. (16) Codifying various statutes governing the consequences of marital breakdown, the Judicial Separation and Family Law Reform 1989 subsequently established the grounds for the award of a decree of judicial separation and empowered the court for the first time to make a wide range of ancillary relief

(14) Reflecting this trend, the Supreme Court in *MD v ND* [2011] IESC 18 at [30] noted: 'it would be to the advantage of the parties and their children if this matter could proceed by way of agreements rather than further litigation'.

(15) This ban was introduced in the Second Constitution of Ireland published in 1937 and did not form part of the First Constitution of the Irish Free State in 1922.

(16) The Report of the Commission on the Status of Women in 1973 had highlighted clearly the need for reform of maintenance laws and was described as 'the most important social document in recent Irish history' see Seanad Éireann debate – Wednesday, 25 Jul 1973 Vol. 75 No. 7 Commission on the Status of Women: Motion. Note, also the Family Home Protection Act 1976.

orders, including property adjustment orders. (17) The ancillary relief provisions of the 1989 Act were subsequently repealed and replaced by the Family Law 1995, which now governs such matters. The ban on divorce was also finally removed in 1996 following a referendum on the Fifteenth Amendment of the Constitution, (18) paving the way for the introduction of Article 41.3.2° and setting out the conditions for divorce and the legislative enactment of the Family Law (Divorce) Act 1996. (19)

Since the early 2000s, the pace of legislative intervention in Irish family law has quickened considerably. While the formalities for entry into marriage were reformed through the Civil Registration Act 2004, (20) major legislative focus has since been placed on the need to broaden the range of recognised relationships and provide a framework for their regulation. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 introduced civil partnership for same-sex couple relationships and a presumptive statutory cohabitation regime for *de facto* same-sex and opposite-sex couples. (21) However, while these reforms were seen by gay rights cam-

10

(17) The act was initially introduced by Deputy Shatter in the form a Private Member's Bill in 1987. It was the first published Private Members Bill to be enacted in over 30 years. It followed the publication of various reports on the issue of marital breakdown, see *Report on Divorce A mensa et thoro and Related Matters* (LRC 8-1983); *Report of the Joint Oireachtas Committee on Marriage Breakdown* (Stationary Office 1985). Prior to the enactment of the 1989 Act, where a marriage broke down, spouses could choose to enter into a private separation agreement or could try to avail of a divorce *a mensa et thoro*. The latter, however, was only available on the grounds of adultery, cruelty or unnatural practices and did not dissolve the marriage or allow the parties to remarry. The legislation applicable prior to the 1989 Act was described as 'a fire brigade legislative response to confront particular problems resulting from marital breakdown', Private Member's Bill, Judicial Separation and Family Law Reform Bill 1987, Second Stage, 377 Dáil Debates Cols 876–877 (February 2, 1988) per Shatter.

(18) In 1986, an attempt to remove the ban through a referendum was rejected by almost two-thirds of the population.

(19) It has been noted: 'Family law reform in Ireland has ... been significantly different from other western societies ... the constitutional ban on divorce in Ireland made reforms a matter for referendum rather than change coming by way of legislation. Even so, nearly 30 years after similar reforms were commonplace in other countries and in spite of widespread marital breakdown, the Irish population remained reluctant in 1995 to change their Constitution to allow divorce'. See Jenny Burley and Francis Regan, 'Divorce in Ireland: The Fear, The Floodgates and The Reality' (2002) 16(2) International Journal of Law, Policy and the Family 202.

(20) See Susan Leahy and Kathryn O'Sullivan 'Changing Conceptions of Marriage in Ireland: Law and Practice' (2018) 30(3) Child and Family Law Quarterly 279–300.

(21) Where a cohabiting relationship breaks down, 'qualified cohabitants' may seek financial provision in the form of maintenance, pension adjustment orders or property adjustment orders. However, access to the scheme is quite restrictive.

paigners as important steps forward, calls for marriage equality continued. A marriage equality referendum was thus held in May 2015 and passed with a 62% 'yes' vote. As a result, Article 41.4 of the Irish Constitution now provides that 'marriage may be contracted in accordance with law by two parties without distinction as to their sex'. With the introduction of same-sex marriage, entry into civil partnership was closed. From the perspective of modernising Irish child law, the Children and Family Relationships Act 2016 has also played a vital role and has added notably to the corpus of laws governing Irish families. (22)

11 Perhaps unsurprisingly given the slow (and late) development of Irish family law, family law disputes continue to be administered predominantly through the court system. However, this system is not functioning well. As the Irish Human Rights and Equality Commission observed, the family justice system in Ireland is 'marked by chronic delays in court proceedings, repeat adjournments, crowded lists, excessive caseloads, delays in conducting assessments of children and adults'. (23) As a result, efforts have been made to encourage alternative dispute resolution. For example, pursuant to sections 5 and 6 of the Judicial Separation and Family Law Reform Act 1989 and sections 6 and 7 of the Family Law (Divorce) Act 1996, a statutory obligation is placed on lawyers acting for separating parties to advise them of the availability and possible benefits of mediation (and negotiation). (24) This obligation has since been expanded to other disputes through the Mediation Act 2017. In addition to raising the profile of mediation as a worthwhile dispute resolution process, the latter Act also provides for the establishment of a Mediation Council to supervise meditation practice in Ireland albeit that no such council has yet been put in place. (25)

12 Finally, it is worthwhile to note that the divorce rate in Ireland remains well below the European average. According to the Central Statistics Office, Ireland had the second lowest divorce rate in the EU27 in 2020, with just 0.6 divorces per 1,000 persons, compared to the EU27 average of 1.6 divorces

---

(22) Note also the Status of Children Act 1987.

(23) IHREC, *Submission on the General Scheme of the Family Court Bill 2020* (IHREC 2021) 3–4.

(24) Solicitors must file a Statutory Declaration in divorce and judicial separation proceedings confirming that they have advised their clients on mediation and negotiation as a way to resolve their marital difficulties. For more on the growing focus on ADR, see Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010). See also Connie Healy, *Collaborative Practice: An International Perspective* (Routledge 2017).

(25) Note also the Arbitration Act 2010.

per 1,000 persons. (26) All divorce decrees and decrees of judicial separations must necessarily be granted by the Irish courts and therefore require a court hearing. However, although data is available as to the number of divorce or judicial separation decrees granted annually, it is unclear from the official statistics precisely how many applications are settled on a consent basis and how many are contested in part or in whole. (27) Research indicates, however, that relatively few cases proceed to a full hearing on all issues with parties preferring to try to resolve matters in an out-of-court setting where possible. (28)

A. *Divorce and legal separation*

1. *Divorce*

Much of Irish divorce law is, to quote Scherpe, 'explained by the social, historical and constitutional background'. (29) Given the ban on divorce which applied until the introduction of the Family Law (Divorce) Act 1996, a relatively conservative approach to the dissolution of marriage remains, albeit that a 'no fault' divorce regime is applied. Article 41.3.2° of the Irish Constitution provides: **13**

'A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that
i. there is no reasonable prospect of a reconciliation between the spouses; (30)
ii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law; and
iii. any further conditions prescribed by law are complied with.' (31)

---

(26) See Central Statistics Office, 'Measuring Ireland's Progress 2021' (14 April 2023) <https://www.cso.ie/en/releasesandpublications/ep/p-mip/measuringirelandsprogress2021/keyfindings/> accessed 29 January 2024.

(27) The Court Service, *Annual Report 2022* (2023) 62–63 notes that there were 4,915 divorces granted and 340 judicial separations granted.

(28) See Court Service, *Family Law Matters* (2007–2009) vol 1(1) 2. However, note the difficulties of reaching such a settlement given the lack of certainty in the Irish approach.

(29) See Jens Scherpe, 'Marital Agreements and Private Autonomy in Comparative Perspective' in Jens Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing 2012) 464.

(30) The initiation of divorce proceedings is generally accepted as evidence that there is no prospect of reconciliation with formal proof rarely required.

(31) Emphasis added.

14 Section 5(1) of the Family Law (Divorce) Act 1996 further provides that a court may only grant a divorce where the spouses have lived apart from one another 'for at least two of the previous three years'. (32)

15 Part III of the Family Law (Divorce) Act 1996 provides the Irish courts with wide-ranging redistributive powers to make 'proper provision' for a spouse and children as legislatively and constitutionally mandated. (33) Having regard to a non-exhaustive list of unweighted statutory factors laid down in section 20 of the 1996 Act, (34) the courts are empowered with 'ground breaking' redistributive powers (35) to make property adjustment orders, pension adjustment orders, lump sum orders, periodical payment orders (support/maintenance) and orders for the exclusive occupation of the home. (36) Unlike many civil law jurisdictions, there is no matrimonial property regime applied. Instead, a 'package' approach to ancillary relief is adopted with no clear distinction between the division of property, spousal support and other financial remedies on divorce. (37) As the Supreme Court reflected, '[a]ll elements of potential provision are, to a greater or lesser extent, interconnected'. (38) Moreover, an open-ended approach is adopted to marital obligations. Irish law does not establish a right to a 'clean

---

(32) Evidence must be submitted to confirm the parties were living apart with an agreed statement by both to this effect and this is regularly accepted by the courts.

(33) While 'proper' has not been given statutory definition, it has been held to be akin to 'fit, apt or suitable' or 'correct or in conformity with rule', see *WA v MA* [2005] 1 IR 1, [2005] 1 ILRM 517. Justice Hardiman however noted it is 'in fact a word of peculiar difficulty'.

(34) These factors include, for example, the financial and property resources of the spouses; the needs, obligations and responsibilities of each of the spouses; the age of the spouses; the duration of their marriage; the contribution the spouses have made or are likely in the foreseeable future to make to the welfare of the family; and the accommodation needs of the spouses. See also section 20(2) and section 20(4) of the 1996 Act. The latter enumerates factors to be considered by the court when deciding whether to make any ancillary orders in favour of dependent members of the family other than the spouse. It has been observed that while the courts are required to have regard to the factors, 'it is for the trial judge to decide what weight, if any, is to be given to them in the individual circumstances', see Louise Crowley, Family Law (Roundhall 2013) 642.

(35) Lucy Anne Buckley, 'Irish Matrimonial Property Division in Practice: A Case Study' (2007) 21 International Journal of Law, Policy and the Family 48.

(36) See sections 12–19 of the 1996 Act. See also section 11 of the 1996 Act for preliminary orders, such as barring orders. The court may not, however, make any order unless 'it would be in the interests of justice to do so', see Section 20(5) of the 1996 Act.

(37) Jens Scherpe 'Marital agreements and private autonomy in comparative perspective' in Jens Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing 2012) 476.

(38) *MD v ND* [2015] IESC 16 at [4.2] per Clarke and MacMenamin JJ (joint judgment)).

break' (39) and broad scope is given to the courts to revisit the provision made, potentially ad infinitum. (40) Either spouse may apply for ancillary relief, including a property adjustment order, not only at the application for a decree of divorce. (41) However, this will only apply provided the applicant has not remarried. (42)

16 Although the vast majority of divorces are applied for in the Circuit Court, a minority of high value cases are initiated in the High Court. (43) Hearings are held *in camera*. Notwithstanding the generalist nature of the courts, in larger districts where caseloads are higher, marital breakdown cases may be heard in special family law sittings and on different days to the ordinary business of the court where possible. (44) Yet, while the scheme operates on the basis that issues pertaining to the division of assets, maintenance, custody and access of children, etc will be decided by the court having regard to the unique circumstances of each family, in reality, the vast majority of divorces reach an out-of-court post-nuptial settlement. (45)

17 There are several routes to reach such post-nuptial settlements on marital breakdown. In many cases, notwithstanding that court proceedings may be issued, parties may instruct their lawyers to negotiate a settlement on their behalf prior to the court hearing. (46) Alternatively, where parties wish to play a more central role in any settlement reached, they may pursue an 'interest-based' approach relying on voluntary consensual methods of dispute reso-

---

(39) See *G v G* [2011] IESC 40. However, despite this, 'it is a legitimate aspiration'. See also see *JD v DD* [1997] 3 IR 64 and Murray J in *T v T* [2002] 3 IR 334 at 407. Louise Crowley, 'Sheltering the Homemaker in Irish Family Law: Ireland's Failure to Evolve with the Shifting Social and Family Norms' (2018) International Survey of Family Law 271 argues strongly that the potential for a clean break should be introduced in Ireland for cases where it would be appropriate.

(40) Section 13 and 22 of the 1996 Act are key to the ongoing obligations of former spouses as regards maintenance and the lack of a clean break.

(41) See section 22(2) of the 1996 Act. However, note under section 22(5) of the 1996 Act, orders for the sale of the family home may only be varied if the sale has not yet taken place and the contracts to purchase remain unsigned.

(42) Section 14(3) of the 1996 Act.

(43) See section 38 of the 1996 Act.

(44) Typically, no wigs or gowns are worn by barristers or judges in such family law sittings.

(45) See Carol Coulter, *Family Law in Practice: A Study of Cases in the Circuit Court* (Clarus Press 2009).

(46) This is commonly termed 'ordinary lawyer negotiation' or 'positional negotiation'. See Connie Healy, 'Financial consequences of ending marriage: Private ordering' in Maebh Harding and Deirdre McGowan (eds), *Irish Family Law in Context* (Clarus Press 2023).

lution, namely mediation (47) or collaborative law. (48) Irrespective of which approach is adopted, however, any agreement reached continues to demand court approval and will not be ruled as a consent order unless it makes such provision as the court deems 'proper' for a dependent spouse and children in line with the constitutional and legislative perquisites for a decree of divorce. (49) Thus, as the Law Society of Ireland recently observed: 'one of the most controversial aspects of the Divorce Act' is that if a court is not satisfied as to proper provision, 'it may re-examine and amend previous agreements or orders, regardless of whether these were operating to the satisfaction of the parties or not'. (50) Unfortunately, what may be regarded as 'proper' remains unclear with a high degree of uncertainty present in the Irish scheme.

18 It should also be noted that pre-nuptial agreements, although not illegal, are unenforceable under Irish law. (51) Thus, while a court may consider the terms agreed as one of the factors to be considered, it is by no means bound to upholding such an agreement.

19 Following the granting of a decree of divorce, former spouses are free to remarry. Although they may still have certain legal obligations to one another subject to the terms of the decree or any future variation in line with the open-ended scheme adopted under the 1996 Act, their statutory succession rights are automatically extinguished, as are, in most cases, any pension rights

---

(47) The Mediation Act 2017 defines mediation as 'a confidential, facilitative, and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute'. As noted above, solicitors are obliged to provide details of mediators who may assist in reaching a negotiated settlement.

(48) Although less commonly availed of in Ireland, arbitration is also available to facilitate the out-of-court resolution of such disputes.

(49) Mediated agreements or agreements reached through collaborative law are not legally binding on the parties with court approval inevitably required. While lawyers will be involved where collaborative law is used, mediators are often not lawyers, with spouses liable to have received no legal advice prior to commencing mediation. As a result, where an agreement is reached, it is necessary for the agreement to be referred to a solicitor to incorporate its terms into a court order for divorce on consent. See Deirdre McGowan, 'Reframing the mediation debate in Irish all-issues divorce disputes: from mediation vs. litigation to mediation and litigation' (2018) 40(2) Journal of Social Welfare and Family Law 181–194.

(50) Law Society of Ireland, Divorce in Ireland: The case for reform (2019) 38

(51) Despite repeated calls for reform, for example in the Report of the Study Group on Pre-nuptial Agreements (presented to the Minister for Justice, Equality and Law Reform, 2007), no reform has been forthcoming. See Louise Crowley, 'Ireland' in Jens Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing 2012). The need for reform was most recently reiterated by the Law Society of Ireland, Divorce in Ireland: The case for reform (2019).

enjoyed by the 'spouses' in each other's pension. (52) Divorce does not affect the parental rights of former spouses, however issues pertaining to custody and access will typically be determined and made an order of the court.

2. *Separation: judicial separation and separation by agreement*

Where a couple wish to formally separate but do not wish to obtain a divorce, they may enter into a separation agreement or, alternatively, seek a decree of judicial separation from the courts. (53) A separation agreement has long played an important role in regulating marital breakdown in Ireland, having occupied an especially significant position prior to the introduction of divorce. In short, it is a non-judicial method of regulating the breakdown of a marriage and is available where the parties are in full agreement regarding the terms of their separation, allowing them to avoid the stress and expense of going to court. Once incorporated into a formal Deed of Separation, the agreement is legally binding and governed by the rules of contract law. (54) It must be signed by both spouses and will usually include a number of clauses through which the couple agree to live separate and apart, clauses setting out the couple's property or financial arrangements, clauses detailing custody, access and residence for children, a non-molestation clause, etc. (55) Entering into a separation agreement acts as a bar to subsequent proceedings for a judicial separation and, by association, the ancillary orders available pursuant to the Family Law Act 1995. However, it does not act as a bar to divorce proceedings under the Family Law (Divorce) Act 1996 albeit that section 20(3) of the 1996 Act requires the court to have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force when determining what provision should be made for spouses and dependent children in divorce proceedings. (56)

20

---

(52) However, note, there may be a court order relating to pension entitlements which could affect this.

(53) Note, it is also possible that a couple may choose not to formalise their separation but instead merely rely on the District Court to secure orders relating to custody of or access to children, maintenance orders and/or orders protecting them from domestic violence.

(54) While the agreement may be reached through alternative dispute resolution with or without legal advice, a Deed of Separation is typically drafted by lawyers. Note also legal advice is mandatory where an agreement includes a division of property. Legislative encouragement for separation agreements is found in sections 5 and 6 of the 1989 Act.

(55) Note, it is not possible to allocate pension benefits through a separation agreement and a court order will be required for same.

(56) Note, where the separation agreement is considered to be a 'full and final settlement', it 'should be given significant weight' by the court in any subsequent divorce proceedings, see YG v NG [2011] 3 IR 717 at [22].

21 Alternatively, where spouses do not wish to enter into a separation agreement, or are unable to reach such an agreement, they may apply to the courts for a decree of judicial separation. (57) Pursuant to the Judicial Separation and Family Law Reform Act 1989, a number of grounds exist for judicial separation with the burden of proof resting with the applicant to demonstrate an entitlement to such an order on the basis that:

- the respondent has committed adultery;
- the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with them;
- there has been desertion by the respondent for a continuous period of at least one year;
- the spouses have lived apart from one another for a continuous period of at least one year; or
- the marriage has broken down to the extent that a normal marital relationship has not existed for a period of at least one year. (58)

22 Meeting one of these grounds, of itself, is not enough, however. A decree will only be granted where the court is again satisfied that a 'proper' provision exists, or will be made, for the welfare of dependent children of the family. (59) To make such provision, whether for a dependent child or spouse, Part II of the Family Law Act 1995 vests the court with many of the same powers as those arising on divorce outlined above, with an open-ended approach again adopted. (60) While the 1995 Act largely mirrors the provisions of the Family Law (Divorce) Act 1996 in terms of the range of orders available to the court, a number of subtle differences do exist. For example, as a judicial separation does not dissolve a marriage, provisions regarding the extinction of succession rights were included, which may be exercised at the

---

(57) Note, any division of pensions requires a pension adjustment order to be made by the court and thus would make a judicial separation more appropriate than a separation agreement. To initiate proceedings for a judicial separation or divorce in the Circuit Court, a Family Law Civil Bill must be completed, see <https://www.courts.ie/content/family-law-civil-bill> accessed 8 November 2024.

(58) Section 2. This must be proved on the balance of probabilities. For a consideration of each ground, see Deirdre McGowan, 'The End of Marriage – Judicial Separation and Divorce' in Maebh Harding and Deirdre McGowan (eds), *Irish Family Law in Context* (Clarus Press 2023).

(59) Section 3(2) of the 1989 Act.

(60) See sections 6–15 of the 1995 Act. The statutory factors are found in section 16 of the 1995 Act. Akin to section 22(2) of the 1996 Act outlined above, section 18(2) of the 1995 Act empowers the court to vary or review any provision made or order further provision into the future. Note also section 18(5) of the 1995 Act limiting the power to vary any order for the sale of the family home.

discretion of the court. (61) Beyond these consequences, section 8(1) of the 1989 Act provides that where a decree of judicial separation is granted, it shall no longer be obligatory for spouses to cohabit. The parental rights of former spouses again remain unaffected, albeit that issues of custody and access will usually have to be resolved.

23 Similar to divorce cases, the vast majority of judicial separations are granted in the Circuit Court, with a minority of high value cases being initiated in the High Court. Hearings are held *in camera* and, where possible, in special family law sittings on different days to the ordinary business of the court. Where a couple agree the terms of their separation, whether with the help of third parties or otherwise, a lawyer may incorporate the terms into a court order for judicial separation on consent, albeit that the terms of the agreement will again remain subject to judicial oversight to ensure 'proper' provision is made for a dependent spouse and children.

3. *Nullity*

24 A marriage may be annulled under Irish law, however, this arises relatively rarely in practice. (62) A judicial decree of nullity declares that a marriage is null and void – that it never existed in law. (63) As Irish law operates under the presumption that a marriage is valid, (64) the onus of proof remains on the petitioner to establish, on the balance of probabilities, that the marriage is invalid. (65) A marriage is voidable and thus may be annulled under Irish law due to impotence resulting in non-consummation or due to a lack of capacity to enter into, and sustain, a normal and life-long functional relationship. (66) Depending on the ground pleaded, it may be necessary to appoint professionals (such as psychiatrists or psychologists) to give expert

---

(61) Section 14 of the 1995 Act. Order for the preservation of pension entitlements after judicial separation are included in section 13.

(62) The Courts Service, Annual Report 2022 shows just six applications for nullity were received. For more, see Louise Crowley, *Family Law* (Roundhall 2013) 722–726.

(63) A divorce under religious law, for example a canonical annulment, does not have direct civil effect. Where a party obtains a religious divorce or annulment only and subsequently remarries civilly, they will be committing the offence of bigamy. See Louise Crowley, *Family Law* (Roundhall 2013) 721.

(64) See *Mulhearn v Cleary* [1930] IR 649; *S v S* (Supreme Court, Unreported, 1 July 1976).

(65) See *N (orse K) v K* [1986] ILRM 75, McCarthy J. However, note the comments of Denham J in S v K [1993] Fam LJ 18: 'In view of the constitutional protection of the institution of marriage, it is quite clear that there is a heavy burden of proof on the petitioner. There is a severe and heavy burden on the petitioner of a quasi-criminal nature'.

(66) See *RSJ v JSJ* [1982] ILRM 263; *D v C* [1984] ILRM 173. In *F (orse C) v C* 1990 WJSC-SC 1812, Finlay CJ held that incapacity was not confined to cases of recognised

evidence to the court. (67) There are a number of bars to relief, specifically approbation (conduct which demonstrates that the petitioner has accepted the marriage as valid at a time when they know that they have the right to set it aside), delay and collusion. (68) Where a decree of nullity is ordered, the former 'spouses' may not make an application for ancillary relief and no property redistribution is possible under Irish law and no maintenance obligations arise. (69) The primary remedy which may be available exists in equity – a body of law unique to common law systems. (70) Through it, a person who contributed, directly or indirectly, to the purchase price of a property may be able to establish a beneficial or equitable interest in the property under a purchase money resulting trust. Despite various calls for reform, most notably by the Law Society of Ireland in its 2001 publication, Nullity of Marriage: The Case for Reform, the law of nullity in Ireland remains antiquated and in need of modernisation.

4. *Void marriages*

25 Finally, it is important to note that a marriage may be declared void by the Irish courts due to lack of capacity, failure to comply with the formalities for entry into marriage or due to lack of valid consent. A decree of nullity is not required in such cases as the 'marriage' is deemed to have never existed and has no legal effect. (71) Unlike in the case of a voidable marriage where only the spouses can challenge the validity of the marriage during their lifetime, if a marriage is void, the parties themselves and any interested third party may test the validity of the marriage, including where the parties to the marriage have died.

---

psychiatric or mental illness. It also applied in situations where it arose from some other inherent quality or characteristic of an individual's nature or personality, including cases where it could not be said to be voluntary or self-induced.

(67) However, where such evidence is provided, the court must not abdicate its functions to the expert, see *McG v F* [2001] 2 ILRM 326. Note also, medical records of the parties may additionally be sought via the process of discovery.

(68) This would see parties colluding to reach an agreement to present an inaccurate case to the court as a means of obtaining the decree of nullity.

(69) The Family Law Bill 1994, which was subsequently enacted as the Family Law Act 1995, had originally included provisions permitting property adjustment orders to be made where a marriage is annulled. However, these provisions were not carried over in the final Act.

(70) Equity developed from the courts of chancery, an alternative to the common law courts. See Hilary Biehler, *Equity and the Law of Trusts in Ireland* (7th edn, Roundhall 2020).

(71) A voidable marriage on the other hand remains a valid marriage until a decree of nullity is granted.

5. *Cross-border situations*

26 In determining cross-border disputes as to jurisdiction in divorce, legal separation or annulment proceedings, Irish law applies Regulation 2019/1111, the so-called Brussels IIb Regulation. This Regulation also provides for automatic recognition of divorces granted elsewhere in the EU (except Denmark). Where divorces are obtained outside the EU, the Irish approach can be problematic, with the basis for the recognition of foreign divorces and annulments having given rise to some uncertainty and confusion in recent times. Pursuant to the Domicile and Recognition of Foreign Divorces Act 1986, the current test applied focuses on whether one of the spouses was domiciled in the foreign jurisdiction granting the divorce at the date of the beginning of the proceedings. (72) This, in turn, requires an often difficult consideration of the intention of the person to remain in that jurisdiction. As a result, there have been calls for change with the Law Reform Commission having committed to consider the potential for reform, perhaps towards the adoption of a habitual residence test, as part of its Fifth Programme of Law Reform – this however has not yet materialised. (73) If undertaken, any resulting proposals are likely to form the basis for any future legislative reform. (74) Under section 29 of the Family Law Act 1995, an application can be made to the court for a declaration on marital status, such as whether a foreign divorce, legal separation or annulment is recognised in the State. It is also worthwhile to note that Ireland has not opted into Regulation 1259/2010, the Rome III Regulation.

B. *Parenthood*

27 Irish law operates different rules for determining legal parentage depending on the marital status of the parents, with some situations requiring the intervention of the courts. (75) Effectively applying the mater semper certa est

---

(72) Common law domicile rules govern the recognition of foreign divorces granted before the commencement of the 1986 Act.

(73) (LRC 120-2019) 16. See also the comments of the Supreme Court in *H v H* [2015] IESC 7, [2015] 4 IR 560.

(74) Note, the Thirty-Eighth Amendment of the Constitution (Dissolution of Marriage) Act 2019, which allows the Irish legislature (the Oireachtas) to legislate for the recognition of foreign divorces granted under the civil law of another State. See also <https://www.lawsociety.ie/gazette/top-stories2/20222/foreign-divorce-consistency-must-await-lrc-report--minister> accessed 29 January 2024.

(75) Note, pursuant to the Child and Family Relationships Act 2015 (as amended), a same-sex parent may be recognised as such on a child's birth certificate. However, note the difficulties in the context of surrogacy outlined below.

principle, the legal mother is the person who gives birth to the child. Where a couple are married, section 46 of the Status of Children Act 1987 (as amended) states that the husband of the mother is presumed to be the father. (76)

28 Where a couple are unmarried, there are various pathways for a father to secure legal recognition. While a father may need to go to the Circuit Court to prove paternity by genetic testing and secure a declaration of same, (77) other routes are available which do not involve such judicial intervention. For example, the person whose name is entered on the birth certificate shall be presumed to be the father of the child unless the contrary is proved on the balance of probabilities. (78) Moreover, pursuant to section 2(4A) of the Guardianship of Infants Act 1964 as amended by the Children and Family Relationships Act 2015, a man who is not married to the child's mother will be the 'father' of the child (and secure automatic guardianship of the child) where he and the mother have cohabited for not less than 12 consecutive months 'which shall include a period, occurring at any time after the birth of the child, of not less than three consecutive months during which both the mother and father have lived with the child'. (79)

29 In the absence of a framework for the regulation of surrogacy in Ireland, these routes towards parental recognition apply in that context also and have created significant difficulties for the intending parents, particularly intending mothers, of surrogate-born children. However, legislation has been proposed for the regulation of domestic surrogacy in Part 7 of the Health (Assisted Human Reproduction) Bill 2022, which would remedy this lacuna in the law in some cases. It proposes that intending parents could apply to the courts and obtain a post-birth order establishing their parentage. (80) As

---

(76) Note that section 46(2) now provides that this presumption does not apply to a child born more than ten months after the date of the mother's separation from her husband.

(77) See https://www.courts.ie/paternity-and-declaration-parentage.

(78) Section 46(3)(a) of the Status of Children Act 1987 (as amended). Although a mother is not at present required to provide the name of the birth father on the certificate, once commenced, section 22 of the Civil Registration Act 2004 (as amended) will require the compulsory registration of the father's name on the birth certificate where the parents are not married to each other subject only to limited exceptions.

(79) See section 43 of the Children and Family Relationship Act 2015. The Law Reform Commission recommended in its Report on the Legal Aspects of Family Relationships (LRC 101, Dublin 2010) 19–20 that compulsory joint registration of the birth could trigger an unmarried father's automatic guardianship rights. These proposals were not adopted, however. For more, see Brian Tobin, 'Guardianship and Unmarried Fathers in Ireland: One Step Forward, Two Steps Back?' (2020) 23(4) Irish Journal of Family Law 87.

(80) For a critique of this approach, see Brian Tobin, *The Legal Recognition of Same-Sex Relationships* (Hart Publishing 2023) chapter 4. Note, despite these shortcomings in Irish law,

regards cross-border disputes, traditionally the common law view was that the law of the domicile (in the traditional common law sense) determined 'legitimacy'. (81) In contemporary law, however, parenthood disputes tend to arise in relation to international surrogacy and, in this context, the Irish authorities have tended to take a law of the forum approach. This approach involves the courts applying Irish domestic law to decide whether the intended father is a parent under Irish law and ignoring the law of the country where the child was born and where the intended parents were recognised as the child's parents. (82) Whether this approach will continue to dominate remains to be seen. The Supreme Court has signalled a shift back to the law of the domicile and has, for example, recognised a parent-child relationship in the context of a child born through surrogacy in England in circumstances where the whole family remained domiciled in England throughout and a parental order had been issued in England confirming the parentage of the intended parents. (83)

C. *Adoption*

Adoption is one of the few areas of Irish family law where a non-judicial body does play a central role. The Adoption Authority of Ireland (AAI) is an independent body established under the Adoption Act 2010. (84) Following an assessment of prospective adoptive parents by the Child and Family Agency (TUSLA) or an accredited adoption agency, the AAI may issue a declaration of eligibility and suitability for the purposes of adoption. (85) Where appropriate, it is also responsible for making adoption orders under

---

some recognition has been given to more diverse family types. For example, since the full commencement of the Children and Family Relationships Act 2015 in May 2020 and the enactment of the Civil Registration Act 2019, both members of a female same-sex relationship may be recorded on a child's birth certificate, thereby affording them full legal rights as parents. Section 6B of 1964 Act (as amended). Note, this change was inserted by section 49 of the Children and Family Relationships Act 2015.

(81) See William Binchy, *The Conflict of Laws* (Butterworth 1988) 347.

(82) Note this was the approach under the Department of Justice Guidelines, see <https://www.dfa.ie/media/dfa/alldfawebsitemedia/childrens-issues-surrogacy-guidance-document.pdf>.

(83) See *A, B & C v Minister of Foreign Affairs* [2023] IESC 10 [56]–[71] per Murray J.

(84) Prior to 2010, another body, An Bord Uchtála, was responsible for matters relating to adoption in Ireland and operated under older legislation. The first Adoption Act was passed in 1952.

(85) See chapter 3–6 of the 2010 Act and Article 42A.4.1. See also <https://aai.gov.ie/images/Rules---Eligibility-and-Suitability.pdf>.

Irish law, transferring parental rights to the adoptive parents. (86) Irish law only permits the adoption of minors. Thus, an adoption can be effected only if the child is under the age of 18 years on the date the adoption order is made. Simple adoption (where ties to the family of origin are maintained) does not exist under Irish law.

31 Since the commencement of the Adoption (Amendment) Act 2017 a 'cohabiting couple' — defined as two adults who are cohabitants of each other and who have been living together as cohabitants for a continuous period of not less than three years (87) — may now jointly adopt (88) and, in doing so, will become the joint guardians of the child. (89) This Act also now permits same-sex couples, both civil partners and cohabiting couples, to adopt a child jointly.

32 Where there is an intercountry adoption, and parents wish or are compelled to register the adoption in Ireland, an application must be made to the AAI. Various documentation may be required by the Authority including proof of the foreign adoption, a certified English translation of the original of the adoption order made in the foreign country, etc. If the adoption complies with the definition of a 'foreign adoption' set out in section 1 of the Adoption Act 1991, an entry can be made in the Register of Intercountry Adoptions.

33 However, it is important to reiterate that while the AAI plays a significant role in the non-judicial administration of justice in this context, the role of courts may still be relevant in various scenarios, such as in dispensing with the consent of the birth parents to an adoption under section 31(3) or section 54(2) of the Adoption Act 2010. (90) Moreover, judicial review proceedings may be taken in the High Court to challenge any decisions of the AAI. (91) Finally, pursuant to Article 42A.4.1 of the Irish Constitution, the 'best interests' of the child will be the paramount consideration in any proceedings

---

(86) For full details of the procedure followed at an adoption order hearing, see < https://aai.gov.ie/en/what-we-do/domestic/adoption-orders-and-hearings.html>.

(87) Section 3 of the Adoption Act 2010 (as amended). The definition of 'cohabitant' is derived from section 172(1) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

(88) Section 33 of the Adoption Act 2010 (as amended).

(89) Section 6 of the Guardianship of Infants Act 1964 (as amended).

(90) See *The Child and Family Agency & Ors v the Adoption Authority of Ireland & Ors* [2018] IEHC 515. See also *Child and Family Agency & Another v Adoption Authority & Ors* [2023] IESC 12.

(91) See, for example, <https://www.breakingnews.ie/ireland/couple-take-court-action-to-have-daughters-adoption-recognised-by-the-state-1464590.html> accessed 31 October 2024.

concerning adoption. (92)In relation to cross-border disputes, Ireland is a party to the 1993 Hague Convention on Intercountry Adoption. (93) This regulates situations where a child who is habitually resident in another Contracting State is adopted by a person/couple habitually resident in Ireland and this tends to govern most aspects of international adoption given the range of Contracting States (105). Where there is a foreign domestic adoption (ie a couple living abroad adopt a child locally and then move to Ireland), it seems this can be recognised under section 57 of the Adoption Act 2010. (94)

D. *Parental responsibility*

34 Under Irish law, 'parental responsibility' relates primarily to guardianship rights, namely the rights and duties of a person in making decisions regarding a child's overall welfare. (95) Equal and joint rights of guardianship are conferred on both the mother and father of children born to married parents or parents who subsequently marry. (96) However, unmarried birth fathers, specifically, do not enjoy an automatic right of guardianship at birth. (97) While in light of the amendments introduced through the Children and Family Relationships Act 2015 (outlined above), a man who is not married to but cohabiting with the child's mother will be the 'father' of the child and secure automatic guardianship of the child in certain circumstances, (98) where this does not apply, an unmarried father has two options.

35 First, he can apply to the court for an order to be appointed a guardian of his child pursuant to section 6A of the 1964 Act (as amended). (99) Although he possesses no automatic right to be appointed guardian, the 'best interests'

---

(92) See below for more.

(93) See <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69> accessed 31 October 2024.

(94) See *In the Matter of A (A Minor) and Ors* [2023] IESC 6.

(95) See *RC v IS* [2003] 4 IR 431. It includes rights regarding a child's education, medical treatments, passport applications, etc. Note also the lesser rights of custody and access (contact) discussed below.

(96) Section 6 of the Guardianship of Infants Act 1964 (as amended). Prior to the 1980s, marriage to the child's mother presented the only method to acquiring guardianship rights to a biological child.

(97) The natural mother does, see the Guardianship of Infants Act 1964 (as amended) and Art.40.3 of the Constitution which recognises this right as a personal right of the mother.

(98) Section 2(4A) and section 6F of the Guardianship of Infants Act 1964 (as amended). See also *LC v KC* [2019] IEHC 513.

(99) Note also section 6C of the Guardianship of Infants Act 1964 (as amended), which provides for individuals other than fathers to apply for guardianship. This type of order may be made on consent. However, where consent is withheld, the court may dispense with it in

of the child will be the paramount consideration as required under section 3 of the 1964 Act (as amended). Alternatively, the mother and father may execute a statutory declaration by agreement in the presence of a Peace Commissioner conferring the status of guardian on the father. (100) To ensure validity, the declaration must include various statements: namely, that the couple are the father and mother of the child; that they are unmarried; that they agree to the father's appointment as guardian; and that they have agreed arrangements for custody and access. (101) Conscious that in practice it has been rarely availed of to date, the importance of this non-judicial route has recently been highlighted. (102) Thus, since the commencement of the Children and Family Relationships Act 2015, when registering, or re-registering the birth of a child, the parents will now be informed that, in the absence of marriage, putting the father's name on the birth certificate will not make him a guardian. A copy of the statutory declaration conferring guardianship will be given to the couple, which they can sign, at no charge, in front of the registrar immediately or within a fortnight. (103) In relation to cross-border cases, under section 6D of the 1964 Act (as amended), a person shall be the guardian of a child under Irish law where they have rights and responsibilities equivalent to guardianship arising in another State.

36 Alternative forms of guardianship are now also a part of Irish law since the Children and Family Relationships Act 2015. Testamentary guardians may be appointed by court or be appointed by deed or by will by a child's parent who is the guardian of the child, (104) while temporary guardianship is available under section 6E of the 1964 Act (as amended). In the latter case, a 'qualifying guardian' can nominate in writing a temporary guardian in the event that they become incapable (for example, through serious illness) of exercising their rights and responsibilities of guardianship. The 'qualifying guardian' may include any limitations they wish to place on the temporary guardian's rights and responsibilities in the nomination. However, discretion

---

certain circumstances. Section 6C may also require the court to consult the parents, and not merely other guardians.

(100) Section 2(4) of the 1964 Act (as amended).

(101) See the Guardianship of Children (Statutory Declaration) Regulations 1998. While the Law Reform Commission has called for a central register of statutory declarations, no such register currently exists. See LRC, Legal Aspects of Family Relationships (LRC 101-2010). See also <https://www.oireachtas.ie/en/debates/question/2018-06-12/491> accessed 31 October 2024.

(102) See Brian Tobin, 'Guardianship and Unmarried Fathers in Ireland: One Step Forward, Two Steps Back?' (2020) 23(4) Irish Journal of Family Law 87–92.

(103) Section 27A of the Civil Registration Act 2004 (as amended).

(104) Section 7 of the 1964 Act (as amended).

remains with the court whether or not to make an order granting temporary guardianship to the nominated person as well as any limitations imposed.

37 As with most family law issues, any disputes regarding guardianship rights will be addressed by the generalist courts. Certain categories of guardians, such as testamentary guardians, court-appointed guardians or guardians who have acquired guardianship status through satisfying cohabitation criteria, may have their guardianship status revoked by the court. (105)

38 Custody relates to the right and duty of a parent to exercise day-to-day physical care of and control over a child, determine residence, etc. (106) An application for custody may be made as part of divorce or judicial separation proceedings, (107) or on its own basis under section 11 of the 1964 Act (as amended). While joint custody is legislated for under section 11A of the 1964 Act (as amended), many custody agreements and orders require that children reside with one parent only, affording mere access or contact rights to the other parent. (108) Where a custody or access order is breached, the court may issue an enforcement order. (109) Moreover, decisions relating to custody and access may be varied ad infinitum if the welfare of the child requires it. (110)

39 Finally, in all disputes or applications concerning guardianship, custody of, or access to, any child, the 'best interests' of the child will be the chief consideration as mandated by Article 42A.4.1 of the Irish Constitution. Pursuant to section 3(1) of the 1964 Act (as amended), where, in any proceedings before any court, the guardianship, custody or upbringing of, or access to, a child, 'is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration'. In determining the best interests of the child, Part V of the Act requires the court to 'have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family' including matters such as 'the benefit to the child of having a meaningful relationship with each of

---

(105) See section 8 of the 1964 Act (as amended).

(106) Note, guardianship does not guarantee custody, while not enjoying guardianship rights does not preclude a parent securing custody, see section 11(4) of the 1964 Act (as amended). Parties other than parents may also apply for custody, see section 11E of the 1964 Act (as amended).

(107) See above.

(108) A right of access may be granted to conditions including that the contact be supervised. See section 11B of the 1964 Act (as amended) for other persons who may apply for access.

(109) Section 18A of the 1964 Act (as amended). An application may be made directly to the court by the person whose custody or access has been frustrated.

(110) See *UV v VU* [2011] IEHC 519.

his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships'; 'the physical, psychological and emotional needs of the child'; 'the history of the child's upbringing and care'; 'the child's religious, spiritual, cultural and linguistic upbringing and needs'; 'the child's social, intellectual and educational upbringing and needs'. (111)

40 In line with Article 42A.4.2°, Part V of the Act also requires the court to take into account 'the views of the child concerned that are ascertainable'. (112) Section 31(6) of the 1964 Act (as amended) provides that in obtaining the ascertainable views of a child, the court 'shall facilitate the free expression by the child of those views and, in particular, shall endeavour to ensure that any views so expressed by the child are not expressed as a result of undue influence'. It may also make an order under section 32 procuring an expert report or appointing an expert to determine and convey the child's views. Where such expert involvement is required, the associated fees and expenses must be paid by the parties to the proceedings and in such proportions as the court may determine. (113) However, notwithstanding the legislative importance attributed to the voice of the child in such judicial proceedings, whether this is reflected in practice appears doubtful in light of recent research findings. (114)

41 Finally, it is worth noting that where parents rely on alternative dispute resolution such as mediation on relationship breakdown, the voice of the

---

(111) See section 31. See also *HOR v MR* [2016] IEHC 781.

(112) Section 31(2)(b) of the 1964 Act (as amended). Article 42A.4.2° states: 'Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child'.

(113) Section 32(9). See Conor O'Mahony, 'The Constitutionality of the Children and Family Relationships Bill' (2015) Irish Journal of Family Law 3 for a critique of these provisions pertaining to the appointment of experts. Note the Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 have sought to cap the amount charged for such expert assistance. For example, a maximum fee of €325 is applied where a written report is required.

(114) Sinead Conneely et al, 'Custody and Access in the District Court' (2021) 24(4) Irish Journal of Family Law 84–92 who found that in 94.8% of 360 cases observed in the District Court, the views of child had not been heard by the court. Note, pursuant to section 31(5) of the 1964 Act (as amended), where the court is assessing the best interests of a child, it shall have regard to the general principle that unreasonable delay in determining these proceedings may be contrary to the best interests of the child. Thus, while significant delays may be encountered in other areas of the Irish judicial system, such cases are effectively fast-tracked.

child may also be afforded importance. If the parents give their consent, some mediators may organise a family session in which issues such as custody and access arrangements may be discussed with the children. (115) Although it was initially signalled that the Mediation Act 2017 would include provisions reflecting the importance of hearing the voice of the child, these were not enacted. (116) The extent to which private dispute resolution processes include consultations with children remains somewhat doubtful. (117)

Jurisdiction in cross-border disputes regarding parental responsibility will **42** usually be determined having regard to Regulation 2019/1111 (previously Regulation 2201/2003). (118)

E. *Matrimonial property regimes*

Irish law does not apply a matrimonial property regime. Although the **43** property rights of spouses continue to be held on the basis of title and are not automatically altered by marriage, some modifications to the separate property regime have been taken to mitigate the harshness associated with it. On marital breakdown, the Family Law Acts 1995 and 1996 (discussed above) empower the Irish courts to redistribute property. There is no rule of equal sharing and no concept of matrimonial or relationship property: all assets are available for redistribution at the discretion of the court. (119) As Crowley explains, the court is 'the ultimate and only adjudicator' as to whether an asset ought to be divided and determines the 'nature and scope of any order to be made'. (120) The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 provides similar powers for addressing economic disparity for civil partners and significantly weaker powers for addressing the vulnerability of certain categories of 'qualified cohabitants' on relationship

---

(115) Connie Healy, 'Financial consequences of ending marriage: Private ordering' in Maebh Harding and Deirdre McGowan (eds), *Irish Family Law in Context* (Clarus Press 2023).

(116) See Head 18 of the draft Heads of the Mediation Bill 2012.

(117) Simone McCaughren et al, 'Research report on guidance on contact time for infants and young children in separated families', Trinity College Dublin and UCC, (December 2022) <https://onefamily.ie/wp-content/uploads/2022/12/FINAL-Research-Report-from-TCDUCC-Infant-Contact.pdf> accessed 31 October 2024.

(118) See Máire Ní Shúileabháin, 'An Overview of the Principal Reforms in Regulation (EU) 2019/1111 (Brussels IIter)' in Otto Schmidt (ed), *Yearbook of Private International Law*, Vol XXII (De Gruyter 2020–21) 117–137.

(119) Note, however, that in some cases, inheritance appears to be gaining importance as a reason not to divide an asset. See *NO v PQ* [2021] IECA 177.

(120) Louise Crowley, 'Dividing the spoils on divorce: rule-based regulation versus discretionary-based decision' (2012) International Family Law 388, 395.

breakdown. (121) Moreover, the law of trusts may assist non-title holding spouses, partners or cohabitants to establish a beneficial interest in a property where financial contributions have been made, directly or indirectly, to its acquisition.

44 Spouses in Ireland enjoy limited scope to arrange their financial affairs without court intervention. Pre-nuptial agreements, although recognisable in Irish law, are not enforceable as noted above. Although it is possible on marital breakdown to reach an out-of-court post-nuptial settlement agreement or, for example, secure a judicial separation or divorce on a consent basis, it can be difficult to do so in the 'shadow of the law' given the highly discretionary and uncertain approach adopted to financial provision. Moreover, any settlement reached is subject to judicial oversight with the court not bound by any of the terms contained therein.

45 In cases of cross-border conflicts, the applicable law regarding matrimonial property will be determined by the matrimonial domicile, namely the law of the jurisdiction where the spouses share a domicile. If the spouses are not domiciled together in the same country, applicable law will typically be established having regard to the place where the parties and the marriage have the closest connection. (122)

III. Succession law

46 The Succession Act 1965 (as amended) is the primary source of succession law in Ireland. (123) Many administrative succession law issues are dealt with by the Probate Office (which itself is part of the High Court), (124) while scope also rests with legal practitioners in some situations to reach consensual agreements as a means of avoiding the initiation of legal proceedings. Nevertheless, the role of the courts remains key in resolving conflicts regarding inheritance and succession with judicial determinations frequently sought to resolve such disputes. There have to date been no meaningful

---

(121) For more, see Kathryn O'Sullivan, 'Cohabitant protection on relationship breakdown in Ireland: A lesson in illusory justice? (2023) 37(1) International Journal of Law, Policy and the Family (ebad017).

(122) See, for example, <https://e-justice.europa.eu/content_which_law_will_apply-340-ie-maximizeMS_EJN-en.do?member=1> accessed 29 January 2024.

(123) For an in-depth analysis of the 1965 Act, see Brian E Spierin, *The Succession Act 1965 and related legislation: a commentary* (5th edn, Bloomsbury 2017). See also John C Wylie, *Irish land law* (6th edn, Bloomsbury 2021) Part VI.

(124) Probate functions are also undertaken by county registrars in 14 provincial offices. However, serious delays are currently being encountered, see <https://www.oireachtas.ie/en/debates/question/2023-07-05/157/> accessed 31 October 2024.

legislative initiatives or policy actions directly aimed at better facilitating non-judicial dispute resolution in this area.

47 In terms of the entitlements of interested parties, under section 111, where a testator leaves a spouse and no children, the surviving spouse has a right to one-half of the entire estate. Where the testator leaves a spouse and children, the spouse is entitled to one-third of the estate. (125) These entitlements, which are mandatory, are known as the 'legal right share'. After the payment of funeral and testamentary expenses, and the discharge of all debts owing and due, the surviving spouse's legal right share is next in priority and must be discharged before the distribution of the estate amongst the beneficiaries. (126) Although a testator is not obliged to make provision for his children, section 117 allows a child to apply to the Irish courts for 'proper provision' where the court is of opinion that the testator has failed in their moral duty to make such provision for them. However, a high threshold is set for a successful claim and even where an application is successful, the legal right share of the surviving spouse cannot be reduced. (127)

48 The Succession Act 1965 also provides the governing scheme for distribution on intestacy. Section 67 states that where an intestate dies leaving a spouse and no issue, (128) the spouse is entitled to the whole estate. Alternatively, where an intestate dies leaving a spouse and issue, the spouse takes two-thirds of the estate. The remaining one-third of the estate is distributed among the issue. (129) There is no discretion vested in the courts to adjust these entitlements either in favour of a surviving spouse or children. (130) Broadly similar entitlements on testacy and intestacy were extended to civil partners pursuant to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (as amended), however 'qualified cohabitants' are merely given the right to apply to the Irish courts to seek provision from an estate. (131) As cohabitants are not entitled to any specified share of each other's estates, any provision made will thus be at the discretion of the court.

---

(125) See also section 115. These provisions will apply unless the married couple or civil partners had voluntarily renounced the share to which they are entitled as a legal right in an ante-nuptial agreement or in writing after marriage and during the lifetime of the testator. However, in certain cases, a renunciation may be set aside by the courts.

(126) Section 112 of the Succession Act 1965 (as amended).

(127) Anti-avoidance provisions are further set out in section 121 to prevent non-testamentary dispositions, which have the effect of disinheriting a spouse or children.

(128) 'Issue' includes children, adopted children and their lineal descendants.

(129) Note, also, section 67(4) regarding where the issues are not all of equal degrees of kinship. If a deceased made a will which effectively disposed of only part of their estate, the remainder would be distributed as if they had died intestate and left no other estate.

(130) However, note section 56(10)(b).

(131) Section 194 of the 2010 Act (as amended).

49 There are three core formalities required for a valid will pursuant to section 78: it must be in writing; it must be signed at the foot or end of the document by the testator or some person in their presence and by their direction; and the signature of the testator must be properly attested, whereby the testator signs or acknowledges their signature in the presence of two witnesses who are present at the same time. The witnesses must then sign their names in the presence of the testator. (132) There are a number of grounds under Irish law for which the validity of a will may be challenged, beyond non-adherence to the formalities. These may include lack of capacity, undue influence, etc. Where a will is challenged, it may be necessary to 'prove' the will, thereby requiring a court application. (133)

50 Although anyone may write their own will, most people in Ireland rely on the services of a legal representative, usually a solicitor, to do so given the range of statutory formalities to be complied with. (134) As a legal practitioner will be obliged to ensure the formalities are complied with, if a will is subsequently found to be invalid, they may be sued for negligence by the beneficiaries under the will. Unlike many civil law jurisdictions, there is no need to register a will or deposit it in any particular location. Despite this, where a solicitor is involved in drafting a will, they will typically store the document also. (135)

51 Personal representatives carry out the management of a deceased's estate. (136) Where there is a will, the personal representatives will be appointed therein and are called 'executors'. It is their responsibility to apply to the High Court via the Probate Office for a Grant of Probate which authorises

---

(132) For more, see section 78(2). In some cases, for example if there is no attestation clause included in the will or the attestation clause is insufficient, the Probate Office will require the witnesses to sign an affidavit of due execution thus *swearing that the will was properly executed. See further Brian E Spierin, Wills: Irish precedents and drafting* (2nd ed, Bloomsbury 2013) and Albert Keating, *Keating on probate* (4th edn, Thomson Roundhall 2011).

(133) Indeed, even where a will is 'proven', the provision made in the will may be challenged, as noted above, by qualified cohabitants or by children who argue that 'proper provision' has not been made for them.

(134) Difficulties can arise where a will is written without the help of a legal practitioner. For example, see *Goodwin v Murphy* [2023] IEHC 383 which concerned a dispute arising from the poor drafting of a will template downloaded from the internet.

(135) Furthermore, where a will is made in another jurisdiction, it will only be valid if it complies with the internal law of the place either where the testator made the will or of the nationality, domicile or habitual residence of the testator or, in the context of immovable property, where the property is located.

(136) See Albert Keating, *Law and practice of personal representatives* (2nd ed, Thomson Roundhall 2017). He notes the renewed importance of the role played by personal representatives.

them to fulfil their functions. Executors have certain statutory powers, including the power of sale in some circumstances, however these powers may be augmented under the will. On intestacy, the High Court may appoint the personal representatives and they are known as the 'administrators intestate'. However, having regard to the rule that the grant follows the interest, a person entitled to a share on intestacy is also entitled to extract the grant in such circumstances. In either case, it is a so-called 'Grant of Letters of Administration' which authorises the administrators to fulfil their functions. (137) Personal representatives enjoy various administrative and distributive responsibilities. They are required to pay any debts owing, (138) establish title to, and gather in, assets before then distributing the assets to the beneficiaries. (139) As the deceased's assets vest in the personal representatives, such titles must be transferred to the beneficiaries or heirs at the end of the administration period. (140)

52 If provision is made for a spouse under a will, and the deceased died totally or partially testate, the surviving spouse may elect to take either that devise or bequest or their legal right share. The surviving spouse has six months from receiving notification in writing of this right of election from the personal representative or one year from the first taking out of representation of the deceased's estate, whichever is the later, in which to exercise this right. If no election is made, the survivor will take under the will. (141) Alternatively, if a deceased chose to leave nothing to their spouse in their will, or if there is a legacy or devise expressed to be in addition to the surviving spouse's legal right share, the legal right share, similar to a share arising on intestacy or an interest arising under a will, will vest automatically upon the deceased's death. (142)

53 If a surviving spouse decides to take their legal right share or share on intestacy, the personal representative or administrator intestate must deter-

---

(137) For recent case-law on the removal and replacement of administrators, see *Dunne v Dunne* [2016] IECA 269 and *Muckian v Hoey* [2016] IEHC 688.

(138) For example, they must pay any taxes due by the deceased to the date of death, in addition to any taxes owing and due in the course of the administration.

(139) See *In the Estate of White* [2015] IESC 84 for more on the duties of personal representatives.

(140) See section 10 of the 1965 Act. For more, see <https://www.tailte.ie/en/registration/legal-practices/practice-directions/devolution-and-transmission/> accessed 8 November 2024.

(141) Section 115(1) of the Succession Act 1965.

(142) See comments of Barron J in *O'Dwyer v Keegan* [1997] 2 IR 585, rev'ing Kelly J [1997] 1 ILRM 102. However, note also *Re Urquart* [1974] IR 197 at 215 where it was held in the Supreme Court that the legal right could be described as a 'statutory offer which is not binding upon the surviving spouse until it is accepted'.

mine the method of fulfilling that share. The personal representative has complete discretion in this regard and, in general, they cannot be compelled to appropriate any specific property. (143) One key exception does exist, however. Conscious of the importance of the family home, section 56 of the 1965 Act provides that, subject to certain restrictions, where the estate of a deceased person includes a dwelling in which, at the time of the deceased's death, the surviving spouse was ordinarily resident, the surviving spouse may require appropriation of the home in or towards satisfaction of any gift under the will, legal right share or share on intestacy to which they were entitled.

54 It is important to note that although court applications are often required to address disputes arising on death, (144) legal practitioners may use informal solutions to address problems arising in relation to the destination of assets. For example, to avoid the long delays and high costs associated with probate litigation, Deeds of Family Arrangement, also known as Deeds of Variation, may be entered into for up to two years after the deceased's death and may be employed to rewrite a will. (145) Although such deeds will not always be appropriate, in circumstances where all the beneficiaries are in agreement, they can often prove an effective non-adversarial method of addressing inheritance or succession difficulties arising on death.

55 Finally, where a person domiciled abroad owns property in Ireland, they are advised to make an Irish will addressing the property located in Ireland. Where such a will does not exist, the validity of foreign grants of probate will be subject to close inspection, with various hurdles to be surmounted, complicating the administration process. For example, where a deceased dies with both movable and immovable property located in Ireland, an applicant is required to demonstrate their entitlement under Irish law and under the law of the deceased's domicile. This is done through lodging a sealed and certified copy of the grant (and, if relevant, will) from the appropriate court in the country of domicile or an affidavit of law from a lawyer practising in that jurisdiction if no such grant has been issued. Explaining the situation, Lillis, a practitioner, notes:

'A limited grant is sometimes used in foreign domicile cases because the right to apply may differ under different laws. If that happens and there is moveable and

---

(143) Section 55 of the Succession Act 1965.

(144) See Albert Keating, *Probate motions and actions relating to wills and intestacies* (Thomson Reuters 2017) for more in relation to time limits for instituting proceedings, forms and procedures as prescribed by the Rules of the Superior Courts and Circuit Court Rules, rules regarding case management and conducting trials, etc.

(145) For examples of deeds of family arrangements, see Irish Conveyancing Precedents (Bloomsbury Professional, Issue 96, 2023).

immoveable property, a court application may be necessary. If there is a foreign language will, a probate officer's order must be obtained before lodging the application for a grant of representation, which will involve the submission of an affidavit of law and an affidavit of a translator. Foreign grants to transfer assets are not recognised in Ireland per se...' (146)

56 Furthermore, Ireland has not signed up to the European Succession Regulation. Consequently, the European Certificate of Succession (ECS) is not recognised under, or a feature of, Irish law. (147) Instead, a Grant of Probate must be issued by an Irish court in relation to assets located in Ireland. (148)

IV. Status of natural persons

A. *Change of name*

57 Although Irish law does not regulate how a person changes their name, a structure for securing written proof of a person's new chosen name does exist which may be relied upon for official purposes. To this end, a legal document known as a Deed Poll may be signed in which a person may legally declare that they are no longer using their old name and that they wish to be called by their new name. (149) If a person is changing their name after marriage, in line with tradition in Ireland, it is not necessary to sign a Deed Poll. A marriage certificate will be accepted by most bodies as proof of a person's name change. (150) If a person wishes to revert to their original name after separation or divorce, they may contact the relevant organisations with whom they wish to change their details. Each organisation will have its own evidential requirements in this regard. (151)

---

(146) See <https://uk.practicallaw.thomsonreuters.com/1-500-9170?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

(147) EU Regulation on Succession Law (No 650/2012).

(148) See <https://www.elra.eu/contact-point-contribution/ireland/registration-of-certificate-of-inheritance-7/> accessed 8 November 2024.

(149) See <https://www.citizensinformation.ie/en/birth-family-relationships/problems-in-marriages-and-other-relationships/changing-your-name/> accessed 12 July 2023.

(150) See <https://www.citizensinformation.ie/en/birth-family-relationships/problems-in-marriages-and-other-relationships/changing-your-name/> accessed 12 July 2023.

(151) See examples provided at <https://www.citizensinformation.ie/en/birth-family-relationships/problems-in-marriages-and-other-relationships/changing-your-name/> accessed 12 July 2023.

B. *Change of gender*

58 Since the commencement of the Gender Recognition Act 2015, a person can legally change their preferred gender under Irish law without recourse to the courts. (152) Where a person is aged over 18 years old, they may apply for a gender recognition certificate. This involves completing a form available from the Department of Social Protection website (Form GRC1). (153) The form must simply be signed and witnessed by a Peace Commissioner/Notary Public/Commissioner for Oaths/Solicitor before being returned to the Client Identity Services within the Department of Social Protection along with the necessary supporting documentation. If a person has chosen to change their name by Deed Poll, this may be recorded on the gender recognition certificate. (154) Once a certificate is acquired, an applicant may then seek a revised birth certificate. It is also possible for a person aged 16 or 17 to change their gender albeit that an exemption to the age limitation may be required from the Circuit Court. Moreover, if a person has already changed their gender in another country, they may apply for a gender recognition certificate in Ireland by providing a copy of the relevant decision, order or certificate when submitting their application.

C. *Protection of adults*

59 The Assisted Decision-Making (Capacity) Act (2015) (as amended) introduced a new and comprehensive legal framework for supported-decision making in Ireland. (155) Conscious of the need to allow people to enter into legal agreements as to how they can be supported in making decisions relating to their health, welfare, property, etc, it specifically legislates for advance healthcare directives (AHDs) and the creation of an enduring power of attorney (EPA). (156) The 2015 Act also established the Decision Support

---

(152) Note, Irish gender recognition laws recognise two genders: male and female. However, for other purposes, Irish law may recognise genders beyond male and female. See, for example, the Incitement to Violence or Hatred Bill 2022.

(153) See <https://www.gov.ie/en/form/93edb-gender-recognition-certificate-application-form-grc1/> accessed 8 November 2024.

(154) See <https://www.citizensinformation.ie/en/birth-family-relationships/legal-recognition-of-preferred-gender/> accessed 8 November 2024.

(155) As amended by the Assisted Decision-Making (Capacity) (Amendment) Act 2022.

(156) An advance healthcare directive is a written statement through which a person may specify they types of healthcare treatments they may or may not wish to receive in the future if they lose their decision-making capacity. They are governed by Part 8 of the Act. Part 7 of the Act pertains to EPAs. A person may also create an EPA whereby they may nominate a person to make decisions on their behalf regarding property, finances and personal welfare

Service to assist with the introduction of the new framework. (157) As well as providing information, promoting awareness of the Act and investigating complaints made thereunder, the Service provides an important regulatory function, registering decision support arrangements and supervising decision supporters.

Various formalities are laid down in the 2015 Act which must be complied with to ensure the validity, for example, of an EPA. The EPA must be in writing and must be accompanied by various supporting documents from the donor, the attorney, a medical practitioner and a legal practitioner with a view to confirming the donor's capacity and understanding of the action being taken. Following the execution of the EPA, various parties set out in the Act must be notified and an application must be made to the Director of the Decision Support Service to register the instrument no later than three months after the date of execution or the date of receipt of all supporting documentation, whichever is the later. (158) In addition to ensuring that the EPA complies with the formalities demanded by the Act, the Director enjoys responsibility for reviewing the instrument and any objections lodged by those with a sufficient interest or expertise in the welfare of the donor. Once registered, the EPA may not be revoked in the absence of court approval. (159) Restrictions on the power of attorney are laid down in the Act (160) as are the legislative obligations placed on attorneys, including to submit an annual report to the Director regarding the performance of their functions. (161)

---

if they lose their capacity. However, decisions pertaining to future health (for example, consent to, or refusal of, medical treatment) are expressly excluded under the Act. Note, although advance healthcare directives and EPA arrangements were already recognised in Ireland, the 2015 Act applies a new framework for such issues. As a result, for example, no new EPA arrangements can be created under the Powers of Attorney Act 1996. For more on all these changes, see Niamh Doyle et al, 'Great power, great responsibility' (2023) Law Society Gazette of Ireland available at <https://www.lawsociety.ie/gazette/in-depth/powers-of-attorney> accessed 08 November 2024. See also <https://www.citizensinformation.ie/en/health/legal-matters-and-health/assisted-decision-making-act> accessed 8 November 2024. Prior to the commencement of the 2015 Act, EPAs, as legal documents, only came into effect once registered with the Office of Wards of Court within the Courts Service.

(157) See <https://decisionsupportservice.ie/> accessed 8 November 2024.

(158) This application may be made by the donor or by the attorney provided the donor provides their written consent.

(159) Section 73.

(160) For example, section 63.

(161) Section 75. Complaints made in relation to attorneys are covered in section 76 of the Act while the categories of persons deemed ineligible to act as attorneys are included in section 65. The disqualification of attorneys is addressed in section 66.

61 As regards cross-border situations, in May 2024 Ireland ratified the 2000 Hague Convention on International Protection of Adults and it came into force with respect to Ireland in September of that year. (162)

V. Conclusions

62 Although family law in Ireland may be regarded as 'one of the most rapidly developing in Europe', (163) it has not yet seen any significant shift in the administration of justice away from the courts to non-judicial authorities or actors. In almost every aspect of family law, and in many areas of succession law, the courts retain a significant, if not exclusive, role in the administration of justice. Indeed, responding to the ever-growing number of family law disputes within the generalist court system — and the problems associated therewith — in November 2024 the Family Courts Bill 2022 passed all legislative stages and will when enacted and commenced (belatedly) facilitate the establishment of a specialist Family High Court, Family Circuit Court and Family District Court. (164)

63 At the same time, however (and mirroring developments across Europe), there is undoubtedly a growing focus on better facilitating parties in resolving family law disputes out-of-court and in a non-adversarial manner. Aiming to support the legislative changes proposed in the planned Family Courts Bill, Ireland's first Family Justice Strategy 2022-2025 was published. Seeking to provide for 'a modern, streamlined and user-friendly family justice system that supports simple, early, fair and – where possible – non-adversarial outcomes', (165) the strategy sets out a number of goals. Goal 4 specifically relates to Alternative Dispute Resolution (ADR). Noting that '[p]romoting the most appropriate ways to help families resolve their problems is a central

---

(162) See <https://www.ireland.ie/en/dfa/role-policies/international-priorities/international-law/private-international-law/> accessed 8 November 2024. Note Part 11 of the Assisted Decision-Making (Capacity) Act 2015 makes provision for giving effect to the Convention in Irish law.

(163) Jens Scherpe, 'Marital agreements and private autonomy in comparative perspective' in Jens Scherpe (ed), *Marital agreements and private autonomy in comparative perspective* (Hart Publishing 2012) 6.

(164) See <https://www.gov.ie/en/press-release/2c31e-minister-mcentee-passes-historic-legislation-to-reform-the-family-courts-system/> accessed 8 November 2024. The Joint Committee on Justice and Equality, Report on Reform of the Family Law System (2019) 21 noted the '[d]elays, excessive caseloads, inadequate facilities and lack of specialist training for judges' in relation to family law disputes and reflected on 'a general consensus amongst stakeholders that the current family law system in Ireland is beset by a number of difficulties'.

(165) <https://www.gov.ie/en/collection/4790f-family-justice-strategy/> accessed 8 November 2024.

aim of this strategy, including the increased use of non-court options,' (166) it places the spotlight on the benefits of ADR in 'alleviating the adversarial nature of family law proceedings'. (167) Reflecting the continuing role of the court in many cases, it adds: 'Even when a case is in court, it is proposed that ADR may be used as a way to agree other matters that may not need a court decision e.g. family visits and access agreements, and judges or other court officers should be able to refer cases to ADR, at any stage throughout a court process.' (168)

In tandem with these developments, and seeking to further advance the **64** policy goal of facilitating the out-of-court resolution of common family law disputes, the Law Reform Commission of Ireland's Fifth Programme of Law Reform intended to consider how more guidance may be given to parties on divorce and to allow them to 'reach settlements and resolve disputes more efficiently and at lower financial ... cost.' (169) While this project has been discontinued in the short term due to 'resourcing constraints', it seems likely that it will nevertheless have to be undertaken in the not-too-distant future. (170) What impact, if any, these policy changes will have vis-à-vis the de-judicialisation of family law remains speculative. However, it is hard to see any scenario arising, either in the context of family law or succession law, where the role of the courts would be meaningfully reduced in Ireland for a long time to come.

(166) Department of Justice, Family Justice Strategy 2022–2025 (2022) 33.
(167) Department of Justice, Family Justice Strategy 2022–2025 (2022) 34.
(168) Department of Justice, Family Justice Strategy 2022–2025 (2022) 34.
(169) Law Reform Commission's Fifth Programme of Law Reform (2019) 16.
(170) See <https://www.lawreform.ie/news/rationalisation-of-fifth-programme-of-law-reform.1122.html> accessed 19 August 2024.

ITALY

by *Elisa Stracqualursi and Nicola Chiricallo*

I. Introduction and overall considerations

A. *Legal sources of family and succession law: Civil Code and relevant statutes*

Both Italian family and, more recently, succession law have undergone a significant de-judicialisation trend. **1**

To fully understand this trend, the relevant legal framework has to be borne in mind. **2**

Succession law, as well as marriage, separation, filiation and parental responsibility are regulated by the Civil Code (hereinafter: CC), while the related proceedings are enshrined in the Civil Procedural Code (hereinafter: CPC). Conversely, same-sex registered partnerships (referred to as civil unions), cohabitation (Law No 76 of 2016), divorce (Law No 898 of 1970), non-judicial proceedings of separation and divorce (Decree-Law No 132 of 2014), foster care and the adoption of children (Law No 184 of 1983) are regulated in special statutes. **3**

Some recent reforms concerning civil proceedings involving the family, the protection of vulnerable adults and minors as well as inheritance matters are also worthy of mention: Law No 206 of 2021 (Delegation to the Government for the efficiency of the civil process and for the revision of the discipline of alternative dispute resolution instruments and urgent measures for the rationalisation of proceedings in matters of personal and family rights as well as in matters of enforcement), and Legislative Decree No 149 of 2022 (Implementation of Law No 206 of 2021). [1] **4**

In particular, Lgs D No 149 of 2022 modified some rules on so-called assisted negotiation and provided notaries with competences previously **5**

---

[1] For a comprehensive overview on the reform: Claudio Cecchella (ed), *La riforma del processo e del giudice per le persone, per i minorenni e per la famiglia* (Giappichelli 2021); Rosaria Giordano and Alessandro Simeone, *Riforma del processo per le persone, i minorenni e le famiglie* (Giuffré 2023); Claudio Cecchella, 'La riforma del processo in materia di persone, minorenni e famiglie dopo il d.lgs n. 149/2022' [2023] Questione Giustizia; Claudio Cecchella, 'Le nuove norme sul processo e il tribunale in materia di persone, minorenni, famiglia' [2023] Rivista diritto civile 1090; Giovanni De Cristofaro, 'Le modificazioni apportate al codice civile dal decreto legislativo attuativo della "Legge Cartabia" (D.lgs. 10 ottobre 2022, n. 149). Profili problematici delle novità introdotte nella disciplina delle relazioni familiari' [2022] Nuove Leggi Civ Comm 1407.

retained by judicial courts (see Article 21 of Lgs D No 149 of 2022) and, therefore, de-judicialised further matters.

6 In the field of private international law of the family and succession, a distinction must be made: in family law, except for matters where some specific European regulations are applicable, the rules are fully collected in L No 218 of 1995 (Articles 26 ff); on the other hand, the private international law of succession is fully regulated by EU Regulation 650/2012.

7 In addition to the legislative sources, the role of case-law has to be taken into account, especially as far as supreme courts are concerned, such as the Constitutional Court (hereinafter: C Cost) and the Court of Cassation (hereinafter: Cass).

8 The main examples of the influence that the Constitutional Court plays on the legislative developments in family law are the judgments of 14 April 2010, No 138 of 2010 and of 11 June 2014, No 170 on civil unions.

9 The 2010 judgment invited the legislator to recognise same-sex partnerships and, in doing so, to fill a gap in the protection of human rights.

10 In 2014, the Constitutional Court intervened again in matters of same-sex couples by declaring that the automatic dissolution of the marriage following one spouse's change of gender was unconstitutional.

11 Finally, Law No 76 of 2016 (Regulation of civil unions between individuals of the same-sex and the discipline of cohabitation) was enacted and, following the advice of the Constitutional Court, recognised homosexual partnerships as separate from marriage and admitted the possibility that marriage could evolve into a same-sex union if one of the spouses undergoes a gender change.

B. *The Constitution and international legal sources*

12 The Italian Constitution (Const) contains provisions on family law (Articles 29, 30, and 31). In particular, it recognises the equality between spouses (Article 29), the rights and duties of parents towards their children as well as the equality between children born in and out of marriage (Article 30), and the measures the State adopts for families (Article 31).

13 Another significant provision is Article 2, which acknowledges and guarantees the inviolable rights of individuals, as such and as part of a community. This provision serves as a general basis for any family relationship including de facto ones.

14 Worthy of mention is also Article 3, according to which, all citizens have equal social dignity and are equal before the law, regardless of gender, race, language, religion, political opinions, or personal and social conditions.

15 Finally, the fundamental principles and duties enshrined in international conventions have to be mentioned. Italy is a party to the following: the UN

Convention on the Rights of the Child of 1989, the European Convention on the Exercise of Children's Rights of 1996, and the European Convention on Human Rights (hereinafter: ECHR) of 1955. In particular, Article 8 ECHR establishes the right to respect for private and family life (as well as home and correspondence) and Article 12 the right to marry and establish a family. The ECHR holds significant weight in Italian family law, as evidenced by the fact that judges often refer to Articles 8 and 12 of the ECHR in their decisions.

C. *Main historical changes in family law (from 1942 to present) – an overview*

16 Constitutional principles were a driving force behind the greatest changes Italian family law has undergone in the 20th century. Law No 151 of 1975 radically transformed the concept of family, by shifting it from a hierarchical concept to a partnership of equals. The key principles underpinning the 1975 reform were, in particular, equality between spouses as prescribed by Article 29 Const and the equal treatment of children born within marriage and out of marriage, in line with Article 30 Const. After the 1975 reform, a residual difference between children born in and out of wedlock remained, as only the former had a legal relationship with the relatives of their parents. The *patria potestas* was abolished and the idea of the child's best interests as the rationale behind the parents' decisions came to the fore (see paras 167ff). In addition, the 1975 Law abolished fault-based separation (see para 67).

17 Any remaining differences between children were finally removed in 2012, by Law No 219 (Provisions on the recognition of natural children) and Legislative Decree 154 of 2013, when a unified legal status of 'child' was affirmed. Furthermore, the 2012 reform replaced the term parental authority with parental responsibility, in accordance with international wording and in the best interests of the child (see paras 167ff). The child's duty to honour their parents was replaced by the duty to respect them (Article 315-bis CC).

18 Both the constitutional principle of equality (Article 3) [2] and the right to respect for private and family life (Article 8 ECHR) [3] compelled the legislator to introduce same-sex unions (Law No 76 of 2016).

A further development which has featured in family law in recent years is the enhancement of the spouses' autonomy in divorce matters. Whereas consensual separation was provided for by both the 1865 and 1942 Civil Codes, a divorce based on the agreement of the parties was only introduced in 1987 for the first time, by amending the divorce law (Article 4, Law No 898 of

---

[2] Constitutional Court, Judgments n 138/2010 and n 170/2014.

[3] *Oliari and Others v Italy* App no 18766/11 (ECtHR, 21 July 2015).

1970, as modified by Law No 74 of 1987). This provision allows the spouses to jointly submit a request for divorce to a tribunal, whose decision has a constitutive nature. Things were different in the case of consensual separation, a different procedure was necessary, where the tribunal examined the legal requirements and, in the case of fulfilment of such, ratified the parties' will. However, as a consequence of Lgs D No 149 of 2022, the judge's decision on separation is now constitutive (see paras 86ff). The role of private autonomy has been emphasised by Lgs D No 132 of 2014 by introducing extra-judicial forms of separation and divorce (see paras 97ff).

19 Over the years, the time in which a marriage can be dissolved has decreased. In particular, Law No 55 of 2015 reduced the length of the separation required to be granted a divorce from three years to six months (in the case of a consensual proceeding) or twelve months (in the case of a contentious proceeding). Pursuant to Lgs D No 149 of 2022, the spouses can file a joint application for separation and divorce with a single request.

20 A further trend to be pointed out is the growing emphasis on the autonomy of minors, grounded on Article 2 of the Constitution, Articles 8 and 12 ECHR and Article 24 of the Charter of Fundamental Rights of the European Union.

21 Before Law No 151 of 1975, the parent-child relationship was hierarchical and authoritative in nature, as the child was considered a passive beneficiary of the authority of the adult. The family itself was understood as being based on paternal authority as the father was regarded as the representative of the interests of the family as a unit. (4) Since 1975, the child has been recognised as a holder of rights towards their parents and the State. (5) Further rights have been recognised by statutes: for instance, the Adoption Law proclaimed the children's right to grow up in their family of origin, (6) and the adopted children's right to know their biological ties (Article 28, Law No 184 of 1983, as modified by L No 149 of 2001); the Constitutional Court recognised the right to maintain contact with some members of the family of origin, even in the case of full adoption. (7)

---

(4) Antonio Cicu, 'Il diritto di famiglia nello Stato fascista' [1940] Jus 371; Francesco de Filippis, Corso completo di diritto civile italiano comparato, I diritti di famiglia (Leonardo Vallati 1881); Enrico Cimbali, La nuova fase del diritto civile nei rapporti economici e sociali (Unione tipografico editore 1885).

(5) Cesare Massimo Bianca, 'La legge italiana conosce solo figli' [2013] Rivista di diritto civile 1; Cesare Massimo Bianca, 'L'unicità dello stato di figlio' in Cesare Massimo Bianca (ed), La Riforma della filiazione (CEDAM 2015) 3.

(6) Cassazione civile n 23797/2021; n 21554/2021; n 16357/2018; n 23979/2015.

(7) Constitutional Court, Judgment n 183/2023; *Zhou v Italy* App no 33773/11 (ECtHR, 21 January 2014).

The Abortion Law (Law No 194 of 1978) authorises, under certain circumstances, women under 18 to terminate their pregnancy, even without parental consent (Article 12). In such cases, the decision is made by the judge, taking the woman's will into consideration. Moreover, certain choices affecting private life were left to children: for instance, children over the age of 16 may decide to marry without their parents' consent on the basis of a judicial authorisation (Article 390 CC); further, they may recognise their own child (Article 250 CC) or conclude an employment contract (Law No 977 of 1967). Children over the age of 14 are required to express their consent to being adopted (Article 7, Law No 184 of 1983) or recognised by a parent (Article 250 CC). **22**

Lgs D No 149 of 2022 emphasises the general right of children to be heard in all proceedings concerning them if they are over the age of 12, or even younger, if they are capable of discernment (Article 473-bis.4 CPC). Finally, Law No 219 of 2017 affirms the right of children to receive information about choices concerning health treatments, and to allow them to express their will. **23**

D. *Concept and role of 'judge' and 'judicial decision'. Voluntary jurisdiction*

No unified concepts of 'decision' and 'court' exist in Italy, whereas a 'judicial authority' includes whoever has passed the State exam as a *magistrato* (judge) and opted for judicial functions instead of the public prosecutor's office. Judges are subject to Article 111 of the Constitution, according to which: **24**

'Every trial takes place in a context of adversarial proceedings between the parties, under conditions of equality, before a third and impartial judge. The law ensures its reasonable duration.'

Judicial authorities still have exclusive competence as regards the resolution of contentious proceedings, the establishment of filiation without the parents' consent (Article 269 CC), the change of filiation (Article 250 CC), the loss of parental responsibility (Article 330 CC), authorisations concerning minors, and adoptions (Law No 184 of 1983, Articles 10 and 25). **25**

Further elements, however, have to be taken into account: the type of control, the procedural guarantees for the parties involved (such as adversarial proceedings) and the available remedies and/or the means of appealing. **26**

Certain functions have been shifted to professionals and authorities other than judicial authorities (see paras 97ff). From a functional perspective, they produce acts with the same effects as judicial decisions. Furthermore, they must comply with professional and ethical standards **27**

E. *Judicial authorities competent in family and succession matters*

28 As for the types of judicial authorities competent in family and succession matters, the following have to be mentioned.

29 Both family and succession matters basically fall under the jurisdiction of the ordinary tribunals (Articles 84, 90, 250, 251, 317-bis, 330, 332, 333, 334, 335, and 371 CC). The Minors' Tribunal is competent for matters of parental responsibility (in particular, those governed by Article 473-bis.39 CPC). Only if they are related to a pending legal action for separation or divorce between the same parties does the competence of the ordinary tribunal arise. (8) The Minors' Tribunal is further competent for preliminary authorisations required for carrying out acts of extraordinary administration regarding the property of vulnerable adults.

30 Since 2021, only the tutelary judge has had jurisdiction over these preliminary authorisations (Articles 320, (5); 374; 376; 394 (3); 397 (1 and 2); 424; 411 (1) CC). However, Law No 206 of 2021 introduced a new court 'for individuals, minors, and families', which will be competent for all family issues and matters relating to children, which currently fall under the jurisdiction of the ordinary court, the minor's court, and the tutelary judges. This court will be established two years after the publication of Lgs D No 149 of 2022, that is on 17 October 2024, but it is possible that more time will be needed.

31 This court will always be composed of a single judge (only appeals require a collegial court), while Minors' Tribunals were composed of four judges (two legally trained and two non-legally trained). There will no longer be any contribution from multidisciplinary experts, even if that was of great significance in family matters. On the other hand, Law No 206 of 2021 states that the 'court for individuals, minors, and families' must be composed of judges specialised in family law.

32 As for judges competent in guardianship matters (*giudice tutelare*), see below paras 173ff.

F. *Main extra-judicial proceedings in family and succession matters (overview)*

33 In family law, the extra-judicial procedures for separation and divorce were outlined by Article 6 (assisted negotiation) and Article 12 (procedure in front of the mayor) of Decree-Law 132 of 2014 (see below para 97ff).

(8) Claudio Cecchella, 'Le nuove norme sul processo e il tribunale in materia di persone, minorenni, famiglia' [2023] Rivista di diritto civile 1101. The author admits Minors' court competence only if there is a proceeding ex Article 473-bis.39 CPC. and a proceeding for parental responsibility.

Article 6 of Decree-Law No 132 of 2014 applies to: **34**

- Divorce;
- Separation;
- Consensual resolutions concerning maintenance under Article 433 CC; and
- Mutual agreements pertaining to the custody and maintenance of children born to parents not in a marriage or civil union (including both minor children and non-self-sufficient adults).

Article 12 of the same Decree-Law provides the mayor with the competence **35** for consensual separation, divorce and modification of separation or divorce conditions if the spouses do not have minor, incapacitated, or otherwise non-self-sufficient children. As a consequence, parental responsibility arrangements are not included. As minors are not involved, the scope of party autonomy is broader, as the mayor engages in a primarily formal review (according to Article 12 of Decree-Law 132 of 2014, they merely verify the identities of the spouses). Conversely, wherever minors are involved, a more substantial control is required (see Article 6 of DL 132 of 2014) and, therefore, this proceeding is not available.

On the other hand, in cases of gender-based or domestic violence, no **36** extra-judicial procedures can be initiated. Indeed, in this pathological situation, any alternative dispute resolution (like mediation or conciliation, Article 473-bis.43 CPC) is excluded because it is unreliable.

Consequently, the assisted negotiation or proceedings before the mayor are clearly not possible.

In addition to the above-mentioned de-judicialised proceedings, measures to **37** decrease the conflict between the spouses or prevent them from initiating judicial litigation have been implemented in recent years. Parental coordination and family mediation are contemplated in the newly designed Articles 473-bis.43ff CPC, which allow a mediator to assist the parties in seeking an amicable agreement (including the formulation of a proposal for resolution that can be used in both extra-judicial and consensual judicial proceedings). Incentives for these roles can be found in Article 13 of the European Convention on the Exercise of Children's Rights of Strasbourg, 1996 and also in Article 473-bis.10 and Article 472-bis.22 of the Civil Procedure Code, which allows the judge to suspend certain decisions to await the parents' agreement.

G. *Figures on extra-judicial proceedings*

There are several reasons behind the de-judicialisation trend in family **38** matters. A primary role is played by the need to alleviate the courts' huge

workload. (9) Furthermore, extra-judicial procedures are, in some cases, less expensive (paras 39ff.) and faster (paras 43ff.). This is reflected in the increase in divorce figures, following the implementation of Decree-Law No 132 of 2014, with a remarkable 57.5% surge in just one year. (10)

1. *Cost-effectiveness of out-of-court procedures*

39 In terms of cost-effectiveness, the procedure before a mayor (Article 12 of Decree-Law 132 of 2014) is the best solution. To start the procedure, only stamp duty fees (amounting to €16) are to be paid.

40 Assisted negotiation (Article 6 of Decree-Law No 132 of 2014) is definitely more expensive, involving a lawyer for each party. The cost ranges from €500 to €3,000, depending on the number of meetings required to finalise the agreement. Thus, to encourage parties to opt for an assisted negotiation, economic incentive measures, including the expansion of legal aid, should be taken into account. Despite a prior proposal in this regard, the reform has extended the provision of legal aid exclusively for instances of mandatory assisted negotiation (Article 3 (1), Decree-Law No 132 of 2014), (11) excluding assisted negotiation in family matters.

41 In any case, assisted negotiations are less expensive than judicial proceedings, which range from €1,500 to €10,000.

42 Outside the domain of family law (in succession and matters relating to vulnerable adults), extra-judicial solutions may indeed be more expensive: the notary, following a complex preliminary investigation, will charge higher fees than lawyers in comparable authorisation procedures. Nonetheless, this higher cost is offset by significantly shorter processing times.

2. *Timing of out-of-court procedures*

43 In terms of time, extra-judicial procedures outperform the judicial solution.

44 As for the proceedings before the mayor, 'the agreement shall be completed and signed immediately upon receipt of the declarations' (Article 12 of

(9) Francesca Rinesi, 'La recente evoluzione dei divorzi: uno sguardo ai numeri' [2021] Famiglia e Diritto 140; Filippo Danovi, 'Il P.M. nella procedura di negoziazione assistita. I rapporti con il presidente del tribunale' [2017] Famiglia e Diritto 69.

(10) ISTAT, Marriages, Civil Unions, Separations and Divorces: Year 2023 (National Institute of Statistics 2024).

(11) Eugenio Dolmotto, 'Riforma Cartabia: il nuovo processo civile (ii parte) – la negoziazione assistita nell'ultima riforma della giustizia civile' [2023] Giurisprudenza italiana 736; Luciana Breggia, 'Mediazione e patrocinio a spese dello Stato: la sentenza della Corte costituzionale n. 10 del 2022 nell'evoluzione dei sistemi di gestione dei conflitti' [2022] Questione Giustizia.

Decree-Law 132 of 2014). Then, the parties must re-appear no sooner than thirty days before the mayor to confirm the agreement. All in all, the timeframe remains quite short.

45 As for assisted negotiation, the agreement must be reached within one to three months (with the possibility of a one-month extension). Subsequently, the authorisation or the *nihil obstat* by the public prosecutor is needed. If the authorisation is denied, a further phase in which the parties appear before the president of the tribunal is scheduled.

46 The agreement must be submitted to the public prosecutor within ten days. However, there is no specific deadline for the public prosecutor to transmit the authorisation or *nihil obstat*. Conversely, if the agreement is found not to be in the best interests of the children, there is a five-day deadline within which the agreement has to be forwarded to the President of the Court. Therefore, the same deadline could apply in the first case as well.

47 The President of the Court is then obligated to schedule the parties' appearance within thirty days and must do so promptly.

48 Although several steps are required, the proceeding is faster than the judicial one, also as a consequence of the computerisation of the entire procedure (Article 6 (2-bis) of Decree-Law 132 of 2014).

49 As to the very recently introduced notarial authorisations (Article 21 of Lgs D No 149 of 2022; types are detailed below, paras 214ff), their implementation is still relatively limited and new. Predicting the success of this new measure is quite a difficult task. On the one hand, the notarial authorisation is likely to be quicker and less time-consuming, as it allows a single professional to handle multiple interconnected tasks. Notaries associations ensure that they will be dealt with faster than the corresponding judicial acts. (12) On the other hand, notaries themselves express concerns about the responsibilities they have, (13) particularly during the preliminary phase. Moreover, their duty to authorise often requires collaborations with other professionals, potentially leading to increased costs and time for these authorisations.

50 In the realm of family law, more data are available. Despite the potential benefits and the initial enthusiasm, extra-judicial procedures have never been able to compete with procedures before judicial authorities in terms of attractiveness (14).

---

(12) Antonio Marrese, 'L'autorizzazione notarile di volontaria giurisdizione riflessioni sull'art. 21 del d. lgs 10 ottobre 2022 n. 149' (Conference, Florence, 24 March 2023).

(13) Ibidem.

(14) ISTAT, Marriages, Civil Unions, Separations and Divorces. Year 2023 (National Institute of Statistics 2024).

51 While judicial divorces and separations are more frequent, there are more procedures in front of a mayor than instances of assisted negotiation. This underscores the substantial attractiveness of that administrative proceeding and, at the same time, highlights some disadvantages of assisted negotiation. These are as follows.

52 Firstly, the assisted negotiation proceeding provides no strict time limit for the public prosecutor to provide a response. A further delay can take place if the President of the Tribunal is involved.

53 Secondly, the number of duties lawyers are burdened with is a disincentivising factor, given the risk of civil and disciplinary liability (15) in the case of errors.

54 Thirdly, assisted negotiation does not allow for an in-depth examination of arrangements concerning children and 'weaker' spouses. In fact, the public prosecutor lacks the expertise for such an examination of matters relating to children, where they act as a mere intermediary between the spouses and the President of the Court. As to maintenance between spouses, the public prosecutor does not seem to be equipped with the information concerning the economic situations of the spouses to conduct a substantive review of their agreement. For these reasons, some authors criticise this provision, arguing that the public prosecutor is not competent, heavily burdened with a huge workload, and, therefore, addressing the President of the Court would have been a more suitable solution. (16)

II. Family law

A. *Family law as a source of status. Marriage, same-sex partnerships, factual cohabitation*

55 Family law is a source of personal status, which is recorded in public registries.

56 The status of a spouse is a legal effect of marriage. The latter can be concluded in front of the mayor or their representative (Articles 79 ff) or, alternatively, religious celebrations are allowed. Because of an agreement between Italy and the Vatican State, the concordat marriage allows the

(15) Stefano Ciambotti, 'I profili deontologici dell'attività dell'avvocato nella negoziazione assistita familiare' [2017] Rivista AIAF 26; Alessandro Simeone, 'I procedimenti su accordo di parte' in Rosaria Giordano and Alessandro Simeone (eds), La riforma del diritto di famiglia: il nuovo processo (Giuffré 2023) 299.

(16) Giovanni Bonilini, *Trattato di diritto di famiglia* (UTET 2022) 13.

catholic priest to celebrate the marriage having civil effects, if registered. (17) On the basis of agreements with representatives of non-Catholic religions, the corresponding ministers are allowed to celebrate marriages (Article 8 of the Constitution).

57 The status of spouse is dissolved as a consequence of the divorce, the annulment of the marriage (see below paras 65ff) or death.

58 Marriage was the only recognised partnership until Law No 76 of 2016 (see above). The main differences between marriage and civil unions are as follows:

a) No requirement of fidelity is stated in civil unions (as in Article 143 CC for married couples).
b) Same-sex couples do not have access to adoption or assisted reproduction. Furthermore, unlike marriage, where children are considered the offspring of both parents, children born during a civil union are only recognised as children of the biological parent.
c) A separation is not possible for civil unions, which is a prerequisite for most divorces in marital relationships. Conversely, in the case of civil unions, there is a mandatory three-month reflection period following the initial declaration (addressed to the public authority and officially recorded on the certificate), and preceding the dissolution request. This system enforces a compulsory contemplative phase.

Some critical points remain unclear, particularly whether the three-month period results in any partial suspension of the effects of the civil union's formation. (18)

59 In addition, Law No 76 of 2016 regulates factual relationships between two adults who cohabit and share mutual, moral and material support.

Conversely, if the parties opt for drafting an agreement, this must be done in writing. It can be a public deed drawn up by a notary, or a private document drafted with the assistance of a lawyer and authenticated by a notary or a lawyer. Furthermore, both the notary and the lawyer are required to certify

(17) The term 'Concordat marriage' (Article 82 CC) derives its name from its introduction into the Italian legal system following the signing of the Concordat between the Italian State and the Holy See in 1929. Prior to this agreement, Catholic citizens were required to undergo two marriage ceremonies: one before the civil registrar, having purely civil implications, and the other before a religious minister, which held sacramental significance.

(18) Ilaria Speziale, 'Lo scioglimento dell'unione civile nel confronto con la crisi del matrimonio' [2021] Corriere Giuridico 1359; Alberto Figone, 'Divorzio e scioglimento dell'unione civile' [2021] Famiglia e Diritto 67; Giovanni De Cristofaro, 'Le "unioni civili" fra coppie del medesimo sesso. Note critiche sulla disciplina contenuta nei commi 1°–34° dell'art. 1 della l. 20 maggio 2016, n. 76, integrata dal d.lgs. 19 gennaio 2017, n. 5' [2017] Nuove Leggi Civ Comm 101.

that the contract complies with mandatory legal provisions. The professional must then submit a copy of the contract to the municipality where the parties reside for registration.

In particular, paras 36 of Article 1 Law no 76 of 2016 provide for certain rights to which a cohabitant is entitled, regardless of whether the cohabitation is registered or whether the parties have concluded a written agreement (eg, the right to stay in the family home after the other cohabitant's death, to be admitted in hospital, to be awarded damages in case of death, etc).

60 The parties are free to terminate their relationship without any formality. A maintenance obligation may arise if one of the parties is in a state of need. Any disputes will be resolved before the judicial authority, as no form of de-judicialisation is allowed.

61 As to the filiation status, see the following paras 131ff; 154ff; 167ff.

B. *Divorce, legal separation, nullity of marriage*

62 In Italian law, both separation and divorce are allowed.

63 Originally, only a fault-based separation was permitted (Articles 150ff CC) in case the spouses did not reach a consensual agreement. Proof of the violation of specific marital duties was required (Articles 151, 152, and 153 CC).

64 Law No 151 of 1975, in abolishing fault as a requirement for judicial separation, allowed spouses applying for separation to merely allege that the cohabitation had become intolerable or caused serious harm to the upbringing of their children. Nevertheless, slight relevance to the violation of marital duties is still given, as, according to Article 156 CC, the spouse who is responsible for a breach leading to the matrimonial crisis loses their right to maintenance and, according to Article 548 CC, their succession rights.

65 Legal separation, as a consequence of a contentious or consensual judicial proceeding or an extra-judicial proceeding, suspends all spousal duties, allowing the parties to live apart. However, each spouse retains their succession rights, unless the separation is due to their misconduct (see above). Furthermore, a maintenance right may be given to the spouse with a lower earning capacity.

66 Spouses who have been legally separated for at least six months or one year have a right to apply for divorce.

67 This was introduced by Law No 898 of 1970 and withstood the abrogative referendum of 1974. Like separation, divorce is not based on the violation of spousal duties, being rather grounded on objective reasons listed under Article 3 Law 898 of 1970 (including legal separation). Only if one of these grounds exists is the dissolution of the 'spiritual and material communion between the spouses' verified and the marriage is dissolved.

A further way to extinguish the marital status is its declaration of nullity or its annulment. In particular, the marriage is void if one of its mandatory requirements is not met: for example, if one of the spouses is a minor (Articles 84 and 117 CC); if one of the spouses is already married or in a civil union (Articles 86 and 117 CC). Annulment depends on the natural incapacity or interdiction of one of the spouses at the time of the wedding (Article 120 CC); violence or error (Article 122 CC); or due to 'simulation', as when one gets married to enable a foreign spouse to obtain Italian citizenship (Article 123 CC). **68**

The invalidity proceedings still have a predominantly inquisitorial nature, as the judge checks the grounds of nullity mostly irrespective of the parties' will, with the exceptions of vices of consent (ie error, fraud, moral violence of one party conditioning the will of the other party), which are brought in front of a tribunal by the spouse whose will was vitiated. **69**

Since the parties' agreement and will are generally irrelevant in such matters, the Court of Cassation has admitted the possibility of patrimonial agreements between spouses concerning the potential future annulment of their marriage since the 1990s, [19] as such agreements are held to be irrelevant to the annulment decision. **70**

1. *Judicial proceedings*

Judicial proceedings can be contentious or consensual: **71**

- Contentious judicial separation (Articles 150–157 CC; Articles 473-bis.47-50 CPC);
- contentious judicial divorce (Law 898 of 1970; Articles 473-bis.47–50 CPC); and
- contentious judicial dissolution of a civil union (Article 1, paragraphs 22ff, Law 76 of 2016).
- Consensual judicial separation (Article 158 CC; Article 473-bis.51 CPC);
- consensual judicial divorce (Law 898 of 1970; Articles 473-bis.47–51 CPC); and
- consensual dissolution of a civil union (Article 1 (25) of Law 76 of 2016).

Before Lgs D No 149 of 2022, the judicial proceedings differed in terms of procedures and type of decision. **72**

- Contentious legal proceedings and consensual divorces or dissolutions of civil unions were concluded with a constitutive judgment.
- Consensual separations followed the voluntary jurisdiction procedure and were concluded with a decree that lacked *res judicata* capacity.

---

[19] Cassazione civile n 348/1993; Domenico Giovanni Ruggiero, Gli accordi prematrimoniali (ESI 2005) 187–190.

73 One of the objectives of the recent reform (Law No 206 of 2021 and Lgs D No 149 of 2022) was to unify the two procedures.

74 While at the beginning of the debate for the reform, the prevalent idea was to unify separation and divorce, by using the consensual separation proceeding, the legislator eventually opted for the pattern of a consensual divorce, which ends with a constitutive decision. [20] The reason why a divorce proceeding was chosen as that applicable to both was that its decision can have a constitutive effect (Cass No 21425 of 2022), whereas the decree is not subject to appeal and does not become a *res judicata*.

75 Despite the intention to create a unified procedure, the process differs slightly depending on whether it is contentious or consensual. Furthermore, the nature of the final decision (constitutive or declaratory) varies in the two cases.

a) *Contentious proceedings for separation and divorce*

76 The hearing in front of the court must be scheduled within 90 days from the petition (Article 473-bis.14 CPC).

77 Minor children (who are over the age of 12 or otherwise mature) will always be heard by the judge. Article 473-bis.4 CPC states:
The judge does not proceed with the hearing if it is contrary to the child's best interests or unnecessary, in cases of physical or psychological impossibility of the child, or if the child expresses the wish not to be heard.

78 Additionally, parents are required to describe the daily activities involving the minors to enable the judge to make decisions regarding custody.

79 Regarding the financial aspects between the spouses, the requests must be accompanied by certain financial information, including income declarations, documentation of property ownership, shares in companies, bank account statements, and financial records for the past three years.

80 The judge can issue temporary and urgent measures if necessary (Article 473-bis.22 and Article 473-bis.50).

81 The conclusive judgment is constitutive, as it changes the status.

82 The judgment is capable of becoming a *res judicata*. However, the *rebus sic stantibus* principle applies at the same time, as it can be modified in cases of unforeseen circumstances or justified reasons, such as in the case of a violation of mandatory rules (Article 473-bis.29 CPC). [21]

---

[20] Some authors have criticised the solution: Claudio Cecchella, 'Le nuove norme sul processo e il tribunale in materia di persone, minorenni, famiglia' [2023] Rivista di diritto civile 1090.

[21] Cassazione civile n 22423/2023; n 6889/2023.

b) *Consensual judicial proceedings for separation and divorce*

When the procedure is consensual, the parties can appear before the judge with an agreement regarding their financial matters and a parenting plan for the custody of their children. **83**

In these cases, the children do not necessarily have to be heard, but only if the judge deems it necessary (Article 473-bis.4 (3) CPC). [22] **84**

The judge verifies that the plan is in the best interests of the child. If it is not, the judge proposes the necessary changes to the parties. If these adjustments are not made, the judge rejects the request.

The judge also ensures that the patrimonial agreements do not violate mandatory legal provisions, which include the protection of the economically weaker party (Cass No 16379 of 2014 and Cass No 5065 of 2021). If the agreements do not comply, the judge rejects the request (while, before Lgs D No 149 of 2022, the consensual proceeding turns into a contentious one).

If the agreements on both the children and financial matters pass the judge's scrutiny, the process ends with a (collegial) judgment.

It is constitutive for the modification of the legal status and declaratory in the part where it approves the agreements reached between the parties (Cass No 21761 of 2021). [23] **85**

This means that the patrimonial effects and those related to the custody of the children are directly generated by the agreement, not by the judge's decision. Consequently, contractual remedies can be used. **86**

However, the Civil Procedure Code allows the parties to appeal the judgment (Article 473-bis.30 CPC) and also provides that, in cases of supervening circumstances, the judgment can be modified (Article 473-bis.29 CPC). This can raise some issues, for example, (1) which proceeding should be used in each situation; (2) whether contractual remedies against the agreement apply, given that the judgment is a *res judicata*. [24] **87**

---

[22] Doubts were expressed by Giovanni De Cristofaro, 'Le modificazioni apportate al codice civile dal decreto legislativo attuativo della "Legge Cartabia" (D.lgs. 10 ottobre 2022, n. 149). Profili problematici delle novità introdotte nella disciplina delle relazioni familiari' [2022] Nuove Leggi Civ Comm 1407.

[23] Ilaria Pagni, 'Vizi del consenso e annullabilità della separazione consensuale omologata: lo sfuggente rapporto tra autonomia negoziale e controllo giudiziale' [2022] Nuove Leggi Civ Comm 1407; Giovanni De Cristofaro, 'Le modificazioni apportate al codice civile dal decreto legislativo attuativo della "Legge Cartabia" (D.lgs. 10 ottobre 2022, n. 149). Profili problematici delle novità introdotte nella disciplina delle relazioni familiari' [2022] Nuove Leggi Civ Comm 1407; Geremia Casaburi, 'Separazione consensuale dei coniugi ed accordi patrimoniali atipici tra i coniugi: ammissibilità ed impugnazione' [2008] Famiglia e Diritto 446.

[24] Cassazione civile n 22700/2021; n 25861/2014.

88 When the agreement involves the transfer of real estate, in both contentious and consensual proceedings, the court's minutes are considered to be public deeds and they serve as a valid instrument for registration in the public real estate records (Cass No 21761 of 2021).

c) *Joint application for separation and divorce*

89 Furthermore, Lgs D No 149 of 2022 introduced the possibility of filing a joint application for separation and divorce. The divorce may be pronounced after six months and once the decision on separation has become a *res judicata*. ([25])

90 When the parties jointly and simultaneously file for separation and divorce, they present a comprehensive agreement to the judge. This agreement includes provisions that are valid for the period of separation, but also provisions for (the future) divorce.

91 Thus, even if the Court of Cassation for a long time denied the validity of any agreement in contemplation of divorce (Cass No 15064 of 2003; Cass No 5302 of 2006; Cass No 2224 of 2017), it has finally allowed such agreements on the basis of three different reasons (Cass No 28727 of 2023) ([26]): a) The provisions do not affect the legal status, since these are altered by the judge through a constitutive judgment; b) In any case, legal status modifications by negotiating autonomy are possible, as extra-judicial forms of separation and divorce are permitted; c) Provisions related to children and patrimonial matters are subject to judicial scrutiny, ensuring compliance with i) the best interests of the children and ii) mandatory legal provisions. Mandatory legal provisions also include the guarantee of non-waivable protection of the economically weaker party (Cass, ruling No 16379 of 2014 and Supreme Court, ruling No 5065 of 2021).

2. *Extra-judicial proceedings*

92 The extra-judicial procedures for separation and divorce include negotiated agreements (Article 6 of Lgs D No 132 of 2014) and agreements in front of a mayor (Article 12 of Lgs D No 132 of 2014).

93 To access these procedures, two conditions need to be met: 1) a mutual agreement regarding the terms of separation or divorce; 2) a shared willing-

---

([25]) Mauro Paladini, 'Il cumulo delle domande di separazione e divorzio' in Claudio Cecchella (ed), *La riforma del processo e del giudice per le persone, per i minorenni e per la famiglia* (Giappichelli 2021) 75.

([26]) Criticised by Claudio Cecchella, 'Le nuove norme sul processo e il tribunale in materia di persone, minorenni, famiglia' [2023] Rivista di diritto civile 1090.

ness to opt for an extra-judicial proceeding (agreement may also be reached after one party invites the other).

a) *Requirements, procedure and competence in assisted negotiation*

Assisted negotiation is a procedure available for consensual separation or consensual divorce (only divorces following separation, among those listed in Article 3 of Law No 898 of 1970) and for the consensual dissolution of a civil union. **94**

Access to this procedure can result from an initial agreement or the invitation of one party. **95**

An agreement is established, in which the parties commit to engage in negotiations. They are facilitated by one lawyer for each party. **96**

This initial agreement has specific requirements: **97**

- It must be in writing (it is not necessary to follow the model of the Consiglio Nazionale Forense, the National Bar Association (27)).
- It must specify a time frame for the conclusion of the final agreement on separation, divorce or dissolution: this period should be no less than one month (although an agreement reached earlier is considered valid) and no more than three months, with the possibility of extending it by one more month.

At this stage, there is no provision for the hearing of a child. Additionally, the lawyers presiding over the negotiation are not public officials and thus it is not possible to ensure the procedures outlined in Article 473-bis.5 CPC for the hearing of children. However, it is presumed that the child has been heard by the parents, either before or during the negotiation, as a result of their parental responsibility. **98**

Once the final agreement is reached and written, it must be signed by the parties and their lawyers. **99**

The final agreement should contain financial and child custody arrangements. Moreover, the final agreement should recognise the effort of the lawyers to reconcile the parties and must include information about: 1) the availability of mediation and 2) the importance of children spending sufficient time with both parents.

Lawyers verify its compliance with mandatory rules and public order. (28) **100**

(27) See <https://www.consiglionazionaleforense.it/modulistica-negoziazione-assistita> (accessed 15 January 2025).

(28) Elena Bargelli, 'L'accordo dei coniugi nella negoziazione assistita e nel procedimento municipale: il divorzio per mutuo dissenso fa il suo ingresso nell'ordinamento' in Paolo Zatti (ed), *Trattato Diritto di famiglia. Le riforme* (Giuffrè 2018) 273.

Moreover, they have to check the fairness of the maintenance if it is a lump sum, but not if it is paid on a monthly basis.

101 This additional control was introduced by Lgs D No 149 of 2022. Previously, the verification was carried out only by the public prosecutor. This change has increased the level of control, with a notable increase in the involved lawyers' accountability.

102 In performing this role, lawyers may also use new forms of extra-judicial investigation. This includes the hearing of third parties (Article 4-bis of Law Decree 132 of 2014) ([29]) and confessions by the spouses (in written form, and, therefore, without cross-examination: Article 4-ter). ([30])

103 The agreement is then transmitted electronically to the public prosecutor at the competent court. The competence lies with the court that would have had jurisdiction if the spouses had chosen one of the judicial procedures, following the rules outlined in Articles 473-bis.47 and 473-bis.11 CPC.

104 The public prosecutor examines the agreement: the extent of its control depends on whether minor or handicapped children are involved.

a) If there are no minor or handicapped children, the public prosecutor checks the formal correctness of the agreement and eventually issue a *nihil obstat*. It is controversial whether the public prosecutor is required to ensure that the agreement complies with public order or mandatory rules. ([31]) The most convincing answer is in the affirmative, so that the scrutiny could be thorough and, therefore, the public prosecutor, as a third and impartial authority, could verify whether the agreement complies with mandatory legal provisions. ([32])

([29]) See Alessandro Simeone, 'I procedimenti su accordo di parte' in Rosaria Giordano and Alessandro Simeone (eds), *La riforma del diritto di famiglia: il nuovo processo* (Giuffrè 2023) 290–291.

([30]) Alessandro Simeone, 'I procedimenti su accordo di parte' in Rosaria Giordano and Alessandro Simeone (eds), *La riforma del diritto di famiglia: il nuovo processo* (Giuffrè 2023) 291, emphasises that this mechanism is likely to see limited use: in family law, confessions, whether extra-judicial or judicial, are often not admissible. Statements, at most, can be considered as indications.

([31]) Massimo Crescenzi, 'La degiurisdizionalizzazione nei procedimenti di famiglia' [2015] Questione Giustizia; Elena Bargelli, 'L'accordo dei coniugi nella negoziazione assistita e nel procedimento municipale: il divorzio per mutuo dissenso fa il suo ingresso nell'ordinamento' in Paolo Zatti (ed), *Trattato Diritto di famiglia. Le riforme* (Giuffrè 2018) 269; Mario Pio Calogero, 'Negoziaziazione assistita familiare: poteri del procuratore della repubblica e del presidente del Tribunale' [2018] Giurisprudenza Italiana 2108; Elena D'Alessandro, 'Fuori dal processo: trasferimento in arbitrato, negoziazione assistita e accordi sul matrimonio – la negoziazione assistita in materia di separazione e divorzio' [2015] Giurisprudenza Italiana 1257.

([32]) Elena Bargelli, 'L'accordo dei coniugi nella negoziazione assistita e nel procedimento municipale: il divorzio per mutuo dissenso fa il suo ingresso nell'ordinamento' in Paolo

There is no deadline for the public prosecutor to make a decision. Therefore, legal scholarship suggests applying the ordinary five-day time limit valid for transmitting the agreement to the President of the Court when children are involved (see below para 110). (33)

b) If there are minor children, the investigation is more thorough. In this case, the public prosecutor not only checks if the agreement complies with mandatory rules, but also verifies if the parental plan is in the best interests of the child.

Although some scholars argue that the public prosecutor lacks the resources for a substantive review, (34) the investigation may suffice and conclude with an authorisation if the parental plan is deemed to be in the child's best interests.

However, if the public prosecutor holds that the agreement is not in the child's best interests or that a hearing of the child is necessary, they forward the case to the President of the Court within five days.

Although the hearing of the child is a fundamental right and one of the key issues of the cross-border circulation of the agreement under EU Regulation No 1111/2019, it takes place only if i) the public prosecutor deems it appropriate, ii) and, without any justification, forwards the request to the President of the Court, iii) and, eventually, the President of the Court does not consider it contrary to the child's best interests.

105 If the President of the Court is involved, a proceeding for assessing the agreement starts. This procedure may lead to a decree of authorisation (potentially following suggested amendments) or not. In the latter scenario, the spouses have several options: they can choose to resubmit another agreement or pursue judicial consensual/contentious proceedings. (35)

106 If the agreement receives either a *nihil obstat* or an authorisation, the public prosecutor sends it to the lawyers. Within ten days, the lawyers should transmit it to the civil registrar's office of the town where the marriage was registered. This step is essential for it to take erga omnes effects. The

---

Zatti (ed), *Trattato Diritto di famiglia. Le riforme* (Giuffrè 2018) 276; Mario Calogero, 'Negoziazione assistita familiare' in *Enciclopedia del diritto* (Giuffrè 2022) 930.

(33) Carlo Vittorio Giabardo, 'La "negoziazione assistita" e gli "accordi" coniugali nella gestione della crisi della famiglia' in Chiara Besso and others (eds), *Trasformazioni e riforme del processo civile. Dalla l. 69/2009 al d.d.l. delega 10 febbraio 2015* (Zanichelli 2015) 112; Procura della Repubblica presso il Tribunale di Roma, 'Protocol n 3164/222: Negoziazione assistita in materia di separazione e divorzio'.

(34) Giovanni Bonilini, 'La separazione personale tra coniugi' in Giovanni Bonilini (ed), *Trattato di diritto di famiglia* (UTET 2022) 13.

(35) Francesco Paolo Luiso, 'Le disposizioni in materia di separazione e divorzio' in Francesco Paolo Luiso (ed), *Processo civile efficiente e riduzione arretrato* (Giappichelli 2014) 33.

agreement is also conveyed to the Bar Association Council, which assumes responsibility for the safekeeping of the document as evidence.

b) *Requirements, procedure and competence in the proceeding before the mayor*

107 According to Article 12, Decree-Law 132 of 2014, the mayor of the town in which one of the parties resides or where the marriage certificate is registered can be involved in extra-judicial proceedings (Article 1 of Presidential Decree No 396 of 3 November 2000).

108 Access to this procedure is not granted in cases involving minors or otherwise non-self-sufficient children. The reason is that no judicial authority is involved and the mayor does not perform any substantial control. Furthermore, for the same reason, the agreement submitted to the mayor must not contain any provisions pertaining to the transfer of assets or a lump-sum maintenance (the agreement may also include monthly maintenance payments).

109 The mayor's role is limited to assessing the presence of all formal requirements and to hearing the will of the parties: moreover, in Italy, a mayor is responsible for the registration of civil status events (Article 54, Legislative Decree of 18 August 2000, No 267). The assistance of a lawyer is a mere option. The mayor's examination is confined to verifying the spouses' identities and the presence of the prerequisites for separation or divorce in accordance with Article 12, Decree-Law 132 of 2014.

110 Notwithstanding the lack of any competence to perform a substantial control of the agreement, the CJEU judgment of 15 November 2022 (C–646/20) defined the Italian mayor as a court for the purposes of the Brussels IIa Regulation ([36]). This decision underlined that, 'the registrar [...] examine[s] the content of the divorce agreement in the light of the legal provisions in force', and, therefore, concluded that 'a divorce decree drawn up by a civil registrar of the Member State of origin [...] constitutes a "judgment" within the meaning of Article 2(4)' of the Brussels IIa Regulation. ([37])

111 After the deed containing the agreement is drafted, it is signed. After 30 days, the spouses must appear again before the mayor for the confirmation of the agreement. The deed is then recorded in the civil registry.

([36]) The judgment has been criticised: see Elena D'Alessandro, 'Divorzio davanti all'ufficiale di stato civile – Il divorzio "all'italiana" supera il vaglio della Corte di giustizia' [2023] Giurisprudenza italiana 321; Elena Bargelli, 'La circolazione del divorzio degiurisdizionalizzato in Europa. Il problema del confine fra "decisione" e "atto negoziale"' [2023] Rivista di diritto civile 143.

([37]) In the same sense, Stefano Armellini et al, *La famiglia nel diritto internazionale* (Giuffrè 2019) 164.

c) *Maintenance dispositions and transfers of assets in extra-judicial proceedings*

In both extra-judicial proceedings, (38) no real estate transfers are allowed. **112**
However, agreements encompassing obligations to transfer immovables are **113**
allowed in an assisted negotiation. (39)

In the proceeding before a mayor, the question arises as to whether the **114**
agreement may contain maintenance obligations, as Article 12 excludes only clauses related to the transfer of assets. While a first ministerial directive (no 19/14) had excluded any clause disposing on financial issues, a subsequent one (no 6/15) (40) restricted the prohibition to real estate and lump-sum agreements. This interpretation has also been endorsed by the Council of State, the Supreme Administrative Court (*Consiglio di Stato*, 26 October 2016, no 4478). (41)

Conversely, assisted agreements in accordance with Article 6 can contain **115**
lump-sum contributions. In this way, the conditions between spouses are definitively established, (42) rendering any economic claims against each other untenable, even in the event of a substantial and/or drastic change in financial circumstances. Furthermore, rights to survivors' pensions, severance pay, and inheritance allowances are forfeited. (43) For this reason, in assisted negotiation procedures, a fairness control is required by lawyers and by the public prosecutor.

---

(38) For assisted negotiation, this limit was introduced by Lgs D No 149 of 2022.

(39) A different interpretation is presented only by Alessandro Simeone, 'I procedimenti su accordo di parte' in Rosaria Giordano and Alessandro Simeone (eds), *La riforma del diritto di famiglia: il nuovo processo* (Giuffrè 2023) 296–297.

(40) <https://dait.interno.gov.it/documenti/circ-006-servdemo-24-04-2015.pdf> accessed 15 January 2025.

(41) Supportive of this view in legal doctrine: Michele Angello Lupoi, 'Separation and divorce' [2016] Rivista Trimestrale di Diritto e Procedura Civile 286; Elena Bargelli, 'La circolazione del divorzio degiurisdizionalizzato in Europa. Il problema del confine tra "decisione" e "atto negoziale"' [2023] Rivista di Diritto Civile 143.

(42) For this reason, in the past, some scholars considered these agreements to be amendable (Claudia Irti, 'L'accordo di corresponsione una tantum nelle procedure stragiudiziali di separazione e divorzio: spunti di riflessione sulla gestione patrimoniale della crisi coniugale tra autonomia delle parti e controllo del giudice' [2017] Nuove leggi civili commentate 812), while others excluded such a possibility due to the absence of judicial scrutiny (Michele Sesta, 'Negoziazione assistita e obblighi di mantenimento nelle coppie in crisi' [2015] Famiglia e diritto 295; Ferruccio Tommaseo, 'Separazione e divorzio: aspetti procedurali e de-giurisdizionalizzazione alla luce delle recenti riforme' [2015] Corriere giuridico 1142).

(43) Cassazione civile n 22434 /2018.

d) *Effects and remedies of de-judicialised agreements of separation and divorce*

116 In both extra-judicial proceedings, the agreement has the effects of a decision of a tribunal. More specifically, all legal consequences arising from the alteration of marital status, including those related to surnames (refer to paras 286ff) and marital property are the same.

117 The financial effects and those related to child custody also arise from the agreement. The authorisation granted by the public prosecutor (or the decree issued by the President of the Court) and the confirmation of consent before the mayor have purely declaratory value.

118 As a consequence, contractual remedies and legal concepts, such as 'simulation', (44) annulment due to vitiating factors (45) or because of the incapacity of parties, are applicable. It is noteworthy that the source of the effects is the same as in consensual judicial procedures, where patrimonial dispositions and those concerning maintenance and custody of children are considered to be the effects of the agreement of the spouses and not of the court's decision (refer to paras 86ff).

119 Regarding the timing at which the agreement takes effect, in proceedings before a mayor, the effects occur from the moment the agreement is signed. In assisted negotiations, Article 6, (3), DL No 132 of 2014 states that: 'The agreement reached following the agreement produces its effects and takes the place of judicial measures.' However, some legal scholars argue that effects only follow the authorisation of the public prosecutor or the President of the Court. (46)

---

(44) Cassazione civile n 16909/2015; n 21839/2019 admitted actions of simulation in approved consensual separation agreements, particularly those involving real estate transfers between the parties. Nonetheless, the potential 'simulatory' nature of these separation minutes, according to Article 1415 CC, cannot be raised against third parties.

(45) Cassazione civile n 15169/2022; n 24621/2015; n 18066/2014; n 19304/2013. Francesco Alcaro, 'Realtà dell'apparenza nella simulazione (Nota a Cass 17607/2003)' [2004] Vita notarile 156; Carlo Basini, 'L'annullabilità della separazione consensuale omologata per vizi del consenso (Nota a Cass 17902/2004)' [2005] Familia 382; Virginia Busi, 'Il ruolo dell'accordo nella separazione consensuale e la ammissibilità della simulazione: il nuovo orientamento della cassazione (Nota a Cass, sez I, 20 novembre 2003, n 17607)' [2005] Nuova giurisprudenza civile 347; Ilaria Pagni, 'Vizi del consenso e annullabilità della separazione consensuale omologata: lo sfuggente rapporto tra autonomia negoziale e controllo giudiziale (Nota a Cass 17902/2004)' [2005] Nuova giurisprudenza civile 511; Giacomo Oberto, 'Simulazione della separazione consensuale: la cassazione cambia parere (ma non lo vuole ammettere) (Nota a Cass 17607/2003)' [2004] Corriere giuridico 309.

(46) Michele Sesta, 'Negoziazione assistita e obblighi di mantenimento nella crisi della coppia' [2015] Famiglia e diritto 295; Elena D'Alessandro, 'Divorzio davanti all'ufficiale di

e) *Interaction with other procedures*

Agreements in extra-judicial procedures adhere to the rules of private international law governing the circulation of public acts (ie, Regulation EC No 2201/2003, as replaced by Regulation EU No 2019/1111; Regulation EC No 1347/2000). **120**

These Regulations contain rules to solve conflicts between two proceedings issued in distinct States. For instance, Article 68(1) of EU Regulation No 1111/2019 allows the refusal of recognition if the act is incompatible with a prior decision or agreement involving the same parties in the Member State where recognition is invoked or issued in another Member State or in a third country. **121**

Before the agreement is reached and produces effects, there is no specific procedure for *lis pendens* matters. Nevertheless, such scenarios are relatively marginal, as extra-judicial proceedings can only be initiated jointly. (47) **122**

In particular, it seems unlikely for both parties to initiate the procedure for reaching an agreement through assisted negotiation while simultaneously pursuing other proceedings. It is even more challenging to use the procedure under Article 12 of Decree Law 132 of 2014 concurrently with other proceedings, given that the parties must present an already finalised agreement to the mayor. **123**

In cases where the initial agreement for assisted negotiation or the submission of the agreement before the mayor follows the initiation of the judicial proceeding, the judicial remedy prevails, in accordance with the general principle of temporal priority. Otherwise, the extra-judicial procedure takes precedence. **124**

C. *Parenthood*

The Italian legal system does not recognise forms of parenthood other than motherhood and fatherhood. The Civil Code only refers to 'mother' and 'father' and does not even consider the possibility of the child having two parents of the same sex. **125**

Furthermore, L No 76 of 2016 does not extend the provisions on filiation to same-sex couples. Law No 40 of 2004 on artificial procreation applies only **126**

---

stato civile – Il divorzio "all'italiana" supera il vaglio della Corte di Giustizia' [2023] Giurisprudenza italiana 321.

(47) Elena D'Alessandro, 'Divorzio davanti all'ufficiale di stato civile – Il divorzio "all'italiana" supera il vaglio della Corte di giustizia' [2023] Giurisprudenza Italiana 321.

to heterosexual married and unmarried couples. (48) As a consequence, the recognition of birth certificates indicating same-sex parents is confined to birth certificates issued abroad and meets limitations if they are contrary to the international public order. This happens, in particular, in the case of children born out of surrogacy, whose birth certificate is recognised as far as the biological parents are concerned, whereas the non-biological parents are allowed to establish parenthood through simple adoption. (49)

127 The establishment of biological filiation does not usually involve courts either in cases of married or non-married parents, if the latter spontaneously recognise the child.

128 Conversely, a judgment of the Tribunal is needed for non-marital filiation in the absence of the recognition (see below para 143). A judgment of the Minors' Tribunal is also required to establish the status of adopted child (see below paras 154ff).

129 Biological filiation is regulated by the Civil Code, which was changed by two main reforms. First, the broader family law of 1975 abolished illegitimate filiation (a term which previously indicated children born to unmarried couples, when one of the parents was married to someone else) and almost all differences between children born to married and unmarried couples. The more recent 2012 reform (50) eliminated any further differences, while retaining differences for the establishment of filiation. (51)

130 Three ways of establishing filiation are contemplated by the Civil Code:

131 a) For children of married parents, the filiation arises *ex lege*. However, different rules apply to mothers and fathers. The former are subject to the *mater semper certa e*st principle. However, the automatic attribution of maternity to the woman who gave birth to the child is excluded by the

---

(48) Moreover, two important decisions of the Constitutional Court have provided relevant exceptions to the prohibition on heterologous fertilisation: Constitutional Court, Judgments n 162 of 2014, by virtue of which heterologous fertilisation is allowed for couples who are absolutely sterile; Constitutional Court, Judgments n 96/2015, which allows fertile couples who are carriers of transmissible genetic diseases to have access to heterologous fertilisation.

(49) With regard to the compatibility of surrogacy with international public policy, see Cassazione civile n 12193/2019 and Cassazione civile n 38162/2022: these judgments affirm the impossibility of transcribing the birth certificate formed abroad – when surrogacy has been used – with reference to the non-biological parent. On the other hand, in the case of heterologous fertilisation performed abroad, the same Court of Cassation sees no obstacle to the recognition of a birth certificate issued in a foreign State with regard also to the non-biological parent.

(50) Legge n° 219 del 10 dicembre 2012.

(51) See Gilda Ferrando, 'Il matrimonio' in *Trattato di diritto civile e commerciale Cicu-Messineo* (Giuffrè 2015) 135; Piero Schlesinger, 'Il D. Lgs. N. 154 del 2013 completa la riforma della filiazione' [2014] Famiglia e diritto 443.

exercise of her right not to be named in the birth certificate (Article 30, PD No 396 of 2000). If the mother avails herself of this option, the mechanism of the presumptions laid down in Articles 231 and 232 CC will obviously also cease to apply and the father will only be able to recognise the child as if they had been born out of wedlock (see below, para 138). Conversely, her husband becomes a parent of the child born during the marriage through a system of legal presumptions (Articles 231 and 232 CC) and this may be challenged only through judicial actions (see below para 144).

b) For children born out of wedlock, the establishment of filiation requires an extra-judicial act of recognition (Article 250 CC). This is a unilateral voluntary act requiring a written form and, specifically, a declaration in front of a registrar, or a public deed, or a will; the required minimum age is 16. The validity of the act may be challenged by specific judicial actions if certain grounds are met (see below para 147). If one parent wishes to recognise the child after the other parent, the latter's consent is needed if the child is under 14. **132**

However, the parent's refusal may be challenged by the other parent in front of the ordinary tribunal (Article 250 CC). After hearing the child – if over 12 years old or capable of discernment – the judge may decide that the first parent's refusal is contrary to the minor's interest and issue a constitutive judgment taking the place of their consent. This judgment may be appealed to the competent court of appeal. **133**

Conversely, the child's consent is needed for the recognition to take effect if they are over 14 years old. Their refusal cannot be challenged by the parent wishing to recognise them. **134**

c) As far as children who have been born as a result of incest are concerned, the recognition by any parent (whether in good or in bad faith) has been permitted since 2012, but is not enough to establish the status filiationis, the authorisation by the Minors' Tribunal being another mandatory requirement (Article 251 CC). Before 2012, the recognition of children who have been born as a result of incest was allowed only to parents in good faith, ie, ignoring their biological relationship with the other parent. **135**

Alternatively, a number of judicial actions have led to the establishment of filiation under certain conditions. **136**

a) An action to claim the child's status (*azione di reclamo dello stato di figlio*) ([52]) may be brought in front of the ordinary tribunal only by the child and it is imprescriptible. Pursuant to Article 239 (1) CC, it must be **137**

([52]) On the claim action, see Giovanni Cattaneo, 'Filiazione legittima' in *Commentario al Codice Civile* (Zanichelli 1988) 154ff.

filed after the action to contest the child's status (for which, see below para 148) and leads to the establishment of the filiation relationship within a marriage. Both parents are necessary parties to the process, so a cross-examination is fully guaranteed. The judgment accepting the action to claim the child's status has *erga omnes* effects and retroactively establishes the filiation relationship between the parent and the child; this judgment can be appealed by both parents according to ordinary forms. The judgment denying the action to claim the child's status, on the other hand, can be appealed by the child, again according to the ordinary forms.

138 b) Judicial declaration of motherhood or fatherhood (*dichiarazione giudiziale di maternità o paternità*) may be brought in front of the ordinary tribunal if the child born out of wedlock is not spontaneously recognised. The action may be filed by a child over the age of 18, by their guardian or by the parent who has recognised them and exercises parental responsibility. ([53]) The judgment declaring maternity or paternity has retroactive and constitutive effects and is enforceable *erga omnes*; it can be appealed by the ordinary means of appeal.

139 Once established, the filiation relationship can only be removed judicially.

140 In particular, if the status filiationis is established via marriage the following actions are needed:

141 a) The action for disavowal of paternity (*azione di disconoscimento della paternità*) allows the removal of the paternity relationship that has arisen automatically on the basis of the legal presumptions set out in Articles 231 and 232 CC ([54]) The action can be brought in front of the ordinary tribunal by the child with no time limit; alternatively, under Article 244 CC, it can be filed by the mother within six months of the birth of the child or from the day she discovered that her husband was impotent at the time of conception; lastly, the action can be brought also by the father himself within a period of one year from the day of the child's birth or from the day he became aware of his own impotence at the time of his wife's conception or again from the day he discovered his wife's adultery. In this process, cross-examination is guaranteed to the highest degree, with mother, father and child having to participate; if the child is a minor, a special curator is appointed for them to protect their interests. The judgment has retroactive and *erga omnes* constitutive effects; it is appealable in the ordinary forms.

142 b) The action to contest child status (*azione di contestazione dello status di figlio*) allows the removal of filiation in special cases, such as when a

([53]) See Luigi Balestra, 'La dichiarazione giudiziale di paternità e maternità alla luce della riforma della filiazione' [2014] Rivista trimestrale di diritto e procedura civile 1223.

([54]) The rules governing the action for disallowance are set out in Article 243-bis CC.

birth is falsely assumed to have taken place (but it never did) or when the newborn was swapped for another, for example in a clinic. ([55]) The action can be filed in front of the ordinary tribunal by the parents resulting from the birth certificate and by any interested claimant (child included); it is imprescriptible. Even in this case, cross-examination is guaranteed, with mother, father and child having to participate in the process; if the child is a minor, a special curator is appointed to protect their interests. The judgment has retroactive and *erga omnes* constitutive effects; it is appealable in the ordinary forms.

c) As mentioned above, the act of recognition may be challenged on the following grounds: lack of truthfulness; ([56]) violence (Article 265 CC); and interdiction (Articles 265ff CC). No further grounds of challenge are allowed. Under Article 263 CC, these actions can be brought to the ordinary tribunal by the author of the recognition, by the person who has been recognised, and by anyone else with an interest (eg, the other parent or the spouse of the person who recognised the children in the case of lack of truthfulness). The action is imprescriptible only for the child; on the contrary, the parent must bring the action within one year from when the recognition was noted in the margin of the birth certificate (or from the day they became aware of their own impotence at the time of conception); for all other eligible persons, the action must always be brought within five years from when the recognition was noted in the margin of the birth certificate. The parent who made the recognition and the recognised child are always necessarily parties to the trial in order to ensure adversarial proceedings. As usual, the judgment has retroactive and *erga omnes* constitutive effects; it is appealable in the ordinary forms. **143**

The establishment and challenge of parenthood through artificial procreation entails some differences. **144**

Children born as a result of the application of medically assisted procreation techniques have the status of children born in wedlock or recognised children of, correspondingly, married and unmarried couples who expressed a willingness to use the techniques in accordance with Article 6 of Law No 40 of 2004. Couples who consented to artificial procreation automatically become parents of the children born thereby, even in the case of heterologous fertilisation (Article 8). **145**

([55]) Article 240 CC, which refers only to the first two paragraphs of the preceding Article 239, reducing the possibility of bringing such an action only to cases of supposed childbirth, substitution of a newborn child or erroneous registration as a child of unknown persons.

([56]) Article 263 CC.

146 This means that unmarried parents are not required to recognise children born through artificial procreation as the filiation is established ex lege and cannot be prevented. As a consequence, the mother cannot avail herself of the right not to be mentioned in the birth certificate. In the case of heterologous fertilisation, the unmarried father giving consent to the procreation of the child cannot challenge his status of parent by any action, whereas the gamete donor has no legal relationship with the child (Article 9(3), L No 40 of 2004). Correspondingly, the married husband who has consented to the aforementioned technique may no longer bring an action for disavowal of paternity (Article 9(1) L No 40 of 2004).

147 Finally, with regard to Private International Law rules, under Articles 33ff of L No 218 of 1995, the most important criterion for determining the law applicable to filiation is the nationality of the child; alternatively, the law of the State whose citizenship one of the parents has is applicable when it appears more favourable to the child.

D. *Adoption*

148 In the Italian legal system, adoption of children is established only by a decision of the Minors' Tribunal according to Law No 184 of 1983. Minors may reside in the national territory or abroad. In the latter situation, the rules on international adoption apply (Articles 29ff of Law 184 of 1983). (57)

149 Two forms of adoption are allowed:

150 a) Full adoption establishes a filiation bond identical to the biological one (see Article 6). This requires children to be declared adoptable as finding themselves in a condition of abandonment (Article 7). (58) Only married couples who have been married for at least three years (previous cohabitation periods are calculated) are eligible. Same-sex couples, single adults and cohabitants are not eligible for full adoption. In every step of the adoption procedure, biological parents are summoned and heard by the Tribunal, which may provide them with instructions whose compliance is checked by social services appointed by the judge. Concurrently, the hearing of a child over the age of 12 is always compulsory, whereas a child under the age of 12 may only be heard if they are already capable of discernment.

---

(57) International adoption does not only refer to foreign children residing abroad, but also to Italian children residing in Italy who are adopted by persons residing abroad. See Alessandra Bisio, Ivana Roagna, *L'azione internazionale di minori. Normativa interna e giurisprudenza europea* (Giuffrè 2009).

(58) Abandonment means the complete lack of moral assistance from parents or relatives within the fourth degree. On this point, see Massimo Dogliotti, 'Adozione di minori' in *Enciclopedia giuridica* (Treccani 1988).

The full adoption procedure consists of three steps: **151**

1) The declaration of the state of adoptability: this is a declaratory judgment which presupposes the establishment of the state of abandonment. **152**
2) The pre-adoptive fostering: on the basis of a comparative assessment of the couples that have applied to adopt the child (whose state of abandonment has already been attested as described under 1), the Minor's Tribunal allocates the child to the couple that is deemed to be the most capable of guaranteeing the child's best interests. Children over the age of 14 must give their consent to the pre-adoptive fostering. The decision takes the form of a reasoned ordinance, which may be revoked at any time by the Minors' Tribunal and may be appealed to the court of appeal. **153**
3) The judgment of adoption: After one year of pre-adoptive fostering, if positive indications emerge from the social services and counselling services, the Minors' Tribunal declares the child's adoption. Also in this case, it is required that the child who has already reached the age of 14 expresses their consent to the adoption. The adoption judgment has retroactive constitutive effects and cannot be revoked, and it is able to become a *res judicata*; it may be appealed to the competent court of appeal. **154**

After the adoption judgment becomes a *res judicata*, it definitively establishes the adoption of the child by the adopting couple and must be annotated on the margin of the adoptee's birth certificate.

b) Adoption in special cases or simple adoption establishes a more flexible filiation, as children do not lose any relationship with their biological families, although the parental responsibility is given to the adopting parents (Article 44 (1) of Law No 184 of 1983). They retain their family name and add that of the adoptive parents. Simple adoption is allowed in the following situations: a) If the child is an orphan, to (married or unmarried) couples or single persons who are, alternatively, relatives of the child (up to the sixth degree) or have a pre-existing stable and lasting relationship with the child; b) If a child is adopted by the other parent's spouse; c) If the child is handicapped, to (married or unmarried) couples or single persons; d) If pre-adoptive fostering has been impossible, to (married or unmarried) couples or single persons. (59) **155**

(59) It is precisely on the basis of a broad interpretation of the latter hypothesis, moreover, as mentioned above, that jurisprudence has constructed the possibility of adoption (in particular cases) also for same-sex couples who have availed themselves of MAP techniques: on this point, see Cassazione civile n 12962/2016, according to which, the impossibility of pre-adoptive fostering is not to be understood only in a material sense, but also in a legal sense. More generally, on the prerequisites for adoption in particular cases, see Liliana

156 After the Constitutional Court's judgment No 79/2022, (60) simple adoption has become a form of filiation largely coincident with that established via full adoption. In particular, children adopted via simple adoption have been granted a legal relationship with the adopting parents' relatives. Some important differences, however, persist: eg, the option to terminate the adoption (pursuant to Article 52 of Law 184 of 1983); the preservation of ties with the family of origin (Article 300, para 1, CC); the absence of legal usufruct in the adoptive parents (Article 48 of Law 184 of 1983).

157 The simple adoption procedure falls under the jurisdiction of the Minors' Tribunal and is much quicker than that for a full adoption, as the first two steps are missing, while the court, after hearing the child, the child's parents and the adopting parent(s), directly pronounces the adoption judgment. The consent of a child over the age of 14 as well as that of their biological parents and their spouse (if any) are required. If the biological parents do not consent to the simple adoption and their refusal is not held to be in the best interests of the child, the adoption judgment can nevertheless be issued, unless the refusal is voiced by a parent currently exercising parental responsibility, who can prohibit the adoption without being questioned. An adoption judgment has retroactive constitutive and *erga omnes* effects and becomes a *res judicata*: before that time, it can be appealed to the competent court of appeal in the ordinary manner. However, as noted above, the adoptee or the public prosecutor may request the same Minors' Tribunal to terminate a simple adoption. (61)

158 To conclude, adoption is a judicial procedure where the agreement of the adopting parents and adopted children play a role, whereas the consent of the biological parents is irrelevant in the case of full adoption and may be overcome under certain conditions in the case of simple adoption. General rules on declarations of intent and/or legal acts hardly apply. For instance,

---

Rossi Carleo, 'L'adozione' in Pietro Rescigno (ed), *Trattato di diritto privato* (UTET 1985) 462.

(60) In particular, Judgment No 79 of 2022 stated the following: 'Article 55 of Law No 184 of 1983, insofar as it excludes, by means of reference to Art 300 (2) CC, the establishment of civil relationships between the child adopted in special cases and the relatives of the adopting party, infringes Articles 3, 31(2) and 117(1) of the Constitution, the latter in relation to Article 8 of the European Convention on Human Rights'.

(61) This is possible only in special cases: a) under Art 51, legge n° 184 del 4 maggio 1983, the adoptive parent may apply for revocation when the adoptee has committed or attempted to commit certain serious crimes that are exhaustively determined; under Art 52, legge n° 184 del 4 maggio 1983, the adoptee may apply for revocation when the adopter has committed towards the adoptee the same behaviour described in (a); c) under Art 53, legge n° 184 del 4 maggio 1983, the public prosecutor may apply for revocation when the adoptee has seriously violated the duties incumbent upon them.

the prospective parents' consent to full adoption may not be revoked, while simple adoptive parents can terminate the adoption.

The adoption of adults is regulated in the Civil Code in Articles 291 ff. Its main scope is patrimonial, as the adopted adult acquires the same inheritance rights as the adoptive parents' children. However, the adult adoptee maintains parental relations with their original family and does not establish any relationship with the adoptive parents' relatives (Article 300 (2) CC). **159**

According to Article 38 of L No 218 of 1995, the law applicable to adoption is to be found in the common national law of the adopting parents; secondly, in the law of the State of common residence of them. Nonetheless, the law of Italy always applies when its application is necessary to attribute child status to the adopted child. **160**

E. *Parental Responsibility*

As mentioned above, the term 'parental responsibility' was introduced by L no 219 of 2012 and replaced that of parental authority. **161**

The establishment of parental responsibility is either an automatic effect of the establishment of filiation or a court's decision; therefore, the will of the parties plays no role. Conversely, the parents' agreement is required for its exercise. **162**

In cases of conflict on matters of particular importance, each parent may ask the Ordinary Tribunal to allow one of the parents to take the decision, in derogation of the agreement rule pursuant to Article 316 CC. The Tribunal orders the summoning and hearing of both parents and the child (if under the age of 12, only if they are capable of discernment) and issues a motivated decree. **163**

In the case of separated or divorced couples, see below paras 176ff. **164**

Parental responsibility arises as soon as filiation is established, regardless of whether it is biological or adoptive. Adopting parents hold parental responsibility even in the case of a simple adoption. **165**

Furthermore, parental responsibility may be awarded to foster couples or individuals or institutions, whenever the child's parents are not in a position to care for the child for temporary reasons (Articles 4ff L No 184 of 1983). In these cases, a decision by the Minors' Tribunal is needed. **166**

Powers and duties related to parental responsibility include educational duties (istruire and educare), maintenance and moral assistance as well as the power to take all decisions concerning the care and protection of the child's person and the establishment and management of the child's patrimonial legal relationships. Furthermore, parental responsibility includes the power **167**

to represent the child pursuant to Article 320 CC ([62]) The holders of parental responsibility are separately allowed to perform acts of ordinary administration on behalf of the children, whereas the consent of both is needed in the case of acts of extraordinary administration. Most of these (listed in Article 320 (3) CC) require the authorisation of the guardianship judge that is subject to the test of 'obvious necessity or utility'.

168 The removal or the limitation of parental responsibility is allowed only following a decision of the Minors' Tribunal (Articles 330 and 333 CC) according to Article 38 of the Implementing Provisions to the Civil Code.

169 These actions are brought before the Minors' Tribunal by the other parent, by relatives or by the public prosecutor (Article 336 CC). The court, after summoning and hearing the parents and the child (if under the age of 12, only if they have the capacity of discernment), issues a motivated decree. This is a *rebus sic stantibus* decree and cannot become a *res judicata*, as it can be modified or revoked by the issuing court at any time depending on the interests of the child. In any case, objections to the motivated decree can be submitted to the competent Court of Appeal within the following 20 days.

170 In the case of separation or divorce, both parents usually keep parental responsibility as a consequence of the joint custody of the child as the default model rule (Article 337-ter CC). This means that the day-to-day decisions may be taken by the parent with whom the child lives without the consent of the other; conversely, the most important decisions must be taken jointly.

171 However, the Tribunal is allowed to award the custody of the child only to one parent, who exercises the parental responsibility alone. The other parent is allowed to express their consent only in extra-ordinem situations in the child's best interests and must supervise education, upbringing and living conditions (Article 337 (3) CC).

172 As emphasised above, if one parent's parental responsibility is removed, the other is the only one who holds and exercises it. However, the former remains bound by the duties corresponding to the fundamental rights of children under Article 315-bis CC, which also have a constitutional basis (as said before, educational duties, maintenance, moral assistance). ([63])

173 If nullity of the marriage, separation or divorce are at stake, dispositions on the custody of children are provided by the Tribunal; in any other case, the competent authority is the Minors' Tribunal.

([62]) Giovanni De Cristofaro, 'Dalla potestà alla responsabilità genitoriale: profili problematici di un'innovazione discutibile' [2014] Nuove Leggi Civ Comm 796.

([63]) Michele Sesta, 'La filiazione' in Mario Bessone (ed), *Trattato di diritto privato* (Giappichelli 2011); De Cristofaro, 'Dalla potestà alla responsabilità genitoriale' (n 63) 794. In case-law, Cassazione civile n 15063/2000; Cassazione civile n 22678/2010.

Alternatively, dispositions on the custody of children may be included in the assisted negotiation agreement (see above paras 99ff) under the authorisation of the public prosecutor. **174**

A further de-judicialisation step has been taken by Article 21 of Lgs D No 149 of 2022 in matters of representation of children. (64) **175**

The cited provision states: **176**

> Authorisations for the stipulation of public deeds and authenticated private deeds in which a minor, an interdicted person, an incapacitated person or a person benefitting from the measure of supportive administration intervenes [on vulnerable adults, see below para 309], or concerning inherited assets, may be issued, upon written request of the parties, personally or through a legal representative, by the notary public rogatory.

These authorisations – required for the conclusion of most acts in which a minor or a vulnerable adult is involved, or for acts which concern inherited assets – were previously reserved for the guardianship judge. However, two general limitations apply: the deed must be a public deed or a notarised private deed and the deed must necessarily be performed at the same public notary. **177**

Moreover, to protect the public interest, the notary must notify the issuance of the authorisation to the registry of the court that would have been competent to issue the corresponding judicial authorisation and to the public prosecutor's office at the same court: this measure, in fact, may be challenged before the competent authority within the following 20 days by the interested parties as well as by the public prosecutor. In addition, for the purposes of issuing the authorisation, the notary is granted purely investigative powers (gathering of information, hearing of legatees, technical advice), which appear to be modelled on the summary evidentiary investigations carried out by the guardianship judge who is requested to issue the authorisation. **178**

Nonetheless, according to the legal scholarship, (65) the competence attributed to notaries is not of a jurisdictional nature: in other words, notaries are **179**

---

(64) On Article 21 of Legislative Decree 149/2022, a comprehensive study by the Notaries national association (Consiglio Nazionale del Notariato): Ernesto Fabiani, Luisa Piccoli, 'L'autorizzazione notarile nella riforma della volontaria giurisdizione' at <https://notariato.it/wp content/uploads/StudioPCef_lp.pdf> accessed 15 January 2025; Giovanni Santarcangelo, 'L'autorizzazione notarile nella nuova normativa della volontaria giurisdizione' [2022] Notariato 592.

(65) Angelo Jannuzzi and Paolo Lorefice, *Manuale della volontaria giurisdizione* (Giuffrè 2004); Francesco Mazzacane, *La volontaria giurisdizione nell'attività notarile* (Stamperia nazionale 1986): according to this perspective, voluntary jurisdiction, even when exercised by judges, would be, subjectively, a jurisdictional but, objectively. an administrative

not attributed the function of delegated judges, nor can they be considered honorary judges in this field.

180 More specifically, with reference to vulnerable adults (more generally, on this point, see below paras 301ff), the notary's authorisation will replace, with reference to the interdicted person, the authorisation of the guardianship judge (or, when necessary, of the court) for the conclusion of all acts of asset disposition; for the incapacitated person, for the conclusion of acts of extraordinary administration; for the beneficiary of the supported administration, finally, for all acts for which the decree of appointment of the administrator requires authorisation.

181 As far as minors are concerned, notaries are required to assess the obvious necessity or usefulness of all acts pursuant to Article 320 (3) CC and, as this assessment is quite complex, they may avail themselves of advisors. (66)

182 Finally, with reference to inherited assets, the notary's new role seems to have a very significant impact, as it will prevent the judge from intervening in all those situations affecting the interests of third parties (creditors and legatees), which previously required the authorisation of the Tribunal of Succession (see below paras 214ff).

183 Article 36 of L No 218 of 1995 states that the law applicable to parental responsibility is the national law of the child. Nevertheless, the concrete relevance of this rule has been much reduced by the European private international law legislation adopted in this matter: reference is made to European Regulation 1111/2019, which regulates, among other things, jurisdiction, applicable law and the recognition and enforcement of decisions in matters of parental responsibility.

F. *Matrimonial Property Regimes*

184 Private autonomy governs matrimonial property regimes, which, however, cannot derogate from the rights and obligations arising from marriage

---

activity; in case-law, Cassazione civile n 11860/1997, which notes that from the objectively administrative nature of voluntary jurisdiction derives the unsuitability of authorisations for *res judicata*.

(66) On this issue, Giovanni De Cristofaro, 'Le modificazioni apportate al codice civile dal decreto legislativo attuativo della "Legge Cartabia" (D.lgs. 10 ottobre 2022, n. 149). Profili problematici delle novità introdotte nella disciplina delle relazioni familiari' [2022] Nuove Leggi Civ Comm 1407, 1433, points out the critical nature of the decision to entrust an assessment of such complexity to notaries, pointing out how controversial the fate of the act performed in the absence of the prerequisite of necessity or obvious utility appears to be; moreover, according to the author, it is not clear whether the notary must proceed to hear the minor.

Moreover, the legislator's textual omission of emancipated minors from Article 21 of the reform text seems strange.

(pursuant to Article 160 CC). Unlike the past, judicial authorities play no role in establishing matrimonial property regimes.

185 The patrimonial regimes provided for by the Civil Code are the following: community of property; separation of property; contractual community of property and atypical contractual community of property regime.

186 In the absence of a different choice by the spouses, the community of property regime is established by law at the time of marriage. Spouses may opt for separation of property only, with a specific declaration to the officiant of the marriage or, after the marriage, through an agreement drawn up by a public notary in the presence of two witnesses, which will be recorded in the marriage certificate.

1. *Community of property regime and the role of judicial authorities*

187 Under the community of property regime, all acquisitions made individually by the spouses during marriage fall under the purview of the community regime (with some exceptions, articulated in Articles 177 and 179 CC).

188 This regime is completely regulated by the Civil Code in terms of the non-divisibility of shares, representation, administration (Articles 180ff CC), and the liability regime (Articles 186ff CC).

189 Judicial intervention is exceptional and primarily pertains to the administration of property: acts of extraordinary administration, requiring joint execution by the spouses, may prompt a judicial authorisation if one spouse withholds consent (Article 181 CC). Similarly, in exceptional scenarios, the judge may grant administration authority to only one spouse (in the case of hindrance or incapacity: Articles 182 and 183 CC). (67)

190 Procedures for dissolution are also regulated (Article 191 CC). In particular, the community property is dissolved ex lege in the event of divorce or separation: in the latter case, the community property terminates when the President of the Court authorises the spouses to live separately. The matrimonial community transforms into an ordinary community, and the shares can be separated, typically in equal portions, either by mutual consent or through judicial division.

2. *Optional patrimonial regimes*

191 The choice for other regimes can be made before, during, or after the marriage, without involving a judicial authority. For changes made after

(67) Article 163 CC also includes specific provisions. It states that if one of the spouses dies after giving consent by public deed to the modification of the agreements, those alterations take effect if the other parties subsequently express their consent, with the condition that court approval is obtained.

marriage, the Civil Code used to require a court authorisation, but this form of judicial control was abolished by Law No 142 of 1981.

192 a) Spouses can choose the separation of property regime. They agree that each retains ownership of property acquired individually during marriage (Article 215 CC). If, however, property is acquired jointly, the rules of ordinary community property apply.

193 b) Spouses have the option to choose a more tailored regime to suit their needs. They can partially amend the statutory framework of the community of property regime, through a marriage agreement in accordance with Article 162 CC ('contractual community'). However, private autonomy is not without constraints, as spouses cannot deviate from the rules concerning administration and share equality, nor can they introduce agreements in conflict with the provisions of Article 161 CC (as stipulated in Article 210 CC).

194 c) Alternatively, spouses may opt for an atypical contractual form of the community property regime, and in this case, they must specify the content in a precise and comprehensive manner (a reference to foreign law would not suffice, unless it is applicable under private international law).

3. *Fund for the family's needs*

195 For specific assets, spouses (or a third party with the spouses' consent) may opt to establish a fund for the family's needs (Articles 167ff CC).
The concept of 'family needs', for which the property fund is intended, was elaborated (68) to encompass not only those needs shared by all family members, such as housing, but also those needs specific to individual members of the family, for instance, education and child support. These needs must have arisen after the marriage and should be socially recognised. (69)

196 The rationale behind this institution is to ensure financial support for the family and create a mutually beneficial arrangement for all family members. (70)

---

(68) Ferruccio Auletta, 'Il fondo patrimoniale' in Giovanni Bonilini and Giovanni Cattaneo (eds), *Il diritto di famiglia* (UTET 1997) 345.

(69) Further insights into this topic can also be found in the works of Franco Carresi, 'Del fondo patrimoniale' in Luigi Carraro and others (eds), *Commentario alla riforma del diritto di famiglia* (CEDAM 1992) 61; Alfio Finocchiaro and Mario Finocchiaro, *Diritto di famiglia* (Giuffrè 1984) 801; Fernando Santosuosso, *Delle persone e della famiglia. Il regime patrimoniale della famiglia* (Giappichelli 1983) 134. The Court of Cassation excludes only those needs motivated by extravagance or purely speculative intentions. This stance was evident in Cassazione civile n 11683/2001; n 134/1984.

(70) Cassazione civile n 17811/2014.

Due to its specific objective, there are some restrictions for the use and dissolution of the fund. **197**

Reasons for the dissolution of the fund are specific (Article 171 CC). In particular, the dissolution depends on divorce or annulment of the marriage. **198**

Moreover, a judge's intervention is required for certain acts, particularly those which aim to safeguard minors. **199**

a) In cases involving minor children, pursuant to Article 169 CC, property sales require the consent of the spouses and the judge's authorisation (or, according to Article 21 Lgs D No 149 of 2021, a notary's authorisation). Exceptions to this regime are permitted through specific clauses of the agreement. (71) **200**

b) Conversely, there are no exceptions for the regime governed by Article 171 CC concerning the dissolution of the fund. According to this provision, 'If there are minor children, the fund remains in effect until the last child reaches adulthood'. As a result, the minors have the right to claim the invalidity of the dissolution (Cass No 17811 of 2014). (72) Additionally, as long as the child is a minor, the court may (1) establish rules for the administration of the fund, or (2) allocate a portion of the fund's assets to the children, in order to enhance the safeguarding of their interests. (73) **201**

III. Succession law

Italian succession law is dominated by two sources (Article 457 CC): the testator's will and the law itself. (74) **202**

Succession agreements are prohibited without any exception (Article 458 CC). (75) **203**

Even the testator's will is limited by law granting mandatory succession rights

(71) Cassazione civile n 22069/2019; n 21184/2021. Contra, Cassazione civile n 13622/2010.

(72) The annulment action is reserved for minors and not for third parties, even if they are creditors involved in revocation (Cassazione civile n 3051/2019).

(73) Franca Galletta, *I regolamenti patrimoniali tra coniugi* (Jovene 1990) 146.

(74) *Ex multis*, on the particular rigidity of the discipline of succession in the Italian legal system, Giovanni Gabrielli, 'I legittimari e gli strumenti a tutela dei loro diritti' in *Tradizione e modernità nel diritto successorio dagli istituti classici al patto di famiglia, I quaderni della Rivista di diritto civile* (Cedam 2017).

(75) Among the authors who highlight the peculiarity of the Italian position in the European context, see Andrea Fusaro, 'Uno sguardo comparatistico sui patti successori e sulla distribuzione negoziata della ricchezza d'impresa' [2013] Riv dir priv 391; Maria Vita De Giorgi, *I patti sulle successioni future* (Jovene 1976); Vincenzo Barba, *I patti successori e il divieto di disposizione della delazione. Tra storia e funzioni* (Esi 2015); Salvatore Aceto di Capriglia, *I "divieti" di patti successori nel sistema di civil law* (Esi 2019).

to the spouse, the children and the parents of the de cuius. (76) Apart from the voluntary jurisdiction competences, the role of judicial authorities is, therefore, quite limited in this matter, being restricted to the following cases:

a) declaration of nullity and annulment of wills;
b) remedies related to the violation of reserved shares;
c) declaration of the unworthiness to inherit;
d) action of petition of the estate;
e) division of the estate in the absence of an agreement between the parties involved;
f) other specific competences: eg, to receive declarations of acceptance of an inheritance with the benefit of an inventory or declarations of waiver, the appointment of the administrator of an *eredità giacente* (vacant inheritance, ie an estate not yet accepted by the heirs).

204 Apart from the competences under a), the others are related to extraordinary situations, which do not occur frequently in practice.

205 Conversely, the notary plays an important role as a public official in many aspects. Indeed, the notary is always involved in testamentary successions, where their role is necessary, as will be seen, for the execution of testamentary dispositions. Moreover, again in accordance with the Civil Code, the notary is competent in matters of acceptance with the benefit of an inventory, with regard to waivers of inheritance and the division of the estate.

206 This role has been further empowered by Lgs D No 149 of 2022. Before the introduction of this Law, the Tribunal of Succession, that is the district Tribunal of the place of the deceased's last domicile, was the only competent court to grant the authorisations necessary for the transfer of inherited property under Articles 747 and 748 of the Code of Civil Procedure. (77)

207 According to the aforementioned Article 21 of Lgs D No 149 of 2022, notaries are also currently competent to issue authorisations for all public acts concerning inherited property.

---

(76) Consider the possibility for them, under certain conditions, not only to reduce testamentary dispositions – and donations – detrimental to their own reserved share, but also to recover by an action *in rem* (so-called *azione di restituzione*) property which in the meantime has been transferred to a third party.

(77) A very controversial question is when the inherited property is, at the same time, property owned by minors and therefore subject to the regime of authorisations under Article 320 CC: in such cases, in fact, one must ask whether the authorisation under Article 747 CPC of the Probate Court replaces the authorisation of the guardianship judge under Article 320 CC, or whether they should both be necessary for the performance of acts of extraordinary administration, or whether, ultimately, only the authorisation of the guardianship judge is necessary: in legal writings, see Lodovico Genghini, *La volontaria giurisdizione e il regime patrimoniale della famiglia* (Cedam 2020).

Therefore, a 'double track' is at the disposal of the parties: a judicial or a notarial authorisation. (78) **208**

To sum up, authorisations (notarial or judicial) are needed to sell inherited property in the following situations: **209**

a) acceptance with the benefit of an inventory (see below paras 221ff);
b) call to inherit (*chiamato all'eredità*) and *hereditas iacens* (*eredità giacente*) (see below paras 263ff);
c) executor of the will (see below para 265);
d) institution of an heir under a condition (Article 641 CC);
e) institution of an unborn heir (Article 643 CC).
f) subsequent succession (*sostituzione fedecommissaria*).

A. *Devolution of the estate*

1. *Acceptance of the inheritance*

An inheritance can be accepted expressly or tacitly. **210**

An express acceptance can be provided in two ways: **211**

a) simple acceptance, which can be made in writing without any further formalities;
b) acceptance with the benefit of an inventory requires the separation of the heir's assets from the estate. This can be done by a notarial act or by a declaration received by the clerk of the Tribunal of Succession (Article 484 CC).

Whichever way is chosen, an acceptance of the inheritance has retroactive *erga omnes* effects, so that the person who has accepted the inheritance is considered an heir from the death of the deceased. Under Article 482 CC, the act of acceptance can be challenged in front of the Tribunal of Succession on the ground of moral violence or fraud, but not on the ground of error. **212**

Furthermore, the act of acceptance, although it is unilateral, is unanimously considered to be irrevocable, it cannot be made for a part of the inheritance, nor subject to a condition or term. **213**

If the acceptance with benefit of an inventory is chosen by the heirs, the creditors of the inheritance take priority over the heirs' creditors and can be paid by selling the assets of the de cuius. **214**

---

(78) This appears to greatly reduce the scope of the problem of authorisations for the disposition of the assets of minors: in fact, in such cases, the most logical solution is that the notary drawing up the deed – having the competence to issue both authorisations – can fulfill this function with a single authorisation: in this sense, see Ernesto Fabiani, Luisa Piccoli, Ernesto Fabiani, Luisa Piccoli, 'L'autorizzazione notarile nella riforma della volontaria giurisdizione' at <https://notariato.it/wp content/uploads/StudioPCef_lp.pdf> accessed 15 January 2025.

215 As a consequence, in the case of b) above, heirs may not sell the inherited goods, unless an authorisation is given by the Tribunal of Succession or by a notary (Article 747 CPC).

216 The inventory may alternatively be drawn up by the notary or a clerk of the Tribunal of Succession.

217 Once the inventory is completed, the payment of the creditors of the estate and legatees will take place.

218 Payment may take place in three ways:

219 a) Individual payment, which does not require a notarial activity and leads to the payment of creditors without any formality in the order in which they claim for performance; therefore, this is the easiest way of liquidation.

220 b) Collective payment, which is managed by the notary and is inspired by the principle of *par condicio creditorum*. A particular phase of the procedure (that is, the formation of the distribution plan of inherited property) is subject to judicial supervision: creditors and legatees may file a claim to the Tribunal of Succession against the distribution plan; furthermore, at the request of heirs and legatees, the Tribunal of Succession may also set a term within which to form the distribution plan.

221 c) Release of inherited property to creditors, which does not require a notarial activity and is carried out by a liquidator appointed by the Tribunal of Succession, who will liquidate the estate in accordance with the rules of collective liquidation.

2. *Waiver of inheritance*

222 The waiver of inheritance requires a declaration of intent made in a notarial deed or a declaration received by the clerk of the Tribunal of Succession. The waiver may only be challenged by the same renouncers (the people entitled to inherit by law or by a will), in front of the Tribunal of Succession, on the ground of fraud or moral violence, whereas error has no relevance (Article 526 CC).

223 The waiver has retroactive effects (Article 521 CC) and the renouncer is considered as never having been called to the inheritance.

224 After the waiver, certain mechanisms for the subsequent devolution of the estate come into play: [79] all these steps take place ex lege, without the need for court intervention.

---

[79] In particular, regarding legitimate successions they are: a) representation (*rappresentazione*); b) the mechanism of Article 524 CC; c) called to inherit in the second degree; in testamentary succession, instead: a) voluntary substitution; b) representation; c) accrescimento; d) legitimate succession.

According to Article 524 CC, 'the renouncer's creditors, if the waiver of the succession causes them damage, may request the court to authorise them to accept the succession in the name and place of the renouncer for the sole purpose of satisfying themselves out of the estate's property to the extent of their claims'. **225**

According to legal writings, this is not a true authorisation that falls within the scope of voluntary jurisdiction, but a judgment. ([80]) **226**

Finally, the waiver is revocable until another person called to the succession has accepted it (Article 525 CC). **227**

3. *Unworthiness to inherit and disinheritance*

Unworthiness to inherit requires a judgment of the Tribunal of Succession as a cause of exclusion from the de cuius's succession. ([81]) Of course, this is allowed under strictly determined circumstances listed in Article 463 CC ([82]) and grouped into: **228**

a) Attacks on the physical or moral person of the testator (eg. murder or attempted murder of the de cuius or of a close relative of the de cuius);
b) Infringement of the testator's freedom (eg, formation of a false will or alteration of an authentic will);
c) Loss of parental responsibility.

The judgment of unworthiness has retroactive constitutive effects similar to the waiver of inheritance (see above paras 230ff) and it can be appealed in front of the territorially competent Court of Appeal. **229**

On the other hand, disinheritance, which is a provision contained in a will removing a future legitimate heir from the list of legal heirs, has a very limited role, as forced heirs may not be excluded. ([83]) **230**

4. *Legal succession and mandatory succession*

In the absence of a will, the succession shall be governed by law in Articles 556ff CC, which dictate the shares in which the estate shall be divided. **231**

Forced heirs are the spouse, descendants and, in the absence of the latter, ascendants, who may challenge the will violating their mandatory succession **232**

([80]) Guido Capozzi, *Successioni e donazioni* (Giuffrè 2015) 329.

([81]) In this sense, Pietro Schlesinger, 'Successioni (diritto civile), Parte generale', in *Novissimo Digesto Italiano XVIII* (Utet 1957) 755; Coviello, *Delle successioni, parte generale* (Torella 1935) 78. In case-law, for all, Cassazione civile n 3096/2005.

([82]) They are not susceptible to analogous interpretation: in this sense, Guido Capozzi (n 81) 186.

([83]) Cassazione civile n 8352/2012. See Bin, *La diseredazione. Contributo allo studio del contenuto del testamento* (Giappichelli 1966).

rights before the Tribunal of Succession. To calculate their reserved share, all gifts made during the lifetime of the de cuius must be taken into account. The will infringing the reserved shares is neither void nor ineffective, being rather subject to the heirs' action of reduction.

233 More specifically, they have three actions at their disposal:

a) an action for reduction (*azione di riduzione*, *in personam*), aimed at rendering testamentary dispositions (and donations) detrimental to the reserved share ineffective;

b) an action for restitution against the beneficiaries of the dispositions adversely affecting the reserved share (*azione di restituzione*), *in personam*, seeking the restitution of the property covered by the dispositions adversely affecting the reserved share;

c) restitution action against third-party beneficiaries, in rem, aimed at recovering the res even when it has already left the estate of the beneficiaries of the testamentary dispositions (or donations) which are detrimental to the legitimate share. Because of its critical impact on the circulation of wealth and legal transactions, certain special conditions for its exercise are required. (84)

234 A trend to prevent judicial actions by seeking settlement agreements between the parties (known as *accordi di reintegrazione della quota di legittima*) can increasingly be noticed in practice. These are held to be valid by legal scholars (85) and case-law. (86)

5. *Testamentary succession*

235 A will in the Italian legal system is a formal act that does not require judicial intervention for its execution and may be drafted in three different ways:

236 a) a holographic will, which requires a handwritten document signed by the testator and does not require a notarial deed;

b) a public will, which is drafted in full by a notary who puts the testator's will in writing and requires the presence of two witnesses; and

237 c) a secret will, which is drafted by the testator even in typing and, then delivered to a notary in a closed envelope in the presence of two

---

(84) In particular, Article 563 CC requires as prerequisites the *res judicata* of the reduction judgment and the unsuccessful execution on the beneficiary's estate of the dispositions detrimental to the reserved share; the third party, however, has the option of releasing itself from the obligation to return the asset in kind by paying a pecuniary equivalent.

(85) See Francesca Salvatore, 'Accordi di reintegrazione della quota di legittima: accertamento e transazione' [1996] Rivista del Notariato 211; Alberto Azara, *Accordi sulla legittima* (Giuffrè 2018).

(86) Cassazione civile n 2554/1979; Cassazione civile n 6235/1981.

witnesses; immediately afterwards, the notary drafts the record of receipt of the secret will in the presence of two witnesses.

A will, regardless of its form, is immediately effective upon the death of the testator (it cannot be in any way effective before death, and thus, it is qualified as *atto di ultima volontà* – a *mortis causa* act). Nonetheless, in the case of holographic and secret wills, the designated heirs have no action to demand the execution of the will unless they arrange the publication of the will, which consists of a public act performed by the notary in the necessary presence of two witnesses. **238**

Grounds of invalidity of a will may be formal or substantial ([87]) and, as in contractual matters, a distinction is drawn between nullity and avoidance. ([88]) **239**

Furthermore, a will is revocable until the death of the testator. **240**

6. *Action of petition of the estate*

The action of petition of the estate (*petizione dell'eredità*) is an *in rem* action which may be brought by any heir in order to reclaim inheritance property possessed by third parties not entitled to do so. **241**

The competent authority is once again the Tribunal of Succession. In terms of proof, the heirs will only have to prove their status as heir and the fact that the property belonged to the estate of the deceased. **242**

The judgment unequivocally declares the status of heir and orders the possessor to return the unlawfully possessed property to the heir. **243**

Moreover, the judgment is only partially enforceable *erga omnes*: under Article 534 CC, onerous purchases made in good faith by third parties from an apparent heir are not affected by the petition of the estate. **244**

7. *Legacy*

The legatee succeeds only to specific assets of the de cuius, but not to all (or a share) of their estate. **245**

([87]) Among these, the vices of consent (moral violence, fraud and error) have an important place: however, in testamentary matters, vices of consent must be ascertained with regard to the testator alone, the protection of third parties being superfluous, as clarified by Capozzi, *Successioni e donazioni* (n 81) 914.

([88]) Nevertheless, this difference in testamentary matters is less clear-cut: on the one hand, a will may be annulled at the request of any person having an interest (absolute legitimation); on the other hand, testamentary nullity may be exceptionally avoided by the institution of confirmation. In particular, Francesco Santoro Passarelli, *Dottrine generali del diritto civile* (first published 1954, Jovene 2012), qualifies confirmation as a true emendation of a null and void will, in derogation of Article 1423 CC; in case-law, Cassazione n 2800/1984.

246 The legacy is necessarily a positive asset and, as a result, the legatee can only be liable for the debts of the estate to the extent of the value of the assets they have received.

247 In the Italian legal system, a legacy may be *per vindicationem*, whereby the right is automatically transferred to the legatee with retroactive effects; alternatively, it may be *per damnationem*, so that the burdened parties (who, normally, are the heirs) are obliged to make the legatee acquire the property.

B. *Certificate of succession*

248 Despite some proposals by the National Council of Notaries, (89) in the Italian legal system, a national certificate of inheritance has never been adopted, with the exception of specific geographical areas. (90)

249 In this regard, the Italian legislature has identified the notary as the competent authority to issue the European Certificate of Succession. (91) In particular, the competence of the Italian notary, according to Article 4 of Regulation 650/2012, exists when the de cuius had their habitual residence in Italy, or in the other cases regulated in Articles 7, 10 and 11 of the same Regulation.

250 The notary, in accordance with the provisions of Article 66 of the Regulation 650/2012 and Article 32 of L No 161 of 2014, in order to verify the existence of the prerequisites for the issuance of the certificate, is granted investigative powers that bring them close to the notion of 'court': (92) the notary, in fact,

---

(89) For a brief summary of the arguments used by Italian notaries in support of a national certificate of inheritance, see the following link: <https://notariato.it/it/notariato/certificato-di-successione/> accessed 15 January 2025.

(90) Some localities have a certificate, in particular, those that were formerly part of the Austro-Hungarian empire (eg, South Tyrol). See Articles 13ff Regio Decreto 28 marzo 1929, n. 499.

(91) Article 32, Legge No 161 of 2014.

(92) Moreover, Regulation 650/2012 of 4 July 2012 supports a broad reading of the notion of 'court' (Recital 20): 'For the purposes of this Regulation, the term "court" should therefore be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given succession by delegation of power by a court. All courts as defined in this Regulation should be bound by the rules of jurisdiction set out in this Regulation'; according to Article 3(2): 'For the purposes of this Regulation, the term "court" means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be

may, even ex officio, carry out the necessary investigations to verify the information and statements, as well as the documents and other means of evidence provided by the applicant (Article 66(1)); in addition, the notary may request that the applicant's statements be made under oath or in the form of affidavits (Article 66 (3)). Nevertheless, the Court of Justice has disregarded this interpretation, denying the possibility of qualifying the notary issuing the European Certificate of Succession as a court (C–658/17, May 23, 2019, WB) ([93]).

251 If the notary refuses the application for the Certificate, the applicant may appeal to the territorially competent court (Article 72, Regulation 650/2012), which may also order rectification, amendment or revocation when the content of the certificate does not correspond to the truth.

252 The elements ascertained and the subject of the certification are presumed to be accurate (Article 69(2), Regulation 650/2012): it is therefore presumed that the person named as heir, legatee, executor or administrator of the estate possesses the qualities indicated in the certificate and/or the powers set forth therein, without any other condition and/or restriction in addition to those specifically mentioned.

C. *Administration of estate*

1. *General remarks. The one 'called to inherit' and the 'hereditas iacens'*

253 The administration of the estate is primarily a duty of the heirs who have accepted the inheritance and who may freely dispose of the assets of the estate. In the case of acceptance with the benefit of an inventory, the limits of the heirs' faculty of disposal mentioned above apply (see above paras 221ff).

254 Prior to accepting (or refusing) the inheritance, the person entrusted with the administration of the estate is the party entitled to make the acceptance ('called to inherit', 'chiamato all'eredità'). The person who is called to inherit ex lege acquires possession of the property of the deceased, so that they may:

---

heard and provided that their decisions under the law of the Member State in which they operate: a) may be made the subject of an appeal to or review by a judicial authority; and b) have a similar force and effect as a decision of a judicial authority on the same matter': in this regard, see Carlo Rusconi, 'Il certificato successorio nell'ordinamento italiano, da diritto secondo a diritto primo?' [2020] Europa e Diritto Privato 393.

([93]) Here the CJEU clearly stated that: 'The first subparagraph of Article 3(2) of Regulation No 650/201 Regulation 650/2012 of 4 July 2012 2 must be interpreted as meaning that a notary who draws up a deed of certificate of succession at the unanimous request of all the parties to the procedure conducted by the notary, such as the deed at issue in the main proceedings, does not constitute a "court" within the meaning of that provision (...)'.

a) exercise possessory actions (without a need for the material appropriation of the goods);
b) perform acts of conservation, supervision and temporary administration of the goods;
c) may be authorised by the Tribunal of Succession (or notary) to sell inheritance goods that cannot be preserved or whose preservation involves considerable expenses (Articlse 460 CC, 747 CPC).

255 If none of the called accepts the inheritance and is not even in the material possession of the estate (situation known as 'hereditas iacens'), at the request of one of the interested parties or even of its own motion, the Tribunal of Succession has to appoint an administrator of the estate, who will make an inventory of the estate and manage it in accordance with the same rules as for an acceptance with the benefit of an inventory (Article 747 CPC).

256 However, the de cuius may assign a particular person – the 'executor of the will' – the role of managing their succession. The executor of the will (who may be a third party or even an heir) will be responsible for carrying out all acts of preservation and administration of the estate, thus applying the same rules as those already provided for in respect of the benefit of an inventory (Article 747 of the Code of Civil Procedure).

2. *Other cases where an authorisation is required*

257 Authorisation for the transfer of inherited property (Article 747 CPC) is also required in the following cases:

a) Subsequent succession (*substitutio fideicommissaria*): the will designates as heir a vulnerable child, descendant or spouse with the obligation to preserve the estate. Therefore, at the death of the vulnerable heir, the estate will be transferred to the person or entities that have taken care of them (Article 692 CC): until this time comes, the transfer of the assets is subject to authorisation.
b) The will designates the heir under the condition that something will happen (or something will not happen) (Article 641 CC). As long as the event has not occurred, the transfer of the assets is subject to authorisation.
c) The will designates an unborn heir (Article 643 CC). Until the child is effectively born, again, the transfer of the assets is subject to authorisation.

3. *Division of the estate*

258 In the presence of several parties called to the estate who accept the inheritance, in the absence of a division implemented directly by the testator

(Article 734 CC), a situation of joint ownership (*comunione ereditaria*) is automatically established. (94)

259 The joint ownership can be terminated, first of all, by a contract of division: this contract, when the estate also consists of immovable property, necessarily requires the written form.

260 In the absence of the co-heirs' agreement, each co-heir has the right to apply for the division of the joint ownership at any time by a judicial action brought before the Tribunal of Succession. The division proceedings are mainly regulated by Articles 784ff of the Code of Civil Procedure and are articulated differently depending on whether or not conflicts arise between the parties involved:

a) if the division is contentious, the procedure is more complex and leads to a judgment;
b) if the division is not contentious, part of the procedure may be delegated by the judge to a notary. In this case, the division is established by ordinance.

261 Finally, L No 98 of 2013 added the possibility to jointly apply for the division. In this case, the proceedings for the division of the estate must be fully delegated to a notary or a lawyer based in the same district of the Tribunal of the Succession; as a result, the Tribunal of Succession itself plays only a subsidiary role, restricted to deciding on any objections against the proposed division filed by the parties involved in the proceedings.

IV. Status of natural persons

262 The legal status of natural persons is not established by private autonomy or judicial acts, being rather the legal effects of certain facts, such as birth, death, or the age of majority. They are typically non-disposable.

263 The status of a natural person is established by birth and ceases upon death. A child has a name, chosen by the parents, and a gender, corresponding to the biological sex. Both identify the individual (Article 2 of the Constitution). Private autonomy has a role in changing one's name and surname while the modification of one's gender is subject to a judicial decision.

264 At birth, a person acquires full legal capacity, ie the capacity to have rights and obligations. Upon reaching the age of 18, one acquires legal capacity to

(94) In general, on the division of the estate, Giovanni Bonilini, 'La divisione' in *Digesto delle discipline privatistiche* (Utet 1990) vol 6; Capozzi, *Successioni e donazioni* (n 81) 1287ff. Moreover, unless dispensed by the testator or the donor, the so-called *collazione* must be carried out before the division: under this institution, all donations made during the lifetime of the testator to particular persons (spouse and descendants) are returned to the estate. Because of this institution, the gift is said to be an advance on succession. On *collazione*, see Ugo Carnevali, 'Collazione' in *Digesto delle discipline privatistiche* (Utet 1988).

act, ie the capacity to perform legal acts. Once acquired, only the judge can revoke or reduce legal capacity to act.

A. *Change of name*

265 The Constitutional Court (95) affirmed that one's first name and surname constitute the initial distinctive markers of a person and a central component of personal identity. The right to one's name is inviolable, safeguarded by the Constitution under Articles 2 and 30, as well as by Article 8 ECHR and Article 7 of the Charter of Fundamental Rights of the European Union. (96)

266 The first name and surname, recorded in civil registers, are also fundamental elements for personal identification. Consequently, there is a significant public interest in preserving the stability of these attributes, (97) as well as in ensuring alignment with an individual's gender identity.

267 There are indeed circumstances under which a name can change. Sometimes, the change is voluntary (paras 268ff), sometimes it is not mandatory but possible (paras 271ff), and finally, it could be mandatory (paras 276ff).

1. *Voluntary (but limited) change of name*

268 D No 396 of 2000 governs how an Italian citizen can voluntarily modify their given name and surname. This constitutes an extra-judicial proceeding. Foreign citizens living in Italy, on the other hand, can change their name or surname in accordance with the laws of their home country. Once they have obtained a certificate from their consulate, which confirms that the old and new identities correspond, they can proceed to submit the name change request to the authorities in their place of residence.

269 The application must allege that the name is ridiculous, shameful, or revealing one's origins (Article 89, PD No 396 of 2000).

270 The prefect, ie, the representative of the government, (that of the district where the person lives or, alternatively, that of the civil registrar's office holding the birth certificate) is competent to deal with the application (Article 89, PD No 396 of 2000). If it is considered to be justified by

---

(95) Constitutional Court, Judgment n 120/2001; Constitutional Court, Judgment n 286/2016; Constitutional Court, Judgment n 131/2022.

(96) In addition, the principles outlined in Article 24 of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, which entered into force on 23 March 1976, and Arts 7 and 8 of the New York Convention on the Rights of the Child (CRC) of 20 November 1989, which was ratified by Law 176 on 25 July 1991, provide further legal foundations for the protection of these rights.

(97) Giovanni Di Rosa, 'Attribuzione del prenome e dignità della persona' [2009] Famiglia, Persona e Successioni 101.

objectively relevant circumstances, the prefect can order the application to be published for 30 days (Article 90) and can order, at the same time, the application to be notified to counter-interested parties. In this way, interested parties have the possibility to object to the name change, by submitting an official objection to the prefect (Article 91). If no objections are raised, a decree for the change may be obtained (Article 92). The decree must be noted in the birth and marriage registers (Article 94).

2. *Opportunities for Name Changes*

A person has the option of changing their surname without adhering to the procedure described in (a.1) under two circumstances: when an adult is acknowledged by their biological father; or when their parents undertake a surname change. **271**

In these cases, the possibility to alter one's surname is based on the preservation of a familial connection. Nevertheless, given that the person has reached the age of majority, the surname is a component of their personal identity, and therefore it is up to the individual to decide whether or not to change their surname. **272**

Therefore, if a parent undergoes a surname modification or acknowledges their child after birth, the latter has the option to modify their surname (by either appending, preceding, or substituting it to/for the previous one; Article 262 CC). Such a choice must be communicated to the civil registrar of the municipality of birth within one year from the date on which they became aware of the modifications (Article 33, PD No 396 of 2000). **273**

On the contrary, if the child is a minor and the parent undergoes a surname change, the child's surname is automatically modified. **274**

If a minor child is acknowledged, the judge determines the assumption of the parent's surname, after discussing it with the minor child, who is over the age of 12 or even younger if they possess discernment (Article 262 CC). **275**

3. *Mandatory Name Changes*

Surname change is required in cases of divorce or dissolution of a civil partnership (a.3.1), when an adult is adopted (a.3.2.). After a gender recognition decision, a name change is required(b). **276**

However, alterations to civil status must consider the importance of preserving one's name as an essential aspect of personal identity. (98)

(98) Constitutional Court, Judgment n 13/1994.

a) *Changes in Surname Usage Within Marriage and Civil Unions*

277 Article 143-bis CC allows a wife to add her husband's surname to her own. The addition, however, does not entail any registry variations but is merely a 'surname in use'. (99)
It was initially mandatory, as evidence of the family union; subsequently, with Law No 151 of 1975, it became optional. (100)

278 In the case of separation, Article 156-bis CC stipulates that the judge has the authority to either forbid a wife from using her husband's surname or grant her permission not to use it, depending on whether it is detrimental to either party.

279 In the case of divorce, a wife automatically loses the added surname, and only the judicial authority that grants the divorce can authorise its retention (Article 5 Law No 898 of 1970). This authorisation depends on her interests or those of her children.

280 For same-sex civil unions, partners can adopt a shared surname, selected from their own surnames. Law No 76 of 2016 did not explicitly state whether the 'common surname' should be officially registered, leading to uncertainty about whether it should be treated as an official name change or if it is merely a 'surname in use' without formal registration.

281 Article 3(c)(2) of Legislative Decree No 5 of 2017 considered the common surname a mere 'surname in use'. Constitutional Court decision No 212 of 2018 affirmed that this provision adequately guarantees the identity of the couple.

282 The effect of this agreement expires upon the dissolution of the civil union (Article 10 (1) of Law 76 of 2016), without exception. This solution raises concerns about its constitutionality, as it potentially infringes upon personal identity.

b) *Adult Adoption and Surname Modification*

283 The addition of the adopter's surname is a consequence of the adoption of an adult, as a formal recognition of the newly established familial bond.

---

(99) DPR n 223/1989, art 20(3). Massimo Paradiso, 'I rapporti personali tra coniugi' in Francesco Donato Busnelli (ed), *Il codice civile. Commentario* (Giuffrè 2012) 153; Francesco Finocchiaro, 'Del matrimonio' in Francesco Galgano (ed), *Commentario al Codice civile* (Zanichelli 1993) 270; Gilda Ferrando, 'I rapporti personali tra coniugi: principio di uguaglianza e garanzia dell'unità della famiglia' in Pietro Perlingeri and Michele Sesta (eds), *I rapporti civilistici nell'interpretazione della Corte costituzionale* (ESI 2007) 317; Enrico Al Mureden, 'Cognome e identità personale nella complessità dei rapporti familiari' [2022] Famiglia e diritto 871.

(100) Alessandra Arceri, 'Art 143-bis cc' in Michele Sesta (ed), *Codice della famiglia* (Giuffrè 2015) 475.

The balance between this requirement and the individual's personal identity is evidenced in the position of surnames. Indeed, the adoptee can select the placement of their new surname, as outlined in Article 299 CC (after the Constitutional decision No 135 of 2023). [101] **284**

More specifically, the adoption of an adult is granted through a judgment (Article 313 CC), after the court's meticulous evaluation of several criteria (see above, paras 154ff). This includes the suitability of the adoption for the adoptee, as well as the consent of both the adopting party and the adoptee, as specified in Article 296 CC. Such consent must be voluntary and it must be given with full awareness of the effects, including the determination of the adoptee's surname. [102] **285**

B. *Gender recognition*

The procedure for gender recognition remains entirely judicial (Article 31 (1) of Legislative Decree No 150 of 2011). **286**

The initial regulatory framework dates back to 1982 (Law No 164 of 1982). With the introduction of Lgs D No 150 of 2011, the process underwent a transformation. This proceeding now needs a constitutive judgment rendered by an ordinary court, in a collegial composition. **287**

The competence is determined by the applicant's place of residence, as outlined in Article 2 of Law No 164 of 1982, and Article 31 (of) Lgs D No 150 of 2011.

The court's role is to ascertain the factual changes in sexual characteristics and, based on this verification, to assign a different gender identity (pursuant to Article 31 of Lgs D No 150 of 2011). Notably, the court no longer grants authorisation for a gender change but, rather, recognises a change that has already occurred in reality. **288**

Moreover, surgery is no longer a requirement. In any case, if it is requested, for personal identity reasons related to gender identity issues, an additional and separate judicial authorisation was required until Constitutional Court decision 143 of 2024.

These changes have implications for relationships with other individuals: ie, they lead to the automatic dissolution of marriage or a civil partnership, in accordance with Article 4 of Law No 164 of 1982 and Article 31 of Lgs D No **289**

---

[101] Previously, according to Article 299 CC, the adoptee took the surname of the adopting party, placing it before their own.

[102] Gabriele Salvi, 'Note in tema di poteri di verifica del tribunale nel procedimento di adozione dei maggiori di età: la validità del consenso e l'utilizzo abusivo dell'adozione ordinaria' [2012] Nuova Giurisprudenza Civile 10529.

150 of 2011. For this reason, it is necessary to notify one's partner and children.

290 Moreover, spouses have the opportunity to express their consent to continue the union in an alternative form, such as transitioning from marriage to civil partnership. If, on the other hand, the couple was formed by persons of the same sex and one of them changes sex, Constitutional Court decision No 66 of 2024 declared the rule unconstitutional because it did not allow the parties to remain united. It therefore provided for a period of 180 days after gender recognition judgment in which to marry: during this period, even if the couple consists of persons of different sexes, the couple remains civilly united. If they do not marry within this period, the couple is automatically divorced.

Thus, the automatic dissolution of the previous union can only be avoided in specific circumstances and with the mutual agreement of the parties involved.

291 Furthermore, gender recognition has implications related to an individual's name. Although not explicitly required by law, changing one's name (103) is regarded as a necessary consequence of gender recognition, (104) for consistency between an individual's name and gender identity. (105) In any case, this requirement does not allow a judge to impose a specific gender rendering of the former name (eg Bruna with Bruno). Instead, the judge must respect the individual's wishes in this regard. (106)

---

(103) Cassazione civile n 12638/2015; n 3877/2020; Tribunale di Torino, 15 September 2022.

(104) The responsibility for obtaining a new name lies with the individual. In the same proceeding for gender recognition: App Florence 23 November 2007, App Genoa 23 April 1990, App Benevento 10 January 1986, App Messina 5 December 1985, App Macerata 21 December 1985, App Macerata 12 November 1984, App Pisa 20 January 1984, App Monza 5 December 1983, App Rome 9 April 1983, App Rome 3 December 1982, and App Milan 2 November 1982 have supported this approach. However, contrary decisions were made by Treviso Court, Section I, 18 September 2015, and Ancona Court 4 November 1990. These contrary decisions require the activation of a separate subsequent application for changing one's name. The request for name change may also be made directly to the civil registrar. It is important to mention the decision of *SH v Italy* App no 5521/08 (ECtHR, 11 October 2018), which condemned Italy for not allowing a change of name even before surgical intervention and, at the time, after the initial registry change.

(105) Cassazione civile n 20385/2012; n 3877/2020. Additional arguments are drawn from textual evidence, including Article 35, paragraph 1, of PD No 396 of 2000. Furthermore, Article 5 of Law No 164 of 1982. An exception arises when the original name can be used interchangeably for both masculine and feminine names (Cassazione civile n 20385/2012).

(106) Cassazione civile n 3877/2020.

C. *Protection of adults*

292 Three protection procedures for vulnerable individuals are provided for by the Civil Code. When a mental illness is of such magnitude that the individual is not able to manage any business at all, an 'interdiction' can be issued (Article 414 CC). This prevents the interdicted person from performing any legal acts, and, therefore, a representative (a 'tutor') must be appointed (Article 424 (1) CC) by the same interdiction decree.

293 Conversely, where a mental illness is not as severe as above, the incapacitation (*inabiliatazione*) may be chosen, with the consequence that the adult retains the full capacity to perform acts of ordinary administration, being rather assisted by a curator for acts of extraordinary administration. The curator is appointed by the decree of incapacitation as well.

294 Both interdictions and incapacitation require a constitutive judgment by a judicial authority and must be registered in the civil registers.

295 Not only vulnerable persons, but their spouse, partner or cohabitant as well as certain relatives and the public prosecutor are allowed to file the claim (Article 417 CC). Given the public interest involved in the proceeding, the public prosecutor is an essential party to the process.

296 The President of the Court then names a reporting judge by decree and sets a hearing date. This decree is then communicated to the public prosecutor.

297 The reporting judge gathers all relevant information to assess the need for a guardianship or incapacitation measure. For this purpose, it is mandatory to examine the recipient of the protective measure, and if necessary, a guardian or provisional custodian may be named (Article 419 CC).

298 Interdiction and incapacitation take effect from the day of the judgment's publication (Article 421 CC, with the exception of cases provided for in Article 416 CC for measures concerning minors, which take effect when they reach legal age).

299 The decision can only be revoked upon the request of an entitled party (Article 429 CC), not by the incapacitated individual.

300 Law No 6 of 2004 introduced a third and more flexible protective measure referred to as 'supportive administration' (*amministrazione di sostegno*). Its main feature is tailored to the specific needs of the individual, with the consequence that it may be temporary and based on mere physical weaknesses.

301 Both the public prosecutor's intervention and the hearing of the individual are required (Article 407 CC).

302 The judge is required to decide within 60 days from the date of the application, by decree, which is immediately enforceable (unless the individual was under interdiction or incapacitation: see Article 405 CC). In any case, the registration of the decree in the birth registry is required.

303 The supervisory judge may, at any time, modify, even *ex officio*, the decisions made in the decree.

304 The adult's autonomy plays a role in the choice of the administrator, as emphasised by Article 408 CC ('the choice of the support administrator [...] may be made directly by the interested party in anticipation of their potential future incapacity, through a public deed or private document. In the absence or in the presence of significant reasons, the judge may appoint a different support administrator'). (107)

305 No extra-judicial appointment is currently allowed, while the United Nations Convention on the Rights of Persons with Disabilities (CRPD) of 13 December 2006, and the Council of Europe Recommendation No R (99) 4 of 23 February 1999 recommend fully negotiated solutions.

306 In practice, the representation (*procura generale*) is used to allow a third party to act on behalf of the beneficiary at least in the realm of property law. Nevertheless, whenever the person is no longer capable of overseeing the representative's acts, these remain valid and effective, (108) while no revocation can take place. In this case, relatives can only apply for an *amministratore di sostegno*, who will be able to revoke the previous authorisation. (109) Legislative proposals (110) to introduce a protective mandate have been presented in recent years (according to solutions already prevalent in France, Germany, Austria, and Spain).

307 Acts of extraordinary administration on behalf of vulnerable adults may require prior judicial authorisations (Articles 372, 374, 424, and 425 CC). These have been de-judicialised by Article 21 of Lgs D No 149 of 2022, which allows notaries to issue authorisations according to the same rules described above (see above paras 214ff), while – as an alternative solution – Article 1 (13), letter a, Law No 206 of 2021 has given the guardianship judge (*giudice tutelare*) the competence to issue protective measures and preventive authorisations.

V. Overall conclusions

308 The Italian legal system has embarked on a process of de-judicialisation in the area of family and succession law. This trend is particularly evident in the

(107) Cassazione civile n 1667/2023.

(108) Matilde Girolami, 'Dalla crisi dell'amministrazione di sostegno al mandato di protezione: un bilancio de iure condendo' [2021] Rivista di Diritto Civile 854.

(109) Matilde Girolami, 'La procura degli incapaci' [2019] Rivista di Diritto Civile 1395.

(110) Matilde Girolami, 'Dalla crisi dell'amministrazione di sostegno al mandato di protezione: un bilancio de iure condendo' [2021] Rivista di Diritto Civile 854.

areas of divorce, separation and dissolution of civil unions, where, since 2014, agreements between spouses can have the same legal effects as a court decision. However, these agreements are not simple private agreements, but the result of a process involving professionals and administrative authorities, whose control varies according to the case. For example, the procedure before a mayor involves less substantive scrutiny than assisted negotiation and for this reason it excludes couples with children and limits the possibility of concluding agreements on lump-sum maintenance and property transfers. However, probably because of the sensitive interests at stake, the trend seems to be different in parenthood matters, where most competences are still attributed to the courts. **309**

On the contrary, since the entry into force of the Civil Code, Italian inheritance law has always assigned to the courts a marginal role, limited to extraordinary situations and to matters of voluntary jurisdiction, such as the granting of authorisations to carry out some specific acts. As regards the latter, however, the aforementioned Article 21 of Lgs D No 149 of 2022 has attributed also to notaries the competence to issue authorisations of voluntary jurisdiction, thus further reducing the competences reserved to the Court of Succession. **310**

In other areas, such as voluntary changes of name or surname, there are administrative procedures. Where such a change is necessary, for example, in the case of divorce, adoption of an adult or gender recognition, issues relating to the change of name and surname are dealt with by a judicial authority. **311**

Areas such as gender recognition and the protection of vulnerable adults do not yet provide for extra-judicial proceedings. Although these procedures are currently under judicial authority, legal scholarship and some legislative proposals advocate a gradual shift towards an administrative approach, in line with the wider trend towards simplifying and rationalising legal procedures in the family and succession context. **312**

LITHUANIA

by *Katarzyna Bogdziewicz*

I. Introduction

The Lithuanian legal system follows the civil law tradition. The majority of family law issues fall within the purview of the judiciary. Notaries handle succession matters that do not involve disputes. **1**

Article 1 of the Lithuanian Law on the Notarial Profession (1) defines the notariat as a group of notaries entrusted with the authority to legally establish uncontested subjective rights and legal facts pertaining to natural and legal persons, organisations, and their subdivisions. Their responsibility is to safeguard the legitimate interests of these entities and the State. As stipulated in Article 2 of the Law on the Notarial Profession, a notary is an individual duly authorised by the State to execute the duties outlined in this legislation. Their duties consist of certifying that civil legal relationships involve authorised transactions and documents. In civil disputes, a notary may additionally serve as an authorised intermediary (mediator) in an effort to achieve an agreement. As stated in Article 12 of the Law on the Notarial Profession, notaries operate with their independence unaffected by public authorities and administrations; their obligations are solely governed by the law. The operations of notaries are regulated by the Constitution of the Republic of Lithuania, this legislation, as well as other laws of the Republic of Lithuania, government resolutions, legal acts of the Minister of Justice, chamber of notary resolutions, and other applicable legal instruments. Lastly, in accordance with Article 41 of the Law on the Notarial Profession, an interested party may file an appeal with the court that is within the area of the notary's office if they hold the opinion that an executed notarial deed or the refusal to execute a deed is erroneous. **2**

The primary legislation governing matters of family and succession in the Republic of Lithuania is the Civil Code. The focus of Book Three of the Code is familial matters, while Book Five addresses succession. The Civil Code, the Law on Registration of Civil Status Acts, (2) and the Rules on the **3**

---

(1) The Law on the Notarial Profession [Lietuvos Respublikos notariato įstatymas], 1992, No I-2882, available in Lithuanian: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.1695/asr>.

(2) The Law on the Registration of Civil Status Acts [Lietuvos Respublikos civilinės būklės aktų registravimo įstatymas], 2015, No XII-2111, available in Lithuanian: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/cab232019db711e591078486468c1c39/asr>.

Registration of Civil Status Records (3) govern civil registry matters. Ultimately, the recently enacted Law on Writing a Person's Name and Surname in Documents (4) addressed issues pertaining to names.

4 Notably, case-law may have a legally binding effect. In multiple cases, the Constitutional Court of the Republic of Lithuania has clarified that the continuity of jurisprudence is a prerequisite for the constitutional principle of the rule of law. Thus, courts are obligated to adhere to their own precedents, which are decisions rendered in similar cases, when rendering decisions in the pertinent categories. (5) The Supreme Court of Lithuania, in developing the rules of application of a precedent, has also adopted a consistent practice according to which, when deciding whether the practice set out in the rulings of the Supreme Court has been complied with, it is necessary to establish whether: (1) the same provisions of law have been the subject of different judgments; (2) the same provisions have been applied in the context of an identical legal regulation of the legal relationship at issue; (3) all the applicable and legally relevant provisions of law have been analysed and applied in the judgment or order of the court; and (4) the provisions have been analysed in detail in the reasons given by the court in its judgment; (5) such provisions are duly substantiated by reasoning from the rules of law, legal doctrine and case-law; (6) the provisions of law have been applied to the same facts; (7) the statements in the judgments or orders are either substantive, determining the outcome of the case on the basis of the facts, or are merely recitals, arguments, or other incidental reasonings. (6)

5 The judicial system of the Republic of Lithuania consists of tribunals of general jurisdiction and courts with special jurisdiction. District courts, the Supreme Court of Lithuania, and the Court of Appeal of Lithuania are examples of judiciary bodies endowed with general jurisdiction. These tribunals hear criminal and civil proceedings. District courts possess the authority to adjudicate cases pertaining to administrative offences within

---

(3) Rules on the Registration of Civil Status Records [Civilinės būklės aktų registravimo taisyklės], 2016, No 1R-334, available in Lithuanian: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/65a5ecc0cd4111e69185e773229ab2b2/asr>.

(4) The Law on Writing a Person's Name and Surname in Documents [Lietuvos Respublikos asmens vardo ir pavardės rašymo dokumentuose įstatymas], 2022, No XIV-903, available in Lithuanian: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/32ec5f92790211ecb2fe9975f8a9e52e?jfwid=xo46sndtc>.

(5) Rulings of the Constitutional Court of 28 March 2006 and of 24 October 2007. All rulings of the Constitutional Court of the Republic of Lithuania are available in English: <https://lrkt.lt/en/court-acts/rulings-conclusions-decisions/171/y2023>.

(6) Rulings of the Supreme Court of the Republic of Lithuania of 8 December 2009, in civil case No 3K-3-552/2009; of 20 December 2010 in civil case No 3K-7-385/2010; and of 2 May 2012 in civil case No. 3K-3-218/2012.

their purview. The Supreme Administrative Court of Lithuania and regional administrative courts are instances of courts with special jurisdiction that are responsible for resolving disputes that arise from administrative legal relations.

6 Notaries have recently been granted the authority to render decisions in specific family matters, replacing courts. The Civil Code of the Republic of Lithuania (7) underwent an amendment in 2022, which resulted in the transfer of competences in matters of divorces by mutual consent to notaries. The latter was the result of courts releasing non-contentious cases to lessen their workload. (8) As stipulated in Article 3.51, the dissolution of a marriage through mutual agreement of the spouses (before a notary) is permissible under the following circumstances: 1) it has been over one year since the matrimonial ceremony; 2) both partners have reached an agreement regarding the implications of the divorce, including matters such as property division; 3) both partners are capable of making decisions regarding this matter; and 4) in cases where neither partner has lived a conjugal life for over one year nor do they have joint minor children, the marriage is dissolved by mutual consent of the partners in a joint agreement.

7 There is no definition of 'court', 'decision', or 'judicial function' under Lithuanian law. The aforementioned concepts are frequently cited by scholars and case-law in relation to the recognition of foreign judgments. (9) Nonetheless, the Supreme Court examined in one of its decisions whether the notaries of Lithuania qualify as 'courts' for the purposes of the Succession Regulation. The Supreme Court posited that the notary's authority is conferred by law solely to legally establish subjective rights and legal facts pertaining to natural and legal persons, in order to safeguard the legitimate interests of said persons and the State. (10) It is worth noting that, while 'legally to establish' is used in the English version of the Law on the

---

(7) The Civil Code of the Republic of Lithuania [Lietuvos Respublikos civilinis kodeksas], 2000, VIII-1864, English translation (for the version in force on 30 June 2022), available online: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/512506f2684411eea182def3ac5c11d6?jfwid=f6r2n5zks>.

(8) Katažyna Bogdzevič, Natalija Kaminskienė, Laima Vaigė, 'Non-Judicial Divorces and the Brussels II bis Regulation: To apply or not to apply?' (2021) International Comparative Jurisprudence 7(1), 31–39.

(9) Eg, Remigijus Jokubauskas, Mykolas Kirkutis, Egidija Tamošiūninė, Vygintas Višinskis (eds), *Užsienio teismų pripažinimas ir leidimas vykdyti Lietuvos Respublikoje* (Vilnius 2020).

(10) Ruling of the Supreme Court of Lithuania of 4 November 2020 in civil case No e3K-3-422-378/2020.

Institution of Notaries, (11) as well as in the E.E. case, (12) 'confirm' or 'certify' would be more appropriate. (13) It appears to be consistent with the Supreme Court's interpretations in other cases. The Court has repeatedly stated that the concept of a notary's functions presupposes that the notary does not examine personal disputes, does not establish disputable circumstances, and that, if doubts or disagreements arise regarding a person's rights or legal facts, they must refuse to certify such rights or facts. Thus, a notary may only certify particular rights or facts if they are certain of their content and legality. (14)

8 According to the Law on the Notarial Profession, the notary's status necessitates heightened diligence, caution, and care. Additionally, the notary is obligated to strictly adhere to legal requirements and decline to perform any notarial act that violates or fails to comply with the stipulations of the law. This understanding of the notary's role suggests that they do not mediate disputes between individuals, do not establish circumstances that are the subject of a dispute, and are obligated to decline attesting when there are any uncertainties or disagreements regarding the legal rights or facts. In order to certify specific rights or facts, a notary must be completely certain of their veracity and compliance with the law. Due to the fact that Lithuanian notaries lack the authority to resolve disputes between parties, establish obscure and obvious facts, or render decisions on disputed facts, the panel of judges concluded, in accordance with the aforementioned interpretations, that the issuance of a national inheritance certificate by Lithuanian notaries does not constitute the execution of judicial duties.

II. Family law

9 The Lithuanian Civil Code became effective on 1 July 2001. This event marked a noteworthy achievement in light of the transition from the Soviet legal systems to the contemporary Lithuanian legal systems. Numerous amendments have been made to it since its adoption on 18 July 2000;

---

(11) The translation is available on the website of the Lithuanian Parliament (Seimas): <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.90284?jfwid=swznzpvms>. It is a translation of the first version of the Law on the Notarial Profession and does not include its later amendments.

(12) Case C–80/19 *E.E.* ECLI:EU:C:2020:569.

(13) As it is used in the literature, eg, Agnė Limantė, 'The E.E. Decision Sheds Light on Notaries Acting as 'Courts' and on a Few Other Notions Within the Context of the Succession Regulation' (2021) European Papers 6(1), 45–55.

(14) Ruling of the Supreme Court of 3 May 2011 in civil case No 3K-3-219/2011; ruling of the Supreme Court of 6 December 2013 in civil case No 3K-3-643/2013.

however, the most significant modification, as viewed through the lens of non-judicial justice, was implemented in 2022. In regards to family matters, Book Three of the Civil Code contains almost exhaustive regulations. It governs matrimonial affairs, adoption, guardianship, parentage, and the rights and responsibilities of other family members. Initially, court jurisdiction was extended to all family matters; nevertheless, as previously stated, a portion of the uncontested matters were transferred to notaries. Lithuanian law does not provide a possibility to register or dissolve partnerships.

10 The Civil Procedure Code (15) provides special provisions for family matters. As a result of the strong public interest in the regulation of family relations, the legislature makes substantial exceptions to certain civil procedure principles in family proceedings. (16) Proceedings in family matters have the following particularities: the court is actively involved; the possibility of changing the subject-matter or cause of action, or bringing a counterclaim; the prohibition of default judgments; the limitation of the principle of publicity of court proceedings; child participation in court proceedings and the possibility for the child to express their views in court; often obligatory participation of the children protection institution; preparation for trial – at a preparatory hearing. (17) It is important to note that civil procedural rules are supplemented by Civil Code norms. For instance, Article 3.178 of the Civil Code requires the court to hear the child in child-related disputes. It is worth mentioning that this requirement only applies in cases where there is a dispute between the parties. Even in circumstances where both spouses divorce by mutual consent, the court may hear the case orally, especially if the family has minor children and the court wishes to hear their viewpoints, such as regarding their place of residence. (18) However, a case-law analysis reveals that even in such circumstances, the court typically dissolves marriages in writing.

11 However, it is worth noting that in many family cases, particularly non-contentious ones, the court follows a simplified procedure. This includes cases involving parent-child disputes, divorces by mutual consent, and

---

(15) The Code of Civil Procedure of the Republic of Lithuania [Lietuvos Respublikos civilinio proceso kodeksas], 2002, IX-743, Lithuanian version is available at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.162435/asr>.

(16) Marius Jonaitis, 'Atskirų kategorijų bylų nagrinėjimo ypatumai pagal naująjį Lietuvos Respublikos civilinio proceso kodeksą' (2003) Jurisprudencija 42(34), 124.

(17) Egidija Tamošiūnienė, 'Procesiniai šeimos bylų nagrinėjimo ir teismo sprendimų vykdymo ypatumai' in Egidija Tamašiūnienė & Inga Kudinavičiūtė-Michailovienė (eds), *Šeimos bylų nagrinėjimo ir teismo sprendimų vykdymo ypatumai* (Vilnius 2013) 283–305.

(18) Valentinas Mikelėnas, *Šeimos teisė* (Vilnius 2009) 236.

adoptions. (19) Generally, when the procedure is simplified, the hearing is conducted in writing, unless particular provisions stipulate otherwise (eg, only oral hearings are permissible in the case of adoption). For instance, in divorce by mutual consent, usually the court decides in writing even if spouses have minor children and have to decide on their maintenance, access rights and place of residence.

12 The general procedures for appeals apply to both regular and simplified family proceedings.

13 Article 301(1) of the Civil Procedure Code states that judgments and orders of a court of first instance that have not yet come into force are subject to appeal, unless the Code specifies otherwise. The decision of the court may be subject to review. A detailed enumeration of grounds for the review procedure can be found in Article 366 of the Civil Procedure Code.

14 Article 385(2) of the Civil Procedure Code states that the marriage is deemed dissolved on the date the court's judgment to dissolve it becomes effective. The judgment becomes effective within 30 days of its issuance. The court shall transmit that decision electronically to the civil registry office that registered the marriage, no later than the subsequent business day following the date the court's ruling to dissolve or nullify the marriage entered into force. This electronic transmission enables the civil registry office to record the dissolution of the marriage in adherence to the procedure prescribed by the Law on Registration of Acts of Civil Status of the Republic of Lithuania.

15 The establishment of international jurisdiction for Lithuanian courts and notaries primarily adheres to bilateral agreements and international conventions, including the Hague Convention on the Protection of Children and the EU Regulations (Brussels IIb Regulation and the Maintenance Regulation).

16 The Civil Procedure Code also encompasses regulations pertaining to international jurisdiction. According to Article 784 of the Civil Procedure Code, Lithuanian courts have jurisdiction over family cases if at least one of the spouses is a Lithuanian citizen or a stateless person with habitual residence in Lithuania. In the event that both partners have their habitual residence in Lithuania, exclusive jurisdiction over their family matters shall rest with the courts. In cases involving family matters, the jurisdiction of the Lithuanian courts extends to foreign spouses who are habitually resident in Lithuania.

17 According to Article 785 of the Civil Procedure Code, Lithuanian courts will only hear issues involving legal relations between parents and children or adoption if at least one of the parties is a Lithuanian citizen or a stateless person with habitual residence in Lithuania. If both parties are habitually

---

(19) Artūras Driukas and Virgilijus Valančius, *Civilinis procesas: teorija ir praktika. IV tomas* (Vilnius 2009) 402.

resident in Lithuania, the dispute shall be resolved exclusively by the courts in Lithuania. In addition, cases involving legal relations between parents and children and adoption fall under the jurisdiction of the Lithuanian courts when both parties are foreign nationals with habitual residence in Lithuania. Notably, the Lithuanian Civil Procedure Code makes no provision for the application of *lis pendens*. According to Article 781, in the event that the courts of the Republic of Lithuania possess the jurisdiction to adjudicate civil cases as defined in the Civil Procedure Code, this authority shall not be revoked if an identical case is pending before a foreign court. Regarding notaries, there are no specific provisions regarding jurisdiction or *lis pendens*. Nevertheless, one could argue that notaries are obligated to adhere to the jurisdictional provisions outlined in the aforementioned legal instruments, provided that their conduct does not contradict those provisions.

A. *Divorce and legal separation*

18 Spouses who mutually agree to the divorce and meet the criteria outlined in Article 3.51 of the Civil Code are eligible to have their divorce decreed by a notary. A notary shall certify the separation by common consent of the spouses, as stipulated in Article 3.73 of the Civil Code. The sole avenue through which a marriage can be annulled is through judicial process, as stated in Article 3.37 of the Civil Code.

19 It is noteworthy that while the divorce case is pending before the notary, there is no legal requirement for the notaries to inform the judicial authorities. This is due to the fact that the jurisdiction of notaries and courts in divorce cases are distinct. Put simply, if the court is required to render a decision on divorce under legal provisions, the notarial process is not applicable. Similarly, if the notarial process is accessible, it is not possible to petition for a divorce through the judicial process. According to Article 137(2) of the Civil Procedure Code, the court will refuse to accept a claim if the person who has applied to the court has not followed the procedure for the earlier settlement of disputes out of court as prescribed by law for such cases. Based on the aforementioned rule and Article 3.51 of the Civil Code, courts in recent case-law have refused to dissolve marriages if a notarial divorce is possible. ([20])

20 A definition of a court or a judgment is not provided by Lithuanian law. Nevertheless, case-law indicates that the Civil Procedure Code's general

([20]) Ruling of the Vilnius District Court of 16 March 2023 in civil case No e2S-668-430/2023; ruling of the Vilnius District Court of 11 January 2024 in civil case No e2S-124-560/2024.

provisions regarding the recognition of foreign judgments may be applied to non-judicial decisions. To illustrate, the Supreme Court recognised a divorce decree rendered by a municipality (specifically, the Sumida District of Tokyo City, Japan) in one case. (21)

1. *Formal and substantive requirements*

21 Divorce may be granted in accordance with the Lithuanian legislation through mutual consent, the request of one spouse, or due to the fault of one or both spouses. In a notarial proceeding, divorces by mutual assent are the only viable option. In Article 3.51, the conditions for a divorce by mutual consent are outlined. The subsequent conditions must be fulfilled: 1) the marriage has been concluded for over one year; 2) both spouses have reached an agreement regarding the consequences of the divorce, including matters such as property division, child support, and maintenance; 3) both partners possess the necessary capacity to take appropriate action in this regard. These requirements apply to both the judicial and notarial procedures of divorce by mutual consent. Furthermore, in order to initiate a divorce proceeding via notarial process, the following conditions must additionally be met: the spouses have not maintained a common household for more than one year, have not lived a conjugal life and have no minor children in common. All the prerequisites listed above apply to marriages concluded in Lithuania as well as abroad.

22 According to the provisions outlined in Article 3.55, the district court of the applicant's place of residence may be petitioned by one of the spouses to dissolve the marriage, provided that at least one of the subsequent conditions is met: 1) the spouses have been separated for more than one year; 2) a court ruling after the marriage has declared one of the partners incapacitated or partially incapacitated; (3) a court ruling has declared one of the partners missing; 4) one of the partners has been imprisoned for a non-premeditated crime for more than one year. In the interest of a spouse who is incapable in this regard, their guardian, the public prosecutor, or a guardianship and care institution may submit a petition for divorce. A spouse who possesses limited capacity in this regard may file for divorce with the guardian's consent. In situations where the guardian declines to provide consent, the court may grant permission for the person with limited capacity to petition for divorce, upon the petitioner's request.

23 Finally, if the marriage is dissolved due to the fault of the other spouse (Article 3.60 of the Civil Code), a spouse may file for divorce with a

(21) Ruling of the Court of Appeal of the Republic of Lithuania of 27 June 2011 in civil case No 2T-212/2011.

declaration of guilt. A partner shall be held liable for the dissolution of the marriage if they have significantly neglected their responsibilities as a spouse to the extent that it is no longer possible for the partners to cohabit.

24 If certain circumstances, even if they are beyond the control of the other spouse, make cohabitation intolerable/impossible or likely to be substantially detrimental to the interests of their minor children, or if the spouses are no longer interested in continuing to live together, one of them may apply to the court for a declaration of legal separation (Article 3.73(1) of the Civil Code). The law does not require the spouses to live in different houses, it is sufficient that they do not continue a conjugal life. (22) Both spouses may apply jointly to the court for a declaration of legal separation if they have concluded an agreement on the consequences of the separation in which they have discussed the residence, maintenance and upbringing of minor children, the division of matrimonial property and the maintenance of each other. Where the previously mentioned conditions are met, but the spouses do not have minor children in common, the separation shall be certified by common consent of the spouses by a notary (Article 3.73(2) of the Civil Code).

2. *Procedural steps – judicial procedure*

25 When examining a divorce by mutual consent, two distinct procedures must be considered: judicial and non-judicial. If both spouses are capable of acting in the area of divorce, their marriage was concluded at least one year before initiating the divorce, and the spouses have reached an agreement regarding the consequences of the divorce but the additional requirements for a notarial procedure are not met (eg, they have minor children), the divorce may be obtained only through a judicial procedure. When this occurs, the spouses draft the agreement in which they deliberate on all pertinent consequences of the divorce. The pertinent provisions regarding this matter are outlined in Article 3.53. According to Lithuanian law, the spouses have a right to divorce, therefore, if there is no doubt that the marriage has ended, the court will decide to dissolve it. (23) When the spouses no longer live together and it cannot be anticipated that they will reside together again, the marriage is dissolved. The marital union is deemed effectively dissolved upon the failure of both partners to live together or engage in conjugal activities for a period exceeding one year. It is crucial to highlight that within the context of judicial proceedings, the duration of abstaining from cohabitation and

(22) Valentinas Mikelėnas et al, *Lietuvos Respublikos civilinio kodekso komentaras. Trečioji knyga. Šeimos teisė* (Justitia 2002) 158.

(23) Valentinas Mikelėnas, *Šeimos teisė* (Vilnius 2009) 236.

maintaining a common household may be reduced to less than one year, on the condition that the spouses substantiate the effective dissolution of the marriage. Conversely, in the event of a divorce via notarial process, a minimum of one year must pass since the effective dissolution of the marriage.

26 Article 381(4) of the Civil Procedure Code specifies that the special procedure is applied to an application for divorce by common consent of both spouses (Article 3.51 of the Civil Code) or by one spouse (Article 3.55 of the Civil Code). In addition to approving the agreement on the consequences of the dissolution of the marriage submitted by the spouses, the court is required to do so in accordance with section 3.53 (3) of the Civil Code. The agreement shall address the following matters: maintenance for the minor children and each other, the place of residence for minor children, their participation in their education, and arrangements for the minor children's access to the separated parent. The judgment shall incorporate the terms and conditions of the agreement. The judgment has *res judicata* effects. However, upon a significant alteration in circumstances (eg, illness, unemployment, etc), either one of the former spouses or the former spouses may petition the court for a modification of the agreement's provisions regarding the consequences of the divorce. It is worth emphasising that only the terms governing the consequences can be amended; the decision regarding the divorce itself cannot. (24)

27 If the agreement regarding the consequences of the divorce significantly undermines the rights and legitimate interests of one of the spouses or the minor children, or is contrary to public policy, the court will halt the divorce proceedings until the parties can reach a new agreement. If the spouses do not comply with the court's instructions regarding the content of the agreement within six months after the stay date, the application will be left unexamined. In such a case, the spouses can reapply for divorce by mutual consent, or one of them can apply for divorce under the conditions laid down in the Civil Code. (25) The agreement between spouses is governed by the principle of privity of contract, which states that rights and obligations are created only for the parties who have entered into the contract, with the exception of circumstances specified in the law. (26) The Supreme Court has stated in its case-law that a contract regarding the consequences of divorce,

---

(24) Egidijus Laužikas, Vaklentinas Mikelėnas, Vytautas Nekrošius, *Civilinio proceso teisė. II tomas* (Justitia 2005) 468–469.

(25) Valentinas Mikelėnas et al, *Lietuvos Respublikos civilinio kodekso komentaras. Trečioji knyga. Šeimos teisė* (Justitia, 2002) 120.

(26) Valentinas Mikelėnas, *Šeimos teisė* (Vilnius 2009) 238.

similar to any other contract, is subject to the principle of privity of contract: the contracting parties possess the authority to ascertain their own rights and obligations. As a result, the parties have no authority to concur upon the rights of individuals who are not parties to the contract at the time of its formation. When one or both spouses have creditors, their consent should be obtained on any provisions of the agreement that could potentially affect the creditors' rights.

28 According to Article 3.54 of the Civil Code, the court shall take steps to reunite the spouses. The court may impose a six-month time restriction for the couples' reconciliation at the request of one of them or on its own initiative. In such cases, the divorce process will be stayed. The proceedings will be reopened when the court-imposed time limit has expired, at the request of one of the spouses. If neither partner requests the dissolution of the marriage within one year of the start of the reconciliation period, the divorce application will be denied. If the spouses have not cohabited for more than one year, if establishing a time limit for reconciliation would be substantially contrary to the interests of one of the spouses or their children, or if both spouses request that the proceedings be heard on the merits, no time limit for reconciliation shall be established. If the parties agree to reconcile, they have to notify the court. The parties' written declaration of reconciliation shall be affixed to the file, and the oral statement shall be recorded in the hearing minutes. The court will dismiss the lawsuit by order once it receives the parties' statement of reconciliation. No appeal shall lie against the court's orders staying and ending proceedings in the event of reconciliation. An order of the court ending the proceedings does not exclude a subsequent application for divorce or legal separation.

29 According to Article 540 of the Civil Procedure Code, divorce cases shall be heard orally by the court, at the request of one of the spouses or by mutual consent, unless it determines that hearing the case by written procedure would not jeopardise the stability of the family relationship, the interests of the children, or the spouses. When oral proceedings are in progress, they are not recorded. In practice, disputes involving divorces by mutual consent are typically resolved through a written procedure. The court hears applications filed in accordance with the procedure for divorce by mutual consent or at the behest of one of the spouses within 30 days of the date of receipt. In the event that creditors of either spouse or one of them file claims during the divorce proceedings, the actions are stayed until the creditors' claims are resolved.

30 Everything that is required of the court to ensure a complete understanding of the case's facts must be done. The court is obligated to ascertain the agreement's legality. In examining a case for dissolution of marriage under

the simplified procedure, the Supreme Court of Lithuania has established that the division of property is not determined; thus, the provisions of Chapter VIII of the Third Book of the Civil Code are not applicable in this instance. Spouses who petition the court for approval of the agreement regarding the consequences of a marriage dissolution are obligated to provide a detailed account of the common property, including both its quantity and value ([27]). Therefore, in order to dissolve their marriage by mutual consent, the spouses are obligated to provide the court with details regarding their assets, including their values and any agreement that was reached regarding their division. In reviewing the terms of the divorce settlement agreement, the court assesses the value of the matrimonial property and, by extension, its division. This evaluation is conducted to ascertain whether the agreement complies with public policy and does not significantly harm the legitimate interests and rights of the minor children of the spouses or one of the spouses (Article 3.53(4) of the Civil Code). Typically, the assessment of the validity of a marital agreement regarding the legal implications of divorce is conducted through oral proceedings. This assessment involves either directly hearing the applicants to determine the grounds for deviating from the principle of equal distribution of matrimonial property, or by clarifying the applicants' position through alternative means (eg, supplementary written submissions). It is noteworthy that the verification process is conducted orally. Article 177 of the Civil Procedure Code defines evidence in a civil case as any factual matter on the basis of which a court establishes, in accordance with the procedure laid down by law, the existence or non-existence of facts in support of the parties' respective claims and defences, and of other matters relevant for the fair determination of the case. The statements of the parties and third parties (whether directly or through representatives), the testimony of witnesses, documentary evidence, physical evidence, records of inspections, expert reports, lawfully obtained photographs, video, and audio recordings, and any other evidence that may be presented shall be used to establish the facts.

31 The judgment concludes the judicial process, in which the court renders decisions on the following matters ([28]): child support, residence, parental involvement in the upbringing of minors, access arrangements for the separated parent, maintenance for one spouse and property distribution, and damages in the event of a claim. A judgment dissolving the marriage is

---

([27]) Ruling of the Supreme Court of Lithuania of 15 March 2011 in civil case No 3K-3-110/2011.

([28]) Both the court and the notary examine the agreements' legality and compatibility with public order. In practice, this check is very formal.

rendered by the court in the event of a divorce by mutual consent; the agreement regarding the consequences of the divorce is appended to this judgment. It is worth noting that if the spouses' creditors become involved in the proceeding and disagree with the spouses' agreement regarding the consequences of the divorce, the court may issue a partial judgment and address the remaining issues later. ([29]) The spouses may file an appeal of the judgment with the court of first instance within 30 days of its issuance.
The same procedure applies to separation. **32**

3. *Procedural steps – non-judicial procedure*

Spouses must provide a notary with an agreement outlining the implications of the divorce and a written declaration that they have not cohabitated or shared their home for over one year when petitioning for a divorce by mutual consent. If either spouse has creditors, they are additionally required to provide the notary with proof that they have duly notified all recognised joint creditors, either of their own or one of them, regarding the petition for a divorce by common consent (Civil Code Article 3.54^1). As with the court, before approving the agreement on the consequences of divorce, the notary must offer the spouses an opportunity to reconcile, in which case they must postpone the approval of the agreement on the consequences of divorce for up to six months. The spouses may submit a written rejection of the reconciliation offer and the request to delay the divorce settlement's approval. If the spouses or one of them fails to appear before a notary following the expiration of the postponed period for contract approval, the notary shall not grant approval to the agreement. **33**

The marriage shall be dissolved by common consent of the spouses in accordance with the notarial procedure, with the notary approving the agreement on the consequences of the dissolution of the marriage, provided that such a dissolution of the marriage meets the conditions laid down in the Civil Code, and provided that the agreement on the consequences of the dissolution of the marriage submitted by the spouses does not contravene public policy or materially prejudice the rights and/or legitimate interests of one of the spouses. The agreement regarding the divorce's implications becomes effective one business day after its notarial approval date. **34**

If these issues are not addressed in the marriage contract or if the property, which is considered community property, has not been divided by mutual agreement, certified by notarial deed, or by a court order, the agreement regarding the consequences of the divorce must address the spouses' main- **35**

([29]) Valentinas Mikelėnas, *Šeimos teisė* (Vilnius 2009) 239–240.

tenance of one another, as well as the spouses' surnames following the divorce.

36 When a divorce is completed via the notarial process, particular care is taken to safeguard the interests of the spouses' creditors. According to Article 3.54^3, in cases where the agreement regarding the consequences of divorce pertains to the distribution of the community property of the spouses, prior to seeking notarial approval for this agreement, the spouses are obligated to notify all known joint creditors of either one or both. In addition to a draft agreement outlining the consequences of the divorce, this notification must include the contact information of the notary to whom the application is directed for the agreement's approval. The creditors possess the authority to provide written notice to the spouses and the public notary specified in their notification, along with concrete objections, within 30 days of receiving the information. Their written objections should not compromise the interests of the spouses' joint creditors or one of their creditors. The objections should be reasoned and not affect the method of division of the matrimonial property or any other provisions of the agreement regarding the consequences of the marriage's dissolution. The notary shall refrain from rendering a decision regarding the dissolution of the marriage by mutual consent prior to the time limit specified in this paragraph. The notary will not approve the agreement on the consequences of the divorce if the spouses fail to address the creditors' objections and refuse to modify the terms of the agreement in accordance with them. In such a case, the spouses retain the right to petition the court for a divorce.

37 Given the aforementioned circumstances, it can be asserted that the notary is unable to validate the spouses' agreement prior to 30 days subsequent to the submission of the information to the creditors. Consequently, the length of the notarial process may vary according to whether the spouses have debt obligations. In a hypothetical scenario where both parties meet the necessary criteria to initiate the divorce process via notarial means, have no outstanding debts to creditors, and the agreement does not violate public policy or significantly harm the rights and legitimate interests of one spouse, the notary would have no hesitation in confirming the agreement immediately following its submission. In accordance with Article 29 of the Law on the Notarial Profession, notarial acts are performed promptly upon receipt of the necessary documents for which a fixed fee is levied. The notarial act may be deferred for a duration of 20 calendar days or until the supplementary information or documents are obtained, whichever comes first.

38 As stipulated in Article 36 of the Law on the Notarial Profession, notaries are required to sign and affix their seal to paper documents that they have certified. Consequently, in contrast to the judicial process, no definitive

decision is rendered; rather, a certified agreement stipulating the implications of divorce serves as the sole document; the union is formally dissolved the day following the confirmation of said agreement.

39 It is noteworthy that the notary, in contrast to the court, has restricted access to evidence. In accordance with Article 34 of the Law on the Notarial Profession, the notary possesses the authority to obtain information, documents, and data required to perform notarial acts from State and municipal institutions, State cadastres, registers, and information systems, banks, and other financial institutions, as well as other natural and legal persons. The timely submission of information, documents, and data is required, as specified by the notary. The notary, nevertheless, is unable to hear the testimony of the witnesses.

40 An interested party who believes that a notarial act performed or a refusal to perform a notarial act is improper may file an appeal with the court located in the jurisdiction of the notary's office, as stipulated in Article 41 of the Law on the Notarial Profession.

41 Subject to a substantial change in circumstances (illness, incapacity to work, etc), Article 3.54^4 of the Civil Code permits the former spouses to amend the provisions of the agreement regarding the repercussions of divorce. Additionally, by notarial deed, the agreement regarding the modification of the provisions of the agreement regarding the consequences of the divorce must be finalised. The court has the authority to amend the agreement regarding the implications of divorce at the request of one of the former spouses. The court may, at the request of a former spouse, declare the agreement on the consequences of divorce wholly or partially void and unenforceable if it significantly disadvantages one of the parties and substantially violates the principle of equality of the spouses, in addition to the grounds for contract nullity specified in the first book of the Civil Code. A lawsuit seeking the complete or partial annulment of the contract regarding the consequences of divorce may be initiated within a period of one year from the date the contract became enforceable under those circumstances. The complete or partial annulment of the agreement regarding the implications of divorce shall not impact the dissolution of the marriage as stipulated in this agreement.

42 Creditors of one or both spouses who were not duly notified, in accordance with the procedure specified in Article 3.54^3 (1) of the Civil Code, regarding the agreement on the consequences of the dissolution of the marriage or any amendments thereto, and whose rights have been affected by the provisions

of the agreement, are entitled to the following: a claim within one year from the date they became aware of the agreement's modification. (30)

43 The same procedure applies to separation. However, the legislator additionally requires the spouses to include in the agreement information as to which of them retains the right to reside in the family home.

B. *Parenthood*

44 Lithuanian conceptions of parenthood are limited to the conventional notions of maternity and fatherhood. Furthermore, the complementarity of paternity and maternity is a principle governing family relations in Lithuania, as stated in Article 3.3 of the Civil Code. As stipulated in Article 3.139 of the Civil Code, the woman who gave birth to the infant is considered to be the mother of the child. In situations where the mother's identity is not documented in the child's birth record or where the matter of motherhood has been disputed, a court may determine motherhood through an action initiated by a woman claiming maternal rights, the child's adult child, the child's father, the child's guardian, the guardian's custodian, or a State authority tasked with safeguarding the child's rights. Non-judicial establishment of motherhood does not exist.

45 According to the provisions outlined in Article 3.140 of the Civil Code, in the event that a child is born to a married mother despite having been conceived prior to the union, the mother's spouse/husband is to be listed in the birth certificate as the father of the child. Where the child is born not more than 300 days after the beginning of the separation, or after the annulment or dissolution of the marriage, or after the death of the husband, the former spouse of the mother of the child is recognised as the child's father. If a mother enters into a new marriage within 300 days of the dissolution of the previous union, the new spouse of the mother is recognised as the child's father.

46 If a child is born to an unmarried mother and over 300 days have passed since the dissolution of the prior marriage, the father's name may be included in the birth certificate as the spouse who has duly acknowledged paternity through a court order or a declaration of acknowledgement of paternity in accordance with the procedures specified in the Civil Code.

47 If a child is born to a mother who is married or to a divorced mother within 300 days of the dissolution of the marriage, all parties involved, including the mother, the child's former or current spouse, and the man who affirms

(30) The notarial divorce should thus qualify as an agreement for the purposes of the Brussels IIb Regulation.

paternity, are permitted to submit a joint declaration to a notary. In this declaration, the notary identifies the paternal guardian as the child's father. If the joint declaration is authenticated by the notary, the paternal figure is listed as the child's father, rather than the paternal mother's former or current spouse. By the subsequent business day following the date of statement approval, the notary is obligated to electronically transmit the document to the civil registry office situated in the jurisdiction of the notary's office.

48 Paternity of a child born outside of wedlock can typically be ascertained through a court action or by a man who believes himself to be the father and the child's mother filing an application with a civil registry office or a public notary for a notarial declaration of acknowledgement of paternity or registration of acknowledgement of paternity, respectively. If the child is ten years of age or older, written consent is necessary for the acknowledgement of paternity. Similar to a divorce proceeding, notarial recognition of paternity requires the notary to authenticate the parties' declarations. In cases where the birth of the child has already been registered, both the acknowledgement of paternity and the establishment of paternity (maternity) are to be accompanied by an entry that modifies or supplements the civil status record. This entry rectifies the information regarding the child's parents as it appears in the birth record. Nevertheless, the acknowledgement of paternity may be concurrently recorded with the child's registration. The birth certificate will then contain the complete names of both parents of the child. In regard to the verification of paternity, neither the notary nor the civil registry requires any evidence (such as DNA tests). ([31]) To this end, even a man who is not a biological father can acknowledge the child. In the event that the mother is unable to jointly declare paternity with the father for whatever cause, the non-judicial process remains feasible; however, only provided that the father provides the notary with a report of tests substantiating biological paternity. The court must require the father of the child to provide proof of paternity when dealing with an application for recognition of paternity in which the child's mother is deceased, incapacitated, or otherwise unable to submit the application with the man claiming to be the child's father. However, biological paternity tests are not the only tests that can be utilised to establish paternity in a legal proceeding. Additional proof, such as witness testimony, is deemed valid.

49 If the father declines to acknowledge paternity, the court has the authority to

([31]) Vugar G Mammadov, Gediminas Sagatys and Roy G Beran, 'The Right to Biological Truth versus Stability of the Family' (2021) Journal of Law and Medicine 28(4), 1154–1155.

establish it. An action to establish paternity may be initiated by the child's mother, a child who has attained full legal capacity, the child's guardian (custodian), the State Authority for the Protection of the Rights of the Child, or the progeny of a deceased child, in accordance with section 3.147 of the Civil Code. The judgment pertaining to paternity is rendered by the court and functions as the foundation for amending entries in the civil registry.

50 It is important to note that a paternity ruling has *res judicata* effects. The Supreme Court declared that if the mother first filed to establish the child's paternity and the court denied it, the child cannot submit the same claim as an adult. ([32])

51 The courts are the sole authority authorised to challenge the accuracy of the mother's or father's name as it appears in the birth record, pursuant to Article 3.149 of the Civil Code. The information contained in a child's birth record regarding their mother or father that was inserted into the record pursuant to a final and conclusive judicial decision is immune from contestation. In accordance with Article 3.150 of the Civil Code, in cases where a child is born to married parents or within 300 days of the dissolution of the marriage, in order to contest paternity, one must establish that the individual in question is incapable of being the child's father.

52 In order to contest the maternity or paternity determined by a declaration of acknowledgement of paternity, it is sufficient to establish that the child's biological parent is not the declaratory parent.

53 A person who is listed as the child's mother or father in the child's birth record, a person who considers themselves to be the child's mother or father but is not listed in the child's birth record, the parents or legal guardians of a minor who is listed as the child's father in the child's birth record, or a child who has reached the age of majority may file an action for the contestation of paternity (maternity). If the parent or guardian of the child is incapable or has limited capacity in this regard, the child's custodians or guardians may initiate legal proceedings (Civil Code, section 3.151(2)).

54 Special provisions regarding jurisdiction are included in the Civil Procedure Code with regard to parent-child matters, including parenthood. According to Article 785 of the Civil Procedure Code, cases involving legal relationships between parents and children or adoption shall be heard exclusively in the courts of the Republic of Lithuania. This requirement is met when at least one of the parties involved is a stateless person or a citizen of the Republic of Lithuania, and that party must be habitually resident in the Republic of Lithuania. In the event that both parties maintain a habitual residence in the

([32]) Ruling of the Supreme Court of 4 April 2018 in civil case No 3K-3-121-378/2018.

Republic of Lithuania, the Lithuanian courts have exclusive jurisdiction over the mentioned cases. In addition, cases involving legal relations between parents and children and adoption fall under the jurisdiction of the courts of the Republic of Lithuania if both parties are foreign nationals with a habitual residence in the Republic of Lithuania.

C. *Adoption*

55 Only one type of adoption is permitted under Lithuanian law: the complete adoption of a minor child. Article 3.227 stipulates that adoption results in the elimination of personal and property rights and obligations that existed between parents and children and their descendants by descent, while also establishing such rights and obligations between the adoptive parents and their relatives, as well as between adoptive parents and their offspring who are related by descent. The adoptive parents are legally recognised as the child's parents upon the court's adoption decision becoming effective, with the exception of circumstances in which the child resided with the biological parents prior to the adoption. In the latter scenario, the adoptive parents are deemed to be the child's legal guardians from the moment the child moves to live with the adoptive family.

56 The adoption process primarily involves two institutions: the court and the child protection agencies. In accordance with Article 3.217, individuals authorised by the State Authority for the Protection of the Rights of the Child conduct an assessment of the prospective adoptive parents' health, living conditions, and living arrangements, examine whether they are free from the impediments to adoption outlined in Book 3 of the Civil Code, gather information regarding their physical well-being, and form an opinion regarding the prospective adoptive parents' readiness to adopt. Prospective adoptive parents have the option to file an appeal with the court against the conclusion reached by certified persons of the national authority for the protection of the child's rights regarding their preparedness to adopt. The determination regarding the suitability and readiness of the adoptive parents for adoption is made by the court that is hearing the adoption application. Additionally, the State Authority for the Protection of the Rights of the Child provides the court with details pertaining to the adoptive child's family, origin, development, and health.

57 It is noteworthy that prospective adoptive parents may be placed on probation for a duration of six to twelve months prior to the adoption, at their request, self-initiation, or at the request of the State Authority for the Protection of the Rights of the Child. During this period, the child may be placed with the prospective adoptive family for the purposes of maintenance,

housing, and upbringing. If a court order is issued to place the child with a family, the adoption proceedings are halted. It is important to emphasise that the child's placement with the prospective adoptive family should ensure that the child will be able to adapt to a new family. It cannot be done if there are concerns about the prospective adoptive parents' suitability to adopt the child. (33)

58 Adoption proceedings are conducted orally in closed court, as stipulated in the Civil Procedure Code, Article 484(1). Adoption proceedings are required to be conducted in the presence of both the applicants and a representative of the national authority responsible for safeguarding the rights of the child. This representative provides the court with an opinion on the adoption. While biological parents are not involved in the adoption process, their written consent is necessary if they are known, and it is feasible to obtain it. Additionally, written consent from the child is necessary if the child is over the age of ten. In the case of a younger child, written consent is necessary if feasible and if it does not conflict with the child's best interests. The court proceedings typically reach their conclusion and render an adoption decision no later than two months subsequent to the petition's filing date. If the circumstances are extraordinary and it is in the child's best interests to do so, this deadline may be extended. Either the court grants permission to adopt the child, or it denies the adoption petition. Appeals of court decisions are permissible in accordance with the Civil Procedure Code. The judgment of the court becomes effective 30 days subsequent to its issuance. The decision may be subject to the review procedure outlined in Article 366 of the Civil Procedure Code in the event of extraordinary circumstances. In its case-law, the Supreme Court emphasises that an adoption case may only be reopened under extraordinary circumstances, such as when the child's biological parents did not acquiesce to the adoption procedure. (34)

59 The court is obligated to electronically transmit the adoption decision to the civil registry office that recorded the child's birth by the next business day following the date the decision to adopt entered into force. This is to enable the office to proceed with the registration of the adoption in accordance with the procedure specified in Article 487(5) of the Civil Procedure Code and Article 13 the Law on Registration of Acts of Civil Status of the Republic of Lithuania.

60 It is also noteworthy to mention the significance of conflict-of-laws regulations in the context of international litigation. The jurisdiction over the

---

(33) Valentinas Mikelėnas et al, *Lietuvos Respublikos civilinio kodekso komentaras. Trečioji knyga. Šeimos teisė* (Justitia 2002) 425–426.

(34) The ruling of the Supreme Court of 12 January 2023 in civil case No e3K-3-58-943/2023.

adoption relationship is governed by the legislation of the country of the child's habitual residence, as stated in Article 1.33 of the Civil Code. In situations where it is evident that an adoption proceeding as per the legislation of the adoptive parents' or child's country of nationality will not be acknowledged in the State where the adopted child resides habitually, the adoption may proceed in compliance with the legislation of those States, as long as it does not compromise the best interests of the child. Adoption is prohibited in cases where the recognition of the adoption in the other State is uncertain. The jurisdiction of the State where the adoptive parent maintains a habitual residence governs the child's interactions with the adoptive parents and their family members. In addition, the previously mentioned article delineates a regulation regarding jurisdiction. This provision was incorporated into the Civil Code at a time when the Civil Procedure Code was still in manuscript form and no jurisdictional rules existed in this regard. Adoption-related matters fall under the jurisdiction of the courts of the Republic of Lithuania if either the child or the adoptive parents are habitually resident within the Republic of Lithuania.

D. *Parental responsibility*

61 The court renders its final decision on the majority of matters pertaining to parental responsibility, including but not limited to restrictions on parental responsibility, disputes concerning parental authority, and custody. However, other non-judicial institutions are also implicated in specific matters. The nature of their function may vary depending on the inquiry at hand. As an illustration, according to Article 3.250(4) of the Civil Code, the State Authority for the Protection of the Rights of the Child serves as the lawful representative of a child who is deprived of parental care pending the appointment of a guardian or caretaker. The State Authority for the Protection of the Rights of the Child or the public prosecutor may petition the court to impose a suspension on the parents from managing the minor's property if the parents or one of them mismanages the property to the detriment of the minor's property interests (Article 3.185(3) of the Civil Code). Lastly, in the event of a divorce by mutual consent, the maintenance of the child, the other parent's access rights, and the place of domicile for the child are all determined in the parents' agreement concerning the repercussions of the divorce. As was previously stated, this agreement serves as an appendix to the divorce judgment.

62 A child who is able to express their views must be heard directly or, if that is not possible, through a representative, in any matter pertaining to the child, in accordance with Article 3.164 of the Civil Code. The child's wishes

must be considered during the decision-making process, unless doing so would be contrary to what is in the child's best interests. When determining whether to adopt or appoint a guardian, the child's wishes must be the sole determining factor. A child who believes that their parents are acting in violation of those rights may independently seek redress with the State authority charged with safeguarding the child's rights, or, beginning at the age of 14, with the court.

1. *Parental responsibility – general issues*

63 In accordance with the provisions of the Civil Code, parents bear equivalent rights and responsibilities towards their offspring, irrespective of the parents' marital status, annulment, divorce, or separation status (Article 3.156(2) of the Civil Code). This holds true even if the child's place of residence has been determined by a court order favouring one parent or the other. Parental responsibility starts when the child is born, even if parenthood is established later. ([35])

64 Parents bear the responsibility of providing for their child's upbringing, safeguarding their belongings, and acting as the child's representatives. According to Article 3.159 of the Civil Code, a renunciation of rights and obligations towards minor children by the father or mother is deemed invalid. All decisions concerning the children's upbringing are reached through a process of mutual consent between the parents. In cases where a parental disagreement arises, the court presides over the dispute (Article 3.165 of the Civil Code). The child, in general, resides with the parents. In situations involving parental separation, the child's place of residence is established through mutual consent between the parents. In the event of a parental dispute regarding the child's place of residence, the court's ruling designates one of the parents as the child's guardian (Article 3.169 of the Civil Code).

65 A non-custodial parent possesses both the entitlement and responsibility to maintain communication with the child and actively participate in their development. Regardless of the residence of the parents, a child who is separated from one is entitled to consistent and direct communication with siblings. In situations where the parents are unable to reach a consensus regarding the separated parent's access to, and involvement in, the child's upbringing, the court makes determinations regarding access and participation in the child's upbringing.

([35]) Valentinas Mikelėnas et al, *Lietuvos Respublikos civilinio kodekso komentaras. Trečioji knyga. Šeimos teisė* (Justitia 2002) 299.

2. *Restrictions on parental responsibility*

66 When it is necessary to determine where a child should reside and objective circumstances (such as illness) prevent the parents from living together with the child, the court may order the child to be separated from the parents. In the event that one parent is facing adverse circumstances, and the other parent is capable of living together and raising the child, the child is separated only from the parent incapable of taking care of them (Article 3.179 of the Civil Code).

67 In accordance with Article 3.180 of the Civil Code, restrictions on parental responsibility include conditions, procedures, and repercussions. In situations where a parent (father or mother) fails to fulfil their responsibilities regarding parenting, abuses their position of authority, exhibits cruelty towards the children, negatively impacts their moral development, or neglects to provide for the children, the court has the authority to temporarily or permanently restrict parental authority. The latter list of grounds for limitation of parental responsibility is final. (36) In situations where temporary custody of a child has been granted on the basis specified in Article 3.254(3) of this Code, the State Authority for the Protection of the Rights of the Child applies to the court for a restriction of the parent's authority within 60 calendar days of the establishment of temporary custody of the child. However, this requirement does not apply in cases where the parent is making an effort to regain custody of the child subsequent to the establishment of temporary custody. In determining whether to impose a temporary or permanent restriction of parental authority (father's or mother's), the court considers the particular circumstances surrounding the petition for such restriction. A court may order an indefinite deprivation of parental authority if it determines that one or both parents are significantly impeding the child's development or are not providing adequate care for the child, and there is no indication that this will alter in the foreseeable future. When parental authority is temporarily or permanently restricted, the legal personal and property rights of the parents, which are established by kinship, are suspended. The right to visit the child shall be upheld, unless doing so would not be in the child's best interests. Lithuanian case-law prioritises maximum communication with the child. (37)

---

(36) Valentinas Mikelėnas et al, *Lietuvos Respublikos civilinio kodekso komentaras. Trečioji knyga. Šeimos teisė* (Justitia 2002) 350.

(37) Inga Kudinaviciute-Michailoviene, Ausra Maslauskaite, 'Enforcement of Parental Obligations: Legal and Sociological Aspects of Contact and Maintenance Arrangements' in Kalvis Torgans et al (eds), *Constitutional Values in Contemporary Legal Space II. Collection of*

68 When parental authority is indefinitely restricted, the child may be adopted without the separate consent of the parents. The limitation of parental authority is solely applicable to those children and solely to the parent regarding whom the court has rendered the decision.

69 The simplified procedure governs applications for the revocation of the separation of a child from its parents, as stated in Article 3.183. When there are indications that a temporary or permanent deprivation of parental authority is warranted, the application is referred to the court to be adjudicated in contentious proceedings. In actions referred to it by the parents, the court is not bound by the claims made in applications for the restriction of parental authority and the separation of the child from the parents. Rather, the court bases its decision on the circumstances and the child's best interests. The court considers the opinions of minors who have the capacity to articulate those opinions.

70 Child support is awarded, and the child's place of residence is determined by the court in the same decision that restricts parental authority until the court's decision regarding the establishment of guardianship (custody) enters into force. The State Authority for the Protection of Children's Rights and, if required, the public prosecutor, shall petition the court for the continuation of the temporary restriction of parental (paternal or maternal) authority or for the establishment of an indefinite restriction of parental (paternal or maternal) authority no later than within six months from the date the court decision on the temporary restriction of authority enters into force.

71 The State Authority for the Protection of Children's Rights is obligated to participate in the proceedings pertaining to the limitation of parental authority, as stated in Article 3.184. A report on the dispute shall be submitted to the court by the State Authority for the Protection of Children's Rights subsequent to an examination of the family's living conditions. However, this requirement does not apply in cases where the action is initiated by the same national authority for the protection of children's rights. This report is evaluated by the court alongside the remaining evidence in the case.

3. *Disputes regarding children*

72 Disputes pertaining to children are governed by Articles 3.173–3.178 of the Civil Code. These provisions address matters such as the child's place of residence, disputes between separating parents concerning access to, and participation in, the child's upbringing, disagreements concerning the child's

---

Research Papers in Conjunction with the 6th International Scientific Conference of the Faculty of Law of the University of Latvia (University of Latvia 2017) 118.

contact with relatives, and disputes concerning the child's name and surname. The court resolves disputes concerning the child's identity, place of residence, and access rights through a simplified procedure. The resolution of conflicts pertaining to the ability of children to interact with their relatives is the responsibility of the State Authority for the Protection of Children's Rights.

73 As stipulated in Article 3.176, the State Authority for the Protection of Children's Rights may compel parents to grant contact with the child's close relatives and other relatives with whom the child shares an emotional bond, in the event that the parents refuse to agree to such contact. If such contact is against the child's best interests, the State Authority for the Protection of Children's Rights may deny parental requests to permit contact with the child's close relatives and other relatives with whom the child has emotional attachments. In situations where the parents fail to adhere to the directives of the State Authority for the Protection of Children's Rights or when the child's close relatives or other emotionally connected relatives disagree with the Authority's refusal to order the parents to facilitate access to the child, the child's close relatives or other emotionally connected relatives may submit an application to the State Authority for the Protection of Children's Rights.

E. *Matrimonial property regimes*

74 The Civil Code distinguishes between matrimonial property regimes established by law and by contract. In the absence of a matrimonial agreement, the assets of the partners are governed by the statutory property regime, as outlined in Article 3.82 of the Civil Code. The legal regime governing the property of the spouses may be established through the execution of a marriage contract (Civil Code, Article 3.83 (1)).

75 The Civil Code establishes a specific institution of family property, which can be seen as an autonomous legal regime of property rather than an alternative form of personal or community property. One of the main features of this institution is that family property must be used exclusively for the common needs of the family. ([38]) Family property refers to a portion of the estate, regardless of the matrimonial property regime in place. The use of family property shall be limited to the family's common requirements. Family property consists of the following items, which are owned by either one or both spouses: 1) the family home; 2) movable property, including furniture,

([38]) Inga Kudinavičiūtė-Michailovienė, 'Šeimos narių teisės į gyvenamąją patalpą įgyvendinimas ir gynimas' (2009) Socialinių mokslų studijos 3 (3), 199.

that is intended to provide for the requirements of the family household. Moreover, the ability to utilise the family home is acknowledged as family property. As of the date of registration of the marriage, the property mentioned earlier shall attain the legal classification of family property. However, for the spouses to invoke this status against legitimate third parties, it is necessary for the immovable property to have been officially registered in the public registry as family property.

76 Additionally, the Lithuanian Civil Code specifies particulars regarding the property of individuals who are registered partners. Article 3.230 permits partners to possess property that is utilised jointly. This may consist of immovable property that is owned by both partners, rented by one of them, or both, as well as furniture and other domestic items that are jointly acquired and utilised (excluding items used individually by the partners). In cases where previously mentioned immovable property or rights are registered in the name of one of the cohabitants, the two cohabitants may jointly request the relevant public register to amend the entry to reflect the joint use of the property or rights by both partners. A public notary certifies the authenticity of the signatures provided by the cohabitants in the aforementioned request. The partners possess the authority to reach a notarial agreement stipulating the manner in which the property obtained and utilised collectively is to be divided subsequent to the termination of their cohabitation. *Mutatis mutandis*, the provisions pertaining to contractual matrimonial property are applicable to said contract. Without a notarial-attested agreement on the division of property, all assets acquired or utilised by the partners during their cohabitation may be divided at the request of one of the partners, in accordance with a court order, at the conclusion of their cohabitation, or upon the death of one of the partners.

77 It is noteworthy that the registration of partnerships is not permitted under Lithuanian law. Consequently, the aforementioned provisions may only be applicable if the partnership is officially registered outside of Lithuania.

1. *Matrimonial property regime established by law (statutory matrimonial regime)*

78 The statutory matrimonial property regime stipulates, pursuant to Article 3.87(1) of the Civil Code, that property obtained by the spouses subsequent to their marriage becomes their joint property. Articles 3.88–3.89 of the Civil Code establish a distinction between the rights and objects comprising joint property and those constituting private property of the spouses. However, individual property may be recognised as the joint property of spouses under certain circumstances. This is possible through a judicial process. A dispute

between the spouses concerning the management of their joint property may also necessitate court intervention. If one spouse declines to grant the other consent for a transaction that necessitates the consent of the other, the concerned spouse may petition the court for authorisation to proceed with the transaction (Civil Code, Article 3.93(1)). Furthermore, in accordance with Article 3.94(2) of the Civil Code, in the event that one spouse is absent or unable to jointly manage the community property for other significant reasons, the other spouse may petition the court for authorisation to manage the property. The court may grant an authorisation for a single action, specifying the period of time for which the authorisation is granted. ([39])

79 If one spouse is incapable of overseeing the joint property or is doing so unprofitably, the other spouse may petition the court for the spouse's removal from the property management. Should the spouse provide evidence that the requested action is essential for the operation of the joint matrimonial enterprise or to provide for the needs of the family, the court grants the petition. A spouse who has been barred from administering the community property by the court may reapply to the court for permission to do so (Article 3.95 of the Civil Code) once the circumstances that led to their exclusion have ceased to exist.

80 If one spouse manages or neglects their personal property in an unreasonable and negligent fashion, thereby putting the family's interests at risk through significant depreciation or loss, the other spouse may petition the court to appoint an administrator of the property. Upon request, the spouse may also be designated as the administrator. If the conditions that originally prompted the appointment of an administrator no longer hold true, either spouse may petition the court to revoke the administration of the property (Article 3.97(2) of the Civil Code).

81 A list of grounds for the termination of joint matrimonial property is specified in the Civil Code. For example, it may occur subsequent to the equitable distribution of communal assets as determined by a court order or a mutual agreement between the partners.

82 Article 3.116 of the Civil Code states that property designated as community property can be divided among spouses through mutual agreement, a court order at the petition of one spouse, or their creditors. This provision applies regardless of the marital status of the spouses. Spouses' shares in their common property are considered equal. Nevertheless, in accordance with Article 3.123 of the Civil Code, a court may deviate from the principle of equal shares of the community property of the spouses by granting a greater

([39]) Valentinas Mikelėnas, *Šeimos teisė* (Vilnius 2009) 173.

portion to one spouse, while considering other pertinent factors such as the financial situation of one of the spouses or the welfare of minor children. In addition, these factors must be considered by the court when determining the way in which the community property is divided. A court order or the mutual agreement between the spouses regarding the division of marital property is required to be recorded in the register of marriage contracts (Article 3.125 of the Civil Code). Claims for the division of matrimonial property, excluding immovable property, are subject to a five-year statute of limitations beginning on the date the spouses began living apart (Article 3.129 of the Civil Code).

2. *Contractual matrimonial property regime*

83 A matrimonial contract may be signed either prior to the registration of the marriage (pre-nuptial agreement) or at any point subsequent to its registration (post-nuptial agreement), as stipulated in Article 3.102 of the Civil Code. The matrimonial contract must be concluded in notarial form. Moreover, the contract, as well as amendments thereto, must be registered in the register of marriage contracts.

84 A marriage contract that was executed prior to the marriage's registration becomes enforceable on the date the marriage is registered. It is worth mentioning that the law does not specify how long before marriage a pre-nuptial agreement may be drafted. (40) In the case of a post-nuptial agreement, unless it specifies otherwise, the date of the marriage contract's conclusion is its effective date. By mutual agreement of the spouses, a marriage contract may be modified or terminated at any time in the same manner as when it was initially executed. The marriage contract may be amended or terminated by a court decision at the request of one of the spouses, provided that the grounds for modification or termination are specified in the general rules applicable to contracts (Article 3.106 of the Civil Code). A marriage contract may also be deemed completely or partially invalid in accordance with the Civil Code's general principles for declaring contracts void (Article 3.108 of the Civil Code).

III. Succession law

85 The primary comprehensive regulations pertaining to succession are outlined in Book Five of the Civil Code of Lithuania. Significant provisions are also outlined in the Civil Procedure Code and the Law on the Notarial Profes-

(40) Valentinas Mikelėnas, *Šeimos teisė* (Vilnius 2009) 215.

sion. Notaries are responsible for matters such as the validation of wills, the issuance of a certificate of the right of inheritance and of a certificate of the right of ownership for the surviving spouse in respect of the deceased person's share of the matrimonial community property, and the handling of inheritance proceedings. (41) If a dispute arises in relation to these matters, it is for the court to decide on them. The court also carries out certain other actions related to the right of succession: it establishes facts of legal significance (concerning the acceptance of the inheritance by taking actual possession of the property), decides on the extension of the time limits for the acceptance of the inheritance, authorises the acceptance of the inheritance in the name of a minor or an incapacitated person, and appoints the administrator of the succession estate. (42) It is crucial to emphasise that, in accordance with the EU Succession Regulation, Lithuanian notaries are not regarded as courts and do not carry out judicial duties, act in delegation of authority by a judicial authority, or operate under the supervision of a judicial authority. (43)

86 The Supreme Court commenced its examination by referring to Article 3(2) of the Succession Regulation. The subsequent factors were predominately determined by the Law on the Notarial Profession. In order to safeguard the legitimate interests of the State and uncontested rights and facts of natural and legal persons, notaries are authorised by Article 1 of this legislation to establish such matters. A notary is obligated to exercise heightened diligence and caution in their work, to rigorously adhere to the law, and to decline to perform notarial acts that violate or fail to comply with the law. This conception of a notary's duties assumes that the notary refrains from resolving conflicts between the involved parties, from establishing circumstances that are subject to dispute, and from attesting to legal facts or rights of individuals if there are uncertainties or disagreements. In order for a notary to certify particular rights or facts, their veracity and legality must be beyond any reasonable doubt.

87 As stipulated in Article 26(1)(2) of the Law on the Notarial Profession, notaries are authorised to issue (national) succession certificates in the performance of notarial acts. According to prior Supreme Court case-law,

---

(41) Svajonė Šaltauskienė, 'Paveldėjimo teisė: lyginamieji aspektai' in Gediminas Sagatys (ed), *Lietuvos Respublikos civilinis kodeksas: pirmieji dešimt galiojimo metų* (Vilnius 2013) 651.

(42) Svajonė Šaltauskienė, 'Paveldėjimo teisė: lyginamieji aspektai' in Gediminas Sagatys (ed), *Lietuvos Respublikos civilinis kodeksas: pirmieji dešimt galiojimo metų* (Vilnius 2013) 651.

(43) The ruling of the Supreme Court of 4 November 2020 in civil case No e3K-3-422-378/2020.

the facts stated in notarised documents are presumed to be true and cannot be rebutted until those documents (or portions thereof) are deemed invalid in accordance with the legally prescribed procedure (Article 26(2) Law on the Notarial Profession).

88 When an heir disputes a succession matter, the matter is resolved in a court in accordance with Article 12 of the Law on Courts. (44) Specifically, this Law designates the Supreme Court of Lithuania, regional and district courts, and courts of general jurisdiction over such disputes. The Supreme Court reached the conclusion that the issuance of a national succession certificate does not authorise the performance of judicial functions, given that Lithuanian notaries lack the authority to rule on the issues that led to the dispute between the parties, to establish facts that are not clear and obvious, and to decide on disputed facts. Consequently, insofar as notaries do not qualify as courts as defined by the Succession Regulation, they are not subject to its jurisdictional regulations. In order to establish a standardised procedure for cross-border inheritance disputes, the Supreme Court noted that the legislature could require Lithuanian notaries to adhere to the jurisdictional rules outlined in the Succession Regulation. However, in their absence, cross-border succession cases in Lithuania must adhere to national law regulations.

89 Given these circumstances, it is the responsibility of notaries to ascertain jurisdiction in accordance with the domestic regulations on jurisdiction outlined in the Civil Procedure Code or the bilateral agreements to which Lithuania is a signatory. Legislative efforts have been ongoing in recent times to establish national provisions that would permit Lithuanian notaries to employ the jurisdictional rules of the EU Succession Regulation.

A. *Devolution of the estate*

1. *Acceptance and waiver of the inheritance*

90 The Civil Code regulates the acceptance, waiver, and liability with regard to the debts of successors in Articles 5.50–5.67. Article 5.50 of the Civil Code stipulates that the heir must accept the succession in order to acquire it. It is prohibited to accept the succession in part, with a condition, or with a reservation. It is presumed that the heir has accepted the succession when they either take physical possession of the inherited property or file a declaration of acceptance with the notary. It is necessary for these actions to be completed within a period of three months from the date the succession

(44) The Law on Courts of the Republic of Lithuania [Lietuvos Respublikos teismų įstatymas], 1994, I-480.

takes place. However, their legal ramifications shall only become apparent if the succeeding heirs do not accept the succession by operation of law or testament. Within three months of their birth date, heirs born subsequent to the event of the inheritance are required to acknowledge the inheritance. Acceptance of the succession must be reported to the register of wills ([45]) by the notary within three business days of the acceptance date.

91 As stipulated in Article 5.51, the heir is considered to have accepted the succession upon assuming possession of the property and commencing to manage it as if it were their own (by owning, using, and disposing of it, maintaining it, paying taxes, petitioning the court to declare their intention to accept the succession and appointing an administrator of the estate, and so forth). Upon acquiring any portion of the estate, including an object, the heir is considered to have acquired the entire estate.

92 The heir who has acquired ownership of the property shall be permitted to renounce the succession by filing a declaration to that effect with the notary of the location where the succession occurs, within the time limit specified for the acceptance of the succession (within three months after the occurrence of the inheritance). Under these circumstances, the heir shall be considered to have acquired ownership of the estate for the benefit of the remaining successors.

93 In accordance with Article 5.60 of the Civil Code, within three months from the date of the inheritance, the heir at law or the heir designated in the will may elect to waive the inheritance. Waivers of an inheritance, in whole or in part, with conditions and reservations, are not permitted. The repercussions of waiving the inheritance are equivalent to those of declining to receive the inheritance. By registering a declaration with the notary of the location where the inheritance occurs, the heir may waive the inheritance. Nevertheless, in the event that the heir has submitted a declaration of acceptance of the inheritance to the notary in the location where the inheritance transpired or requested a certificate of the right of inheritance, the inheritance may not be relinquished.

94 It is important to note that notaries do not resolve succession disputes. The issuance of the certificate of succession is restricted to instances that are beyond dispute.

95 If the heir specifies in the application for acceptance of the succession submitted to the notary that they wish to accept the succession in accordance with the inventory of the estate, the inventory of the estate shall be prepared in accordance with the procedure provided for in Articles 5.53 and 5.54 of

---

([45]) The register of wills is not an authority but the centre of registers is a company that administers different registers.

the Civil Code, and the heir's liability for the debts of the deceased are determined accordingly. If at least one heir has accepted the succession according to the inventory, all the other heirs are deemed to have accepted the succession according to the inventory. (46)

96 In summary, the heir must submit an application to the notary within three months to accept or waive the succession. The application should include an assertion regarding the acceptance of the succession in accordance with the inventory. In the absence of further dispute among the heirs, the notary will then proceed to issue a certificate of succession. The succession certificate contains details of the deceased, the heir(s), the basis of the succession and a description of the property constituting the estate. Testamentary wishes and obligations are not entered in the succession certificate but are communicated to the heir by the notary. The succession certificate also does not include inherited obligations and the heir's share thereof. (47) The certificate might be challenged in the court.

2. *Testamentary succession*

97 Official and personal wills are recognised under Lithuanian law (Civil Code, Article 5.27). Article 5.28(1) of the Civil Code defines official wills as those that are executed in triplicate in writing and attested by a public notary or a consular official of the Republic of Lithuania in the country where they are to be executed. While specific circumstances may permit the official will to be certified by another individual (eg, a ship's commander), it is still mandatory for such documents to be deposited with a notary. From the moment they are deposited with a notary, they have the same legal effect as official wills certified by a notary. (48)

98 A personal will is defined by Article 5.30(1) of the Civil Code as a testamentary document signed by the testator and consisting of the following: the testator's name, the date (month, year), and day of the will's drafting, the location where the will was drafted, and an expression of the testator's wishes. For the purpose of the personal testament, the testator may entrust it to a consular officer of the Republic of Lithuania situated in a foreign jurisdiction or a public notary. It is necessary to ascertain the identity of the testator prior to accepting the will for preservation. In order for a personal

---

(46) Ruling of the Supreme Court of 28 March 2011 in civil case No 3K-3-135/2011.

(47) Eglė Čaplinskienė, 'Notarų funkcijos paveldėjimo bylose' in Sandra Venclovienė (ed), *Notariato teisė* (Lietuvos notarų rūmai, 2014) 261.

(48) Svajonė Šaltauskienė, 'Paveldėjimo teisė: lyginamieji aspektai' in Gediminas Sagatys (ed), *Lietuvos Respublikos civilinis kodeksas: pirmieji dešimt galiojimo metų* (Vilnius 2013) 672.

testament deposited for safekeeping to be considered an official testament, it must meet the subsequent conditions at the moment of depositing:

(1) the will is transmitted by the testator, who affirms that the document constitutes their final testament and will;
(2) the will is deposited in a sealed envelope, stamped with the stamp of the accepting institution, and both the testator and the person accepting the will put their signatures on the envelope;
(3) a document attesting the acceptance of the will for safekeeping provides confirmation that the conditions outlined in paragraph 2(2)(1) and (2) of this Article have not been violated, describing the acceptance of the will. Both the testator and the official who received the will for safekeeping affix their signatures to the deed.

99 The secure deposit box of the accepting office shall be utilised to store the accepted will. The will may be revoked by the testator at any time. The testator may designate a representative to receive the will in accordance with a special power of attorney. In the absence of adherence to the procedure specified in this Article regarding the deposit of personal wills, such wills are submitted to the court for confirmation within one year of the testator's death. In this situation, only the court-approved will is enforceable.

100 Upon becoming aware of the death of the testator, the notary of the place of the opening of succession shall immediately establish the day for the announcement of the will and inform the known successors and other interested persons about it. If the envelope containing the will is stamped, it is necessary to write a protocol where it must be noted whether the envelope and the stamps are intact. In the event that there are several wills, all of them shall be announced. (Civil Code subsection 5.33).

101 The notary responsible for opening the will promptly notifies the heirs and other interested parties who were not present during the will's opening of its contents and take necessary measures to determine their place of residence.

102 As required by law, the immediate family of the deceased is granted heirship privileges in Lithuania. According to the provisions outlined in Article 5.20 of the Civil Code, dependent children (adoptees), spouse, parents (adoptive parents), and children (adoptive children) of the deceased are entitled to inherit half of the share that they would have received in the succession as per the law (their mandatory share), notwithstanding any allocation to the contrary in the will. The amount of the mandatory share is determined by considering the value of the inherited property, which includes the value of common domestic furnishings and utensils.

103 Article 5.17(1) of the Civil Code stipulates that an attempt to nullify a will or portions of a will may solely be initiated by the other successors at law or as stipulated in the will who would be entitled to inherit in the event that the

will or portions were annulled. The case is deliberated by the court using a streamlined procedure.

B. *Certificates of succession*

104 The notary-issued certificate of succession serves as proof of the heir's or legatee's position. Upon delivery of a certificate to the heir or legatee, the entirety (or a portion thereof) of the property inherited by the heir is detailed. (49) In accordance with Article 1.75 of the Civil Code, an heir who inherits property that is required to be registered in the public register may not enforce the inheritance's right of ownership against third parties until after the property has been duly registered in the public register. The aforementioned certificate functions as evidence of ownership when modifications to ownership are recorded in the public registry.

105 The successors are provided with the succession certificate three months subsequent to the succession date. A certificate of the right of succession may be issued to natural persons in the event of inheritance by operation of law or bequest, provided that the notary has evidence that there are no additional heirs besides the individuals applying for the certificate of the right of succession prior to the expiration of three months from the date of the occurrence of the succession. A court is the sole authority that can declare a certificate of succession invalid, given that its issuance carries legal consequences. Even with the consent of all beneficiaries, a certificate of succession cannot be revoked by a notary. (50)

106 In the process of issuing the certificate of the right of succession, the notary is tasked with the following responsibilities: to authenticate the deceased's death and the time and location of the inheritance; to examine the composition and location of the inheritance; to determine whether the inherited property belonged to the deceased by right of ownership; to assess the number of co-owners, liens, and other pertinent details by consulting public registers and other official sources. (51) To substantiate the aforementioned conditions, the notary can demand evidence from the applicants.

107 Additionally, notaries in Lithuania have the authority to issue European Certificates of Succession. Formal documentation is not provided for the request to issue said Certificate. The documents that are necessary are

---

(49) Eglė Čaplinskienė, 'Notarų funkcijos paveldėjimo bylose' in Sandra Venclovienė (ed), *Notariato teisė* (Lietuvos notarų rūmai 2014) 261.

(50) Petrauskaitė Daina, 'Paveldėjimas' in Vytautas Pakalniškis, Leonas Virginijus Papirtis (eds), *Civilinė teisė. Bendroji dalis* (Vilnius 2008) 541.

(51) Vytautas Nekrošius, *Notariato teisė* (Dangerta 1997) 87–91.

enumerated in Article 65 (3) of the Succession Regulation. The subsequent steps are identical to those required to issue a national certificate.

108 The will is executed by an individual designated as the executor by the testator, an heir, or a court-appointed administrator of the estate. In the event that a testamentary executor is designated, the notary has to furnish said executor, upon request, with a certificate attesting to their designation as executor of the will. In the event that the will executor is granted authority over a restricted portion of the estate, it is imperative that this information is explicitly included in the certificate that is granted to them.

C. *Administration of estates*

109 The will is executed by an executor, heir, or administrator of the estate designated by the testator, in accordance with Article 5.37 of the Civil Code. An individual may not be appointed executor of a testamentary instrument against the testator's wishes; however, an executor-in-charge may not renounce their responsibilities without sufficient justification. One or more executors may be appointed by the testator. A secondary executor may also be appointed by the testator if the primary executor is incapable of carrying out their responsibilities. In this instance, the secondary executor's consent must be conveyed in either an entry within the will or in a statement appended to the will. A signatory to the testator's will is ineligible to serve as executor.

110 In the absence of an executor designation by the testator or if the designated executor or heir is incapable of fulfilling their responsibilities, the district court of the jurisdiction where the succession has emerged designates an administrator of the estate. This individual performs all tasks required to execute the will. The individual who has initiated the will's execution is not permitted to halt its execution without justification.

111 In accordance with Article 5.38 of the Civil Code, the executor of the will carries out every action required to execute the will's provisions. In the absence of the appointment of an administrator of the estate or the identification of the heirs, the executor of the will performs the following duties as an heir: administering the estate, preparing an inventory of the estate, discharging debts from the estate, collecting debts from the debtors of the deceased, supporting dependents financially, searching for heirs, determining whether the heirs accept the estate, and so forth. The provisions of a will serve as a manual of instructions for the executor of that will. Prior to carrying out the administration of the will, the executor consults the successors. In cases involving the execution of a will, the district court of the location where the succession took place has jurisdiction to adjudicate. The

executor of a will is to carry out their responsibilities with the same degree of diligence with which they attend to their personal affairs. Should the executor be compensated for their services, they additionally bear responsibility to the beneficiaries and other interested parties for any detriment resulting from their negligent deeds.

112 In cases where the testator appoints multiple executors without explicitly delineating their respective rights and responsibilities, they act jointly. In any disagreements regarding the implementation of the will, a court of law has jurisdiction. By way of a common agreement, the executors are jointly and severally liable for any actions carried out. In cases where the testator has delegated the execution of a specific portion of the will to another executor of the will or given that executor a specific mandate, that executor is held liable solely for their own actions.

113 The expenses related to the execution of a will are the responsibility of the estate. Aside from what the testator may specify in their will, an executor carries out their responsibilities without compensation.

114 As stipulated in Article 5.42 of the Civil Code, in the event that the executor of the will or the administrator of the estate fails to fulfil their responsibilities adequately or infringes the interests of the testator's creditors, heirs, beneficiaries of the testamentary exception, or other interested parties, the court situated at the location of the succession has the authority to dismiss the executor of the will and appoint an administrator, at the petition of the latter.

115 As stipulated in Article 5.55 of the Civil Code, circumstances in which the bequest comprises a farm, a sole proprietorship, or where the debts of the deceased may surpass the estate's value permit the heir who has accepted such bequest to petition the court of the estate's place of origin to designate an administrator of the estate. This application may also pertain to an administrator designated to handle matters concerning the commencement of bankruptcy proceedings or the initiation of auctions. Under such circumstances, the estate is used exclusively to satisfy the debts of the deceased. The administration of the estate is constituted by order of the district court of the location from which the estate originated. The court designates the administrator of the estate and establishes their compensation through said order.

116 If the estate is of modest value and the expenses associated with administration would exceed the estate's value, or if a significant portion of the estate would be allocated to administrative costs, the establishment of an administration shall be precluded. If the estimated expenses of administration exceed the value of the estate, the administration of the estate is revoked. The administrator of the estate is subject to the same rights and responsibilities as the executor of the will (Article 5.38 of the Civil Code). Additionally, they are bound by the provisions outlined in Chapter XIV of Book IV of the Civil

Code, *mutatis mutandis*. When there are multiple successors, they are required to submit a joint application for the administration of the estate. The establishment of an administration of the estate is prohibited once the successors have assumed possession of the property. In the aforementioned situations, should the administration of the estate not be established or revoked, an inventory of the estate is prepared, and the remaining obligations of the deceased are satisfied exclusively with funds from the estate. In the event of a dispute among the successors regarding the administration of the estate, the court issues a suitable order to resolve the matter.

IV. Status of natural persons

A. *Name changes*

1. *Substantive requirements*

117 According to Lithuanian law, a natural person's name may be modified in one of two circumstances: when their family status changes or is acquired (as governed by the Civil Code, the Law on the Registration of Civil Status Acts, and the Rules on the Registration of Civil Status Records; for instance, marriage, divorce, adoption, or child acknowledgement); when their name or surname is changed in an administrative procedure (in accordance with the Rules on Changing a Person's Name and the Law on Writing a Person's Name and Surname in the Documents of the Republic of Lithuania ([52]), the Rules on Writing a Person's Name and Surname on Identity and Other Documents ([53])).

118 A name change is permissible in accordance with the provisions of the Civil Code for the following reasons:

- — concluding a marriage (Article 3.31 of the Civil Code);
- — dissolving a marriage (Article 3.69 of the Civil Code); and
- — adoption (Article 3.228 of the Civil Code).

119 It is noteworthy that a child is entitled to the surname of their parents (Article 3.167(1) of the Civil Code). If the parents have different surnames,

---

([52]) Law on Writing a Person's Name and Surname in the Documents of the Republic of Lithuania [Lietuvos Respublikos asmens vardo ir pavardės rašymo dokumentuose įstatymas], 2022, XIV-903, available in Lithuanian at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/32ec5f92790211ecb2fe9975f8a9e52e?jfwid=xo46sndtc>.

([53]) Rules on Writing a Person's Name and Surname on Identity and Other Documents [Asmens vardo ir pavardės rašymo asmens tapatybę patvirtinančiuose ir kituose dokumentuose taisyklės] 2022, 424, available in Lithuanian at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/efc0e036c6e811ecb69ea7b9ba9d787b?jfwid=11kq9466hk>.

they may choose to grant the child the surname of one of them or both (Article 3.167(2) of the Civil Code). The court will determine the child's surname if the parents are unable to reach a consensus on this (Article 3.167(2) of the Civil Code).

120 In accordance with Article 2 of the Rules on Changing a Person's Name ([54]), stateless persons, foreign nationals, and Lithuanian citizens are all entitled to modify their given name and/or surname. A person can apply for the modification of their name at the age of 16. However, if the person wants to modify the name because of transsexuality, the eligible age is 18. It is worth mentioning that according to the Rules, modifications to the civil status records maintained for a stateless individual or a citizen of a foreign State may solely be made at the civil registry offices of the Republic of Lithuania or at diplomatic missions and consular offices of the Republic of Lithuania. An exhaustive list of circumstances for name changes is provided in the Rules. According to Articles 9 and 91 of the Rules, a person may change their name if:

- they wish to have the surname of their parents or one of them (Article 9(1));
- they wish to have the surname of a grandparent, great-grandparent or other ancestor in the direct line of descent, or the surname of one of them;
- they wish to have a binomial surname;
- they wish to have the surname of a stepfather (stepmother), former guardian (former or current guardian);
- they have a form of surname that does not correspond to their gender;
- they wish to have a different surname on the basis of the existing surname (with a different ending or a different suffix, without a suffix or with a suffix), if the preferred surname is in traditional usage;
- after the registration of a marriage, they wish to take the surname they share with their spouse, or the hyphen(s) of their spouse's binomial (plural) surname, in place of the existing surname;
- after the registration of a marriage, they wish to add to their existing surname the surname of their spouse or the chosen suffix of their spouse's binomial (plural) surname;
- they wish to regain any surname previously held;
- they wish to acquire a form of surname which does not indicate marital status, or vice versa;

([54]) Rules on Changing a Person's Name [Asmens vardo ir pavardės keitimo taisyklė], 2016, 1R-333, available in Lithuanian at: <https://www.e-tar.lt/portal/lt/legalAct/fee03400ccd711e6a2cac7383cbb90a3/asr>.

— they wish to acquire the same surname, but ungrammatical (without the Lithuanian ending like -ienė, -ūtė, -čius), in place of their non-Lithuanian surname (with a Lithuanian ending), or vice versa, to acquire the same surname, but grammatical, in place of their non-Lithuanian surname (without Lithuanian ending);
— they wish to give up the suffix(es) of their existing binomial (polynomial) surname;
— they wish to interchange the suffixes of an existing binomial (plural) surname;
— the applicant has acquired or changed their name and/or surname in a foreign country where they reside or have resided or of which they are or have been a national;
— the applicant wishes to have their name and/or surname written in Lithuanian characters in accordance with the pronunciation (transcription rules into Lithuanian);
— they wish to write their name and/or surnames in the Latin alphabet (without diacritical marks).

121 According to Article 9^2 of the Rules, an applicant who has been recognised as transsexual may change their name if they wish to have the forms of the other gender's name and surname.

122 It is worth mentioning that, until 2022, if a Lithuanian citizen changed their name or surname to a name of foreign origin, it had to be written in the Lithuanian alphabet according to pronunciation. Therefore, for instance, the letter 'w' was changed to 'v', 'x' to 'ks', and 'q' to 'kv', and double letters like 'll' to a single letter. (55) The Law on Writing a Person's Name and Surname in the Documents of the Republic of Lithuania changed the former rules on writing names of Lithuanian citizens and allowed the spelling of the name and surname in the Latin alphabet (without non-Lithuanian diacritical marks) irrespective of whether they were acquired in Lithuania or in a foreign State. (56)

2. *Procedural steps*

123 In order to modify their name or surname, an individual must submit an application to the civil registry or, in the case of residing overseas, to the consulate. The process of modifying one's name or surname can be completed remotely. In contrast, in order to modify both the given name and

(55) These changes could alter the name significantly. For instance, the name 'William' would be written as 'Viljam', 'Maximillian' as 'Maksimiljan'.

(56) Katažyna Bogdzevič, 'Teisiniai pokyčiai asmenvardžių rašymo srityje' in Lyra Jakulevičienė and Vytautas Sinkevičius (eds), *Lietuvos teisės 2022. Esminiai pokyčiai* (Vilnius 2022) 302.

surname, the applicant is required to submit the application in person (Article 16 of the Rules). In accordance with Article 20 of the Rules, foreign-issued documents must be translated into Lithuanian and apostille-certified or legalised, unless international treaties of the Republic of Lithuania and legal acts of the European Union provide otherwise. Furthermore, as stated in Article 22, the civil registry office must receive documents attesting to the records of civil status deeds when the surname is changed to the surnames of parents or other ancestors. These documents must establish that the applicant's desired surname was previously held by their parents, grandparents, great-grandparents, other forefathers, or other forefathers in the line of descent, if not already included in the register. In contrast, in cases where a surname change is initiated pursuant to the provisions outlined in subparagraph 9.4 of the Rules, supporting documentation must be submitted to the civil registry office to verify that the individual in question is the stepfather/stepmother, and was (or is), or currently serves as, the applicant's legal guardian. Additionally, written consent in the form of a form-free agreement from the stepfather/stepmother or legal guardian is required for the application.

124 If a person's name is changed due to transsexuality, a certificate issued by a Lithuanian health care institution stating that the person has been recognised as transsexual, or a medical document issued by a health care institution in a Member State of the European Union, must be presented to the civil registry.

125 Pursuant to Article 28 of the Rules, in the event of a name and surname change, a name change file is created. The application or a copy of the application submitted electronically through the civil registry information system is stored in the file, which also contains all pertinent information pertaining to the name and surname change. If the civil registry office's archives do not include records of civil status acts pertaining to surname and name changes, the civil registry office is obligated to procure the required duplicates from the State archives or an alternative civil registry office. It is necessary to restore a misplaced civil status record in adherence to the regulations outlined in the register of civil status records, which have been approved by the Minister of Justice.

126 When there is any ambiguity concerning the correct spelling of personal names, the State Lithuanian Language Commission is to be consulted.

127 With the conclusion(s) in the prescribed format regarding the change of name and/or surname, the case is closed. The staff member who drafted the conclusion affixes their signature to it, and it is approved by the head of the civil registry office, or another duly authorised official of that office.

128 In order to modify their current name and to reflect their transsexual orientation, or a foreign origin of a name or surname, or to write a name or

surname in the Latin alphabet (without diacritical marks), approval from the Ministry of Justice is necessary. Under such circumstances, the report must bear the signature of the head of the civil registry office, or another duly authorised civil registry office official. The file accompanied by the duly signed report shall be submitted to the Ministry of Justice.

129 An authorised civil servant, designated by the Minister of Justice, is responsible for granting approval or issuing a denial of the conclusion. An appeal may be filed against the approval or denial of the conclusion in accordance with the procedure specified in the Civil Procedure Code of Lithuania. In the event that the civil registry office decides against permitting the change of name and/or surname, it is required to provide written notification to the applicant within a period of three working days.

130 Documentation of a surname and/or name change is achieved by appending or updating the individual's most recent civil status record. In situations where authorisation from the Ministry of Justice is necessary, a modification of name and/or surname must be officially documented by the civil registry office by the business day following the date the decision to change the aforementioned information was adopted. In such instances, the registration deadline is the next business day following the date the certified conclusion is received by the civil registry office. The applicant shall be duly notified by the civil registry office that has recorded the change of name and/or surname within a period of three business days.

B. *Gender recognition*

131 Gender recognition issues have been on the agenda of legislators for quite some time. According to Article 2.27 of the Civil Code, in cases where medically feasible, an unmarried adult may alter their sex. A written request of this nature is required. By law, the conditions and process for gender reassignment are to be established. Such a law, however, has never been enacted.

132 An individual who identifies as transsexual is permitted to alter their given name or surname in accordance with the Rules governing the process of name changes. Changing a gender indicator, on the other hand, is exclusively feasible via the judicial process. An individual desiring to modify their gender-marker approaches the civil registry with a request to update the records accordingly. Upon obtaining a denial, they can proceed to contest the decision in court. Lately, the majority of courts have rendered favourable decisions in such cases. The courts do not mandate gender reassignment surgery in order to modify civil status records; rather, they rely solely on a

medical determination of transsexuality and the individual's self-identification, and recognition of their preferred gender. (57)

C. *Protection of adults*

133 The Civil Code contains regulations concerning the protection of adults. Guardianship is established to implement, protect, and defend the rights and interests of a natural person who is incapacitated in a particular area, pursuant to Article 3.238. A person's guardianship encompasses the guardianship of their property; however, in the event that it becomes necessary, an administrator may be designated to oversee and manage the property. A curatorship is established to safeguard and advocate for the rights and interests of a natural person with limited capacity in a particular field, as stated in Article 3.239. A curator is responsible for both the individual and their property; however, if necessary, an administrator may be designated to oversee and manage the property. Individuals who have been deemed incapable or of having limited capacity in a specific domain by a court and are residing in institutions of care, education, or guardianship remain under the supervision and management of the appropriate institution until a permanent guardian is designated (Article 3.241(2) of the Civil Code).

134 Without a specific mandate, a curator and a guardian serve as the *ex lege* representatives of their wards and guardians, safeguarding the rights and interests of individuals who lack legal capacity or have limited legal capability in a particular area. An individual who is deemed incapacitated or has limited capacity in a specific domain is required to have an immediate guardian or guardianship appointed by the court in that domain. It is noteworthy that, in accordance with Article 789 of the Civil Procedure Code, cases involving natural persons who have been declared incapacitated or limited in a particular field, declared dead, or declared missing, but have a habitual residence in Lithuania, may only be heard in the courts of the Republic of Lithuania.

135 In accordance with the provisions of Article 3.242(3), the appointment of a guardian or curator is restricted to a natural person who possesses the requisite legal capacity to do so, and such an appointment can only be made with the written consent of the natural person in question. Consideration shall be given to an individual's moral and other qualities, capacity to perform the duties of guardian or curator, relationship with the person for whom guardianship or care is being established, the wishes of the ward or the

(57) For instance, ruling of the Vilnius District Court of 2 April 2017 in civil case No E2YT-5326-987/2017.

person under care, the wishes of the guardian or curator, and any other pertinent circumstances when appointing a person to the position of guardian or curator.

136 Pursuant to the provisions outlined in Article 3.246, a curator or guardian may be relieved of their responsibilities in the event that such an individual is incapable of carrying them out due to personal or immediate family illness, financial hardship, or other compelling circumstances. Furthermore, in the event that a guardian or curator fails to fulfil their responsibilities in a suitable fashion, neglects to safeguard the rights and interests of the ward or the individual under curatorship, or exploits their authority for personal gain, said individual or organisation may have their guardian or curator status revoked. The guardian or curator are obligated to provide compensation for any harm caused to an individual who is impaired or has limited capacity in a particular area as a result of their actions as guardian or curator. A court order may terminate or remove the guardian or curator from their responsibilities, with the exception of situations in which a transitory guardianship or curatorship has been established for the individual. The court has the authority to petition the guardian or curator, in addition to the guardianship and curatorship authorities, to remove the guardian or curator from their responsibilities. The public prosecutor, a person who is incapable or has limited capacity in a particular area, or the authorities responsible for guardianship and curatorship have the authority to petition the court for the removal of a curator or guardian.

V. Conclusions

137 In Lithuania, the judiciary has been mostly responsible for implementing justice. However, there are apparent tendencies in which some cases have been removed from the courts and assigned to non-judicial bodies. The most noteworthy example is the transfer of divorce by mutual consent from the judiciary to the notarial procedure. The Civil Code establishes precise conditions for when spouses can dissolve their marriage using the notarial procedure. For the time being, it is uncertain if this reform will have a substantial impact on the courts' workload or make divorce by mutual consent easier or speedier.

138 The other key issue that notaries have always handled is succession. In uncontested cases, Lithuanian notaries issue succession certificates. Following the ruling of the Court of Justice of the European Union, the Lithuanian Supreme Court determined that Lithuanian notaries are not 'courts' under the EU Succession Regulation, with one of the most fundamental justifications being that they exclusively deal with undisputable issues. However, this

problem may be debatable, as courts under the Regulation are interpreted functionally. Thus, the Supreme Court could have considered, for example, whether, if succession was entrusted to the courts, they would act in a different manner than notaries. Probably, the answer would surprise the Court itself. Even more perplexing is the fact that under the Brussels IIb Regulation, Lithuanian notaries may be called 'courts' despite the fact that their operations are identical to those in succession cases. This could be a difficult nut to crack in the future.

139 Finally, in some circumstances (personal status), civil registrars are involved. For example, they make decisions about changing a person's name. However, they do not operate completely independently; in some situations, they require permission from the Ministry of Justice.

THE NETHERLANDS

by *Merel Jonker and Wendy Schrama*

I. Introduction and overall considerations: the Dutch legal system

A. *Substantive civil law*

The Netherlands is a civil law system based on Roman law principles. (1) It is characterised by the codification of legal norms. Statutes and codes are the primary sources of law, including international treaties. The emphasis is on written laws and legal codes rather than relying extensively on judicial precedents. Nevertheless, case-law is an important source of law, though a legal precedent is not as binding as in common law systems. The Dutch legal system is based on several Codes, such as the Civil Code (*Burgerlijk Wetboek,* hereafter: DCC), the Civil Procedural Code (*Wetboek van Burgerlijke Rechtsvordering;* hereafter: DCCP), the Criminal Code and the Criminal Procedural Code. **1**

The Dutch Civil Code is the primary source of substantive civil law in the Netherlands. It is divided into ten books that cover different areas of law, such as family law and the law of persons (Book 1), inheritance law (Book 4), the law of obligations, contract law and property law (Books 3–7) and Dutch domestic private international law (Book 10). Although family law has its own provisions in Book 1, the general rules in Books 3, 5 and 6 of the Civil Code on legal acts (*rechtshandelingen*) and contracts may also be relevant, for instance regarding the validity of the legal act of recognition of a child or the nullity of a matrimonial property agreement. In this respect, the Civil Code has a layered structure, in which the provisions of Book 1 interplay with relevant rules of the other Books. **2**

B. *Procedural law*

While the substantive family law provisions are found in the Dutch Civil Code, the Dutch Civil Procedural Code complements these rules by laying down the procedures and steps necessary for handling family law cases within the judicial system. **3**

The court system is three-tiered. The Civil Procedural Code determines the competence of the different courts for family law cases. There are eleven **4**

(1) See for general introductions to Dutch law, for instance: Larissa van den Herik, Ewoud Hondius, Wim Voermans, *Introduction to Dutch Law* (6th edn, Wolters Kluwer 2022).

district courts (*rechtbanken*), which have a subdivision called subdistrict court (*kantongerecht*). District courts are the first instance courts where most family law cases are initially heard. There are four courts of appeal (*gerechtshof*), each with its own jurisdictional area. Courts of appeal review and hear appeals against judgments from the district courts in family law matters, ensuring proper application of the law including (re-)assessments of the facts. The Supreme Court (*Hoge Raad*) is the highest court for matters of family law. It primarily deals with cases concerning the correct interpretation and application of the law. The Supreme Court does not re-examine facts or evidence; instead, it reviews legal questions and ensures uniformity in the interpretation of the law. It examines whether lower courts correctly applied the law. The rulings of the Supreme Court will be followed by the lower courts, although Dutch law is not familiar with the *stare decisis* doctrine. Adult protection matters fall within the competence of the subdistrict court, which is part of the district court. Most other matters are adjudicated on by the district courts. In district courts, mostly one judge tries the case, but there is the option of a full bench of three judges for complicated cases.

5 Almost all family law and inheritance matters are within the competence of the courts. Dutch law is not familiar with an administrative authority as exists in some Scandinavian countries. There are out-of-court options for only a very limited number of issues.

C. *Recent delegations in family law from courts to non-judicial authorities*

6 There are only two issues in which a non-judicial authority is competent, where this competence previously lay with the courts. Registered partners who do not have parental responsibility over children in their family may end their partnership without court intervention. This has been an option ever since registered partnerships were introduced in 1998; the competent court for the termination of all other registered partnerships is the district court. For the administrative termination, the civil status registrars play a role (see paras 30ff). The other case concerns a change in the registration of gender in the birth certificate of the applicant; this was formerly processed in the district court and is now downsized to an administrative procedure in which the civil status registrar plays a role (see paras 85ff).

D. *Policy discussions/legislative proposals regarding de-judicialisation*

7 In the Netherlands, discussions on de-judicialisation of family law mainly focus on divorce proceedings and related issues, such as parental responsibility. This will be discussed in the following.

Traditionally, a legal divorce of married couples is only possible by court procedure. A divorce proceeding can be instituted by both spouses jointly or by just one of them. A recent discussion revolves around whether the current divorce procedure increases the potential for conflict, due to the so-called 'tournament model', in which each partner has their own lawyer. Several in-court initiatives have been taken to experiment with different kinds of divorce procedures. (2) **8**

An administrative divorce is only accessible for registered partners who do not exercise parental responsibilities over the children in their family (Article 1:80c sub c (3) DCC). In 2022, 24,100 couples entered into a registered partnership (which is open for same-sex and opposite sex couples). (3) **9**

For a short period of time (2001–2009), couples could convert their marriage into a registered partnership, after which an administrative procedure was available for them. During this period, this route was used by approximately 30,000 married couples to dissolve their marriage out of court. (4) The government withdrew the possibility to convert a marriage into a registered partnership, as the 'divorce' was often not recognised abroad because no constitutive act was taken by the authority. Furthermore, agreements were difficult to execute due to the lack of an enforceable title (*executoriale titel*). (5) At the same time, the introduction of an administrative divorce was discussed, and rejected for the same reasons. (6) In 2014, a new law proposal concerning an administrative divorce was submitted to parliament. (7) However, after a new government was elected in 2017, this proposal was withdrawn due to 'a lack of support'. (8) **10**

With regard to the de-judicialisation of the consequences of a divorce, the following developments took place in the Netherlands. In 2009, the Promotion of Continued Parenting and Proper Divorce Act was introduced by the **11**

(2) Christina Jeppesen de Boer, Inge van der Valk, Susan Branje and Wendy Schrama, 'Een eerste verkenning van de resultaten in de nieuwe procedure gezamenlijk toegang ouders' (2023) 5, no 39, EB, 101.

(3) CBS, 'Huwen en partnerschapsregistraties; kerncijfers' (CBS, 24 May 2024) <https://www.cbs.nl/nl-nl/cijfers/detail/37772ned?q=trouwen> accessed 24 May 2024.

(4) Mila van Huis and Suzanne Loozen, 'Dertigduizend flitsscheidingen, 2001–2009' (CBS, 11 January 2010) <https://www.cbs.nl/nl-nl/achtergrond/2010/02/dertigduizend-flitsscheidingen-2001-2009> accessed 24 May 2024; See also Paul Vlaardingerbroek, 'art. 1:77a BW, aant. 2, de afschaffing van de flitsscheiding' in Sylvia Wortmann (ed), *Groene Serie Personen- en familierecht* (Wolters Kluwer 2024).

(5) Parliamentary documents: *Kamerstukken II* 2004/05, 30145 no 3.

(6) Parliamentary documents: *Kamerstukken II* 2003/04, 29676 no 3.

(7) Parliamentary documents: *Kamerstukken II* 2014/15, 34118, no 3.

(8) Parliamentary documents: *Kamerstukken II* 2014/15, 34118, no 6.

Dutch government. (9) The main aim of this Act was to stimulate equal parenthood after divorce and to facilitate a system in which parents are obliged to enter into a parenting plan in which they agree on the consequences of their divorce with regard to their children. The parenting plan is mandatory for parents in a formal and informal relationship, and a requirement for the divorce procedure in court for those parents who have a formal relationship. In this sense, the introduction of the parenting plan was a judicialisation of the divorce procedure. However, the reasoning behind the parenting plan was to 'de-judicialise' the conflict between parents about their children. (10) By agreeing on the exercise of parental responsibility, the expectation of the government was that parents would have fewer conflicts in the future and that they would be able to solve possible conflicts with a mediator instead of going to court. However, evaluations show that the parenting plan has not achieved these two aims. (11)

12 In other words, although the government aims at de-judicialisation within family law, out-of-court procedures are very limited in the Netherlands.

E. *Definitions of courts*

13 The Dutch Constitution (DC) includes a chapter on the administration of justice. With regard to this project, it is important to mention that, according to the Dutch Constitution, the judiciary is responsible for the adjudication of civil law disputes (Article 112 DC). Furthermore, the courts which form part of the judiciary shall be specified by Act of Parliament (Article 116 DC). In the Judicial Organisation Act (*Wet op de Rechterlijke Organisatie*), courts are defined as the district court, the court of appeal and the Supreme Court. Other definitions of 'the judiciary' are not provided by law; however, based on legal scholarship, the following definition can be given:

14 'Judiciary is the settlement of a dispute between at least two parties, where (i) parties (may) argue their legal position, but outsource the outcome dispute, (ii) the process is conducted before an independent and impartial

(9) Parliamentary documents: *Stb* 2008, 500.

(10) Parliamentary documents: *Kamerstukken II* 2004/05, 30145 no 6, p 11.

(11) Marijke ter Voert and Teun Geurts, 'Evaluatie ouderschapsplan, Een eerste verkenning' (WODC: Cahier 2013/8); Marit Tomassen-Van der Lans, 'Het verplichte ouderschapsplan: regeling en werking' (dissertation, Vrije Universiteit Amsterdam, Den Haag: Boom Juridische uitgevers 2015).

court, (iii) in accordance with the principles of due process, and (iv) the judgment is binding and will ultimately be enforceable by the parties'. (12)
Other definitions of the concepts of 'court', 'decision', 'judicial function' or other concepts relevant for the project are not known to the authors. **15**

F. *Statistical data regarding proceedings*

There is no statistical data on non-judicial proceedings. The authors of this paper estimate that the number will be rather low, since both the administrative termination of a registered partnership as well as the change of the registered gender are situations which do not occur often. **16**

The following figures are illustrative regarding family law cases brought before a court. Of all new court cases at district court level in 2021, 177,000 of the 432,000 cases (including criminal, administrative, commercial, tax and immigration law) were a family or youth law case. Due to the ageing population, adult protection measures are taking up a growing part of the courts' work. (13) Other frequent topics are divorces and divorce-related matters. In 2021, 27,000 divorce proceedings were handled by the district courts. If one or both parties do not agree with the decision of the court, they might appeal. In 2021, an appeal was lodged in 5,700 family law cases. Most appeal cases concern parental responsibilities and contact arrangements after divorce, where parties start new proceedings after the divorce decision has been taken (1,400 cases) and maintenance (800 cases); a new request may be filed at the court when a relevant fact after the divorce proceedings has changed. In terms of numbers, these are followed by appeal cases on the divorce proceedings itself (500 cases) and matrimonial property issues (400 cases). Merely a small minority reaches the Supreme Court (46 cases in 2022). **17**

II. Family law

A. *General overview of the family law system*

First, a remark about the definition of family law. In this chapter we use this term, in line with the purpose of the project, as family law including the law of persons. **18**

There are several sources of legislation for family law, both of Dutch origin and of a European and international nature. The primary source of Dutch **19**

(12) Henriëtte Weststrate, 'De notaris en private rechtspraak' (dissertation, Universiteit Leiden 2018); Pauline Ernste, 'Bindend Advies' (dissertation Radboud Universiteit Nijmegen 2012).

(13) Annual Report of the Council of the Judiciary 2021, 47.

family law is Book 1 of the Civil Code. The last full reform of the Family Law Book dates back to 1970 but it has since then been amended often and thoroughly on a piece-by-piece basis. For some topics of family law, separate acts contain relevant rules outside Book 1 of the Civil Code, such as the Youth Care Act (*Jeugdwet*). International family law issues are regulated by Book 10 of the Civil Code, which contains domestic Dutch private international law (only applicable when there is no treaty or EU regulation applicable). Book 4 of the Civil Code deals with inheritance law.

20 International treaties play an important role at the national level. Provisions in treaties that are clear, precise, and unconditional are considered to be binding on all parties. (14) They do not need to be transposed into national legislation, which means that individuals can directly invoke these provisions in national courts. All provisions in treaties – not only those which are clear and unconditional – can impact domestic law when a court interprets domestic family law in line with the treaty's provisions. In particular, Article 8 of the European Convention on Human Rights (ECHR) has had, and still has, a profound impact on many family law topics, including parentage, parental responsibilities, contact and care, names, adult protection measures, and surrogacy. (15) Financial matters between parents and children or ex-partners are less affected by Article 8 ECHR.

21 The UN Convention on the Elimination of all Forms of Discrimination against Women has not had much recent impact on Dutch family law. The Convention on the Rights of the Child already had quite some impact, which is still increasing in family law, both at the level of the legislator and the judiciary. The UN Convention on the Rights of Persons with a Disability is relatively new, and the underlying principles still need to be incorporated in the adult protection measures. In addition, there are treaties on child abduction, child protection, adoption, etc, to which the Netherlands is party.

22 Another important source is case-law. Courts in family law matters fulfil different functions: (1) conflict resolution between parties, mostly in (post-) divorce-related matters; (2) giving constitutive decisions, where a decision of the court is required by substantive family law in order to create a legal situation (such as divorce, adoption, parentage issues, appointment of a legal guardian, name change); (3) supervising legal representatives of vulnerable adults (guardianship).

23 As mentioned, there are hardly any administrative proceedings or authorities competent to deal with family law matters. There are a few exceptions, such

---

(14) Arts 93 and 94 of the Constitution.

(15) Sylvia Wortmann, 'Doorwerking van fundamentele rechten in het Nederlands familierecht' in Janneke Gerards and Carla Sieburgh (eds), *De invloed van fundamentele rechten op het materiële recht* (Kluwer 2013) 215–236.

as a very limited option for registered partners who do not have parental responsibilities to end their partnership without court intervention and some changes in name and gender law that are dealt with by civil status registrars (and not the courts).

24 In the Netherlands, every municipality has its own Civil Registry (Register of Births, Register of Deaths, Marriage Register and Register of Registered Partnerships). Besides local registers, the municipality of The Hague has a special register for the registration of judicial decisions and judgments which have become final and binding regarding marriages or registered partnerships if such events were not recorded in the Dutch civil registers.

25 The competences of the Civil Registry are laid down in the Dutch Civil Code (Articles 16–29f DCC). In each municipality there are at least two civil status registrars (*ambtenaar van de burgerlijke stand*). The civil status registrars are appointed, suspended, or dismissed by the executive council of the municipality (*College van Burgemeester en Wethouders*). They are charged with the registration in the Civil Registry of certificates and of later declarations added to these certificates. Their task includes the preservation of these registers and ensuring the accessibility of the data registered therein. The civil status registrars will check the requirements set by the law but have no discretionary powers. ([16]) They are not allowed to issue a certificate or record a legal fact if they know that this act will result in nullity. In the Dutch doctrine, the authors have found no information on whether the actual act of the civil status registrars are a/the only constitutive element for creating the desired legal effect. Therefore, it is not clear what their role is regarding, for instance, a name change, an administrative separation of a registered partnership or a recognition of a child. The powers vested in the civil status registrars do not seem to indicate this, since their task is mostly to check whether formal requirements are met. The debate in Parliament on the possibility to introduce administrative divorce (see above under paras 7ff) seems to indicate that the government is of the opinion that the acts of the civil status registrar do not have a constitutive effect. Bearing in mind the aim of the project, the authors think Dutch literature should reflect more on this topic. For now, this means that it is not certain what the exact situation is.

26 Procedural family law is regulated by the Civil Procedural Code (*Wetboek van Burgerlijke Rechtsvordering*). Dutch procedural law distinguishes between two types of legal proceedings: proceedings initiated with a petition (*verzoekschriftprocedure*) and the summons proceedings (*dagvaardingsprocedure*). The petition proceedings are initiated by filing a petition (*ver-*

([16]) Léon JW Evers and Henk Vat, *Inleiding tot de burgerlijke stand* (Kluwer 2022) 55.

zoekschrift) directly with the court. (17) It is commonly used for specific types of cases such as family law matters. Rules of procedure tend to be less formal than in summons proceedings, which commence when the claimant issues a summons (*dagvaarding*) to the defendant, compelling them to appear in court at a specified date for a hearing. The summons proceedings are prescribed by the law for a broad range of civil cases. Although many family law disputes are tried on the basis of the petition proceedings, some exceptions exist, such as cases on financial matters upon separation of informal partners. These are tried by the general civil courts in a regular summons proceeding. Urgent matters may also be submitted to a judge in interim proceedings, such as disputes arising on care and contact after the divorce proceedings, but also financial matters of an urgent nature.

27 The general civil procedural rules of the DCCP are applicable in family law proceedings, such as access to the court, the right to a fair trial by an independent and impartial judge, a procedure within a reasonable time, etc. Court hearings in family law are not publicly accessible, in order to protect the private lives of the persons involved. (18) Not only are family law cases in general tried in the more informal petition proceedings, but in addition to this, the DCCP contains specific procedural rules for different types of family proceedings. (19) These provisions contain specific rules for family law proceedings, and even more specifically for divorce proceedings. (20) A positive element about the divorce proceedings is that they offer spouses the option to concentrate (almost) all disputes to one court in one procedure, both child-related and financial issues. This pragmatic approach enables parties and the court to deal with all issues at the same time. Informal cohabitees have to initiate different proceedings at different courts if they cannot come to an agreement themselves. In addition to these regulations, there are rules developed by the judiciary itself (*procesreglementen*), which contain more detailed rules of procedure. (21)

28 There is more room for family law judges to find a solution for the dispute, formal rules are less important, and courts can also take into account the child's best interests, which is different in regular civil law cases. (22)

---

(17) Art 261 DCCP and following and Art 358 DCCP for appeal cases.

(18) Art 27 and Art 803 DCCP.

(19) Arts 798–828 DCCP.

(20) Arts 815–828 DCCP.

(21) See <https://www.rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Paginas/Procesreglement.aspx> accessed 24 May 2024.

(22) Lieke Coenraad, 'Procesrecht' in Wendy Schrama, Masha Antokolskaia, Geeske Ruitenberg and Machteld Vonk (eds), *Familierecht, Een introductie* (Boom Juridische uitgevers 2023) 42.

29 In family law cases, a child aged 12 and older will receive a letter from the court inviting them for a talk with the judge. (23) The Civil Procedural Code provides that the judge will give these children the opportunity to present their views/opinion in family law proceedings that concern them. In general, such issues include parental responsibilities, care and access, relocation issues, adoption, and parentage issues. Only for child maintenance proceedings is a higher threshold of 16 applicable.

B. *Divorce and legal separation*

1. *Out-of-court procedure*

30 In order to obtain a divorce or an annulment of a marriage or registered partnership, couples have to go to court. Out-of-court procedures are not available for married couples. Registered partners, however, can under certain circumstances access an out-of-court procedure at the Civil Registry in order to legally separate (Article 1:80c DCC). A registered partnership can only be terminated by mutual consent. If the partners have joint children, the out-of-court procedure is only available if neither of the parents exercise parental responsibility over them. Additionally, if the partners have children of whom only one of the partners is the legal parent, but they exercise joint parental responsibility over them, an in-court procedure is required.

31 A civil status registrar of the Civil Registry can register a dated declaration signed by both partners and one or more lawyers or notaries, from which it appears that, and at what time, the partners entered into a contract in respect of the termination of their registered partnership within the last three months. The request of registration is not limited to the registered partners but can be submitted by anyone (in contrast to the registration of a divorce decree or of a termination of a registered partnership by the court). (24) The declaration should state the mutual consent of the partners that the partnership has irretrievably broken down and that they wish to terminate their relationship. This legal ground for termination – irretrievable breakdown – is the same as the only ground for divorce in the Netherlands. The termination of the registered partnership is void if it lacks mutual consent concerning the irretrievable nature of the relationship. It is unclear whether

(23) Mariëlle Bruning and Wendy Schrama, 'Child participation in family law proceedings in the Netherlands' in Wendy Schrama, Marilyn Freeman, Nicola Taylor and Mariëlle Bruning (eds), *International Handbook on Child Participation in Family Law* (Intersentia 2021) 231–244.

(24) Hans NE Plasschaert, Burgerlijke Stand (Register Amsterdam 2002) 1008.

vitiating factors may affect the declaration of the partners. It is not plausible that this will occur, since a lawyer or notary has to sign the declaration, which forms a safeguard in this regard. Published case-law shows that only the additional contract, required for termination, is subject to dispute, but not the declaration. The required contract should include agreements on maintenance, the (family) home, the community of property and the division of pension rights (Article 1:80d DCC). Upon fulfilling the requirements, the legal separation is registered by a civil status registrar. It is unclear whether or not this registration of the legal separation is constitutive in nature. Some argue that it has a constitutive character, since the civil status registrar of the Civil Registry has to decide whether the separation is in accordance with the law. (25) However, this assessment is very limited.

32 The civil status registrar of the Civil Registry has a passive role and does not scrutinise, for example, whether or not the partnership has irretrievably broken down, since it does not have the competence to do so. The lawyer or notary is responsible for the legality of the contract. (26) In a divorce procedure or a legal separation of registered partners before the court, the judge does scrutinise the question of irretrievability (Article 1:154 DCC). (27) However, in the case of a joint application for divorce, no additional arguments are needed to prove an irretrievable breakdown. Only in the case of an application of one of the spouses may the issue of irretrievable breakdown be contested. (28)

33 Registration of the contract concerning separation should take place within three months after the contract is signed. After registration, the legal separation has a binding effect (*res judicata*). If registration does not take place within three months, the legal separation is invalid as if it had never taken place. In other words, the parties are still registered as partners.

---

(25) Parliamentary documents: Kamerstukken II 2014/15, no 3, bijlage, p 2–3 (<https://zoek.officielebekendmakingen.nl/blg-438533.pdf>), which refers to Ulrich Magnus and Peter Mankowski, Brussels Ibis Regulation (1st edn, Sellier European Law Publishers 2012) 52–54.

(26) Wilbert D Kolkman and Frits R Salomons, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 1. Personen- en familierecht. Deel II. Huwelijk, geregistreerd partnerschap en ongehuwd samenleven (Wolters Kluwer 2023), no 705, who refer to Sylvia FM Wortmann, 'Rechtsontwikkelingen in het personen- en familierecht: flitsscheidingen en verrekenbedingen' (2002) WPNR 2002/6477, 165, 168.

(27) Wilbert D Kolkman and Frits R Salomons, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 1. Personen- en familierecht. Deel II. Huwelijk, geregistreerd partnerschap en ongehuwd samenleven (Wolters Kluwer 2023), no 705–708.

(28) Masha Antokolskaia, 'Einde van huwelijk en geregistreerd partnerschap' in Wendy Schrama, Masha Antokolskaia, Geeske Ruitenberg and Machteld Vonk (eds), Familierecht, Een introductie (Boom Juridische uitgevers 2023) 221–222.

2. *Legal consequences*

34 The law on divorce, legal separation, and the annulment of marriage is binding, which means that parties do not have the autonomy to enter into a contract. Therefore, the general rules on declarations of intent do not apply to the separation, annulment of marriage or divorce. Parties may, however, and are encouraged to, enter into a contract with regard to the consequences of the termination of their relationship. The possible binding legal provisions on the consequences agreed upon and general contact law apply to these contracts.

35 The legal consequences of a termination of a registered partnership by the civil status registrar of the Civil Registry are the same as the legal consequences in the case of judicial proceedings. The out-of-court procedure is only accessible for registered partners who do not have sole or joint parental responsibility over joint children or who do not have joint parental responsibility over children of one of the partners. Therefore, the out-of-court procedure has no consequences with regard to child-related issues.

36 The provisions concerning the out-of-court procedure explicitly refer to the articles concerning pension rights, maintenance, compensation of loss caused to the community of property and the (family) home, which are applicable in the case of divorce and the termination of a registered partnership in court. In other words, the legal provisions of an out-of-court procedure do not differ from the judicial proceedings. However, the civil status registrar is not competent to scrutinise or decide on the legal consequences of the separation. Although the court is competent to do this in a judicial procedure, in practice this is not the case. However, parties in court have to be represented by a lawyer, who may have advised them in this regard. Registered partners who use the out-of-court procedure have to enter into a contract to agree on the consequences of their separation, whether or not under the guidance of a lawyer of notary (unlike the declaration of termination, assistance of a lawyer of notary is not obligatory when it comes to the agreement on the consequences). The (financial) consequences of the separation may be considerable for (one of) the partners if they were not advised by a professional. If the agreement is drawn up by a notary and laid down in a notarial deed, it will constitute an enforceable title (*executoriale titel*) and therefore have a binding effect.

3. *Cross-border cases*

37 Based on the Dutch Civil Code, the civil status registrar of the Civil Registry is always competent to register declarations of termination if the registered partnership was entered into in the Netherlands. Only Dutch law applies to

these registered partnerships; it is not possible to make a choice as regards the applicable law (Article 10:86 DCC). If the partnership was entered into outside the Netherlands, the civil status registrar of the Civil Registry may register declarations if the conditions of Article 4(4) DCCP for jurisdiction of the court in the case of a dissolution of a registered partnership have been satisfied. These conditions refer to the competence of the Dutch court in the case of divorce and annulment of a marriage, which are also applicable to a registered partnership. The competence of the court is determined by the Brussels IIter Regulation, also if the Regulation is not applicable (Article 4(1) DCCP). Since dissolution of the registered partnership is only possible on the grounds of mutual consent, a *lis pendens* situation does not seem plausible. If a case is pending before a court, an out-of-court procedure is not possible since mutual consent is a requirement for such procedure.

38 Partners who entered into a registered partnership in a foreign country can make a choice of law for the law of that country. However, Dutch law applies in the case of the out-of-court procedure, due to the guarantees provided by Dutch law (involvement of a professional, agreement on the consequences and registration). ([29])

39 A termination of a registered partnership by mutual consent outside the Netherlands is recognised if it was legally concluded there (Article 10:88(1) DCC). Furthermore, a dissolution of a registered partnership outside the Netherlands is recognised if it was brought about by the decision of a judge or other authority to which jurisdiction was vested (Article 10:88(2) DCC).

C. *Parenthood and adoption*

40 Parenthood (*afstammingsrecht*) is regulated by Book 1 of the Dutch Civil Code (Article 1:197-212). These rules have a mandatory nature, and parties cannot opt out or contract otherwise. Parenthood is not defined as such in the Civil Code, but, from the legal system, it follows that it is in principle a lifelong bond of descent between a parent and a child, primarily based on (presumed) biological parentage. Parenthood also creates legal ties between the broader family such as grandparents and siblings. A legal parent does not need to be the biological or genetic parent, but traditionally, biological ties have been the basis for awarding the status of legal parentage and parental responsibility. Originally, there was a strong focus in parenthood law on heterosexual married partners as a child's parents. The biological tie is presumed to exist in this case. At that time, parenthood law strongly

([29]) Art 10:87 lid 4 DCC; Parliamentary documents: Kamerstukken II 2002/03, 28924 no 3.

reinforced the Christian values by punishing children born to unmarried partners for the forbidden extra-marital sexual relationships.

41 In recent decades, with a strongly changed society, law reform has taken place, mostly driven by the aim of creating equality for all parents and children. ([30]) The law now includes other family types, such as informal partners and some types of same-sex parents. It is still based on a two-parents system, which limits the number of parents to two. The Government Committee on the Reassessment of Parenthood published an influential report in 2016, proposing to introduce full parental rights and duties for up to four intentional parents. ([31]) It is currently not clear whether the (new) government will introduce multi-parenthood. The prior government drafted a bill regarding surrogacy, covering both national and cross-border surrogacy. ([32]) The bill has been declared controversial and it is likely that a new (right-wing) government will not continue the legislative process. If it did, the bill would always prescribe court involvement to examine the parties' interests and, in particular, those of the future child. There would be no role for an administrative or other body.

1. *Establishment of parenthood*

42 The establishment of parenthood depends on the scenario in which the child is born: to married/registered/informal partners, and whether there is biological and/or intentional parentage.

43 In most cases, parenthood is created by operation of law at the child's birth: the birth mother of a child will always be their legal parent (Article 1:198 s 1 sub a DCC). The husband of the mother also automatically becomes a legal parent of the child born during his marriage with the child's mother. ([33]) The same applies for male registered partners. No court decision is needed. The parents will be registered in the birth certificate.

44 A second parent in an informal relationship – regardless of whether the

---

([30]) Machteld Vonk and Wendy Schrama, 'Social parenthood in the Netherlands' in Clare Huntington, Courtney G Joslin and Christiane von Bary (eds) *Social Parenthood in Comparative Perspective* (New York University Press 2023).

([31]) Government Committee on the Reassessment of Parenthood (*Staatscommissie Herijking Ouderschap*) *Child and Parents in the 21st Century (Kind en ouders in de 21ste eeuw,* 7 December 2016. For an English summary of the Report, see: <https://www.government.nl/documents/reports/2016/12/07/child-and-parent-in-the-21ste-century> accessed 24 May 2024.

([32]) Wetsvoorstel 'Wet Kind, draagmoederschap en afstamming', Parliamentary Papers, Second Chamber of Parliament, 2022/23, 36390, no 2–3.

([33]) Art 1:199 sub 1 under a DCC. There is a *lex specialis* applicable when the second parent dies before the child is born: Art 1:199 s 1 under b DCC.

couple is cohabiting and regardless of whether the second partner is female or male – has to recognise the child (Article 1:199 s 1 sub b DCC) in order to become the child's legal parent. This may take place pre-birth (Article 1:2 DCC), at the registration of the birth or later. Recognition of the child takes place by submitting a form and required documents at the civil status registrar. (34) The civil status registrar has to check whether the conditions prescribed by law are met. (35) On the bases of the parties' declarations, a civil status certificate is issued and subsequently recorded. The mother's consent is required until the child is 16 years old as well as the child's consent when the recognition takes place at the age of 12 or older. Recognition has *ex nunc* effects. The civil status registrar only has the power and duty to check the mentioned requirements. The civil status registrar of the municipality of birth of the child is responsible for dealing with such recognition and a certificate of recognition will be issued.

45 If the mother does not give her consent, the other parent may ask for a substitute consent order of the court. (36) The conditions to be fulfilled depend on the status of the second parent: for biological fathers (either the male partner who conceived the child with the mother or the donor with family life; (37) donors without family life may not make such a request) different tests have to be applied by the court than for non-biological parents. An application by a biological father will generally be awarded because it is regarded to be in the child's interests to have a legal parental tie with a biological parent. (38) A court will only deny the request if recognition seriously interferes with the relationship between mother and child or if it would put the development of the child at risk. If the applicant is a social parent, and this can either be a male or female non-biological parent, they will have to show they were the birthmother's life companion (*levensgezel*) at the time that they consented to an act which can have resulted in the conception of the child (such as artificial insemination with donor sperm). The court must assess whether recognition in such a situation would be in the

(34) Art 1:203 DCC. In theory, this allows also for recognition by a notary but in practice this does not appear to happen.

(35) Art 1:204 DCC: recogniser (ie the person who recognises the child [as a result of which this person becomes a legal parent of the child]) must be at least 16 years old, child must have only one parent, this parent may not be too closely related to the recogniser, consent of the mother and child older than 12.

(36) Art 1:204(3) DCC.

(37) This means a donor who has a close personal relationship with the child, which qualifies as family life under Art 8 ECHR.

(38) Wendy Schrama, 'Ontwikkelingen in de rechtspraak over de ongehuwde verwekker: tips voor de praktijk en vragen voor de wetgever' (2023) EB 2023/81.

child's best interests. There is hardly any case-law on such requests by female second parents. (39) Children aged 12 or older may oppose the recognition; their consent is required. In that case, a court can issue a substitute consent order. In practice, this hardly plays a role since most parental ties are established during early childhood.

46 If the mother is married to another woman, this second woman can become a legal parent. As of 2014, female same-sex couples can both automatically become legal parents on the birth of a child in their relationship or through recognition by the co-mother before or after the birth of the child, depending on their relationship status and their choice of the sperm donor. For female second parents who are in a marriage or registered partnership with the birth mother, there is an extra requirement (compared to male partners) for automatic legal parenthood for the co-mother. (40) After the birth of the child, a declaration must be submitted to the civil registrar indicating that the child was conceived with sperm of a donor whose identity is not known to the birth mother. When the mothers opt for the use of a donor who is known to them, the three persons involved may wish to make other choices, for instance opting for making the donor a legal parent by recognition; in this scenario, the second mother does not automatically become a legal parent. She may still recognise the child. The known donor will not be a legal parent, unless he recognises the child with the consent of the birth mother. This will depend on what the parties agreed upon on as regards their respective positions in the child's life.

47 The general rules of contract law, for instance on vice, are not applicable to legal acts performed regarding parentage. Book 1 contains specific rules which derogate from the general rules. (41) Nevertheless, a court could take an agreement into account, but the child's interests will likely be of more importance.

48 Apart from the standard ways to create parenthood, Dutch law is familiar with the judicial determination of parentage. (42) This may be of a man or a woman. The legal ground for granting such a request is that the person is the begetter of the child (*verwekker*, who is defined in Dutch law as the person who conceived the child through having sex with the mother, excluding donors) or the consenting life companion of the birth mother. It always

(39) See Machteld Vonk and Wendy Schrama, 'Social parenthood in the Netherlands' in Clare Huntington, Courtney G Joslin and Christiane von Bary (eds), *Social Parenthood in Comparative Perspective* (New York University Press 2023).

(40) Art 1:198 (1 *b*) DCC.

(41) For instance, Art 1:200(4) DCC.

(42) Art 1:207–208 DCC.

requires a decision of the court. The legal provision does not offer room for balancing the interests of the child, but, on the basis of Article 8 ECHR, courts sometimes still perform such a balancing act.

49 There are separate sets of rules for internal and intercountry adoptions. In respect of international adoptions, the Hague Adoption Convention is applicable. (43) Adoption of children within the Netherlands is a rare phenomenon. It is regulated in Article 1:227–232 DCC. The law has strict rules based upon the best interests of the child, but also having regard to the interests of their original parents. Dutch law is only familiar with so-called 'strong' adoptions, where the legal parents' ties with the child are severed, while new legal ties with the adoptive parent(s) are vested. (44) It always requires a court decision. Having regard to the serious effects of adoption, strict conditions apply, in which the best interests of the child are important. Adoption is only allowed for minors (with some exceptions in case-law).

2. *Termination of parenthood*

50 The termination of parenthood is only possible when the legal parent is not a biological parent. Birth mothers will always be a legal parent. In surrogacy cases, the birth mother has to give up her child for adoption; the legal tie with the birth mother will be severed if the adoption is granted by a court.

51 The rule that severing the ties is only possible when the legal parent is not the child's biological parent implies that the motherhood of the second mother may always be declared null by the court. The manner in which the ties might be severed depends on how the parenthood originated: as married or registered partner of the birth mother, by recognition of the child or by adoption. (45) Each has its specific conditions. The options to terminate parentage of the child for the mother and father are usually limited, but the child itself, be it represented by a special guardian or after reaching the age of majority, has more possibilities. There is a statutory time limit of three years after reaching the age of majority, but often courts are not too strict with this deadline. All types of parentage may be terminated, except when parentage has been established by way of a judicial determination of parent-

(43) Catelijn M van Doorn and Henriëtte Lenters, 'Adoptie' in Fatih Ibili (ed), *Nederlands internationaal personen- en familierecht* (Recht & Praktijk no PFR3, Kluwer, 2022).

(44) Art 1:229 DCC.

(45) Art 1:202a DCC, art 1:205 DCC, art 1:231 DCC.

age of the begetter (*verwekker*) or the consenting life companion. (46) It is possible to revoke an adoption at the request of the adopted child before it is 23 years old. This always requires a decision of the court, which will assess the best interests of the applicant. (47) In practice, such applications are rarely brought to the court.

3. *General remarks*

52 In most situations of the establishment of parenthood, there is no State authority involved. It is only when there is a conflict between (potential) parents about parentage that the family court has to be called upon. This concerns both the establishment of parenthood and the severing of existing parenthood. In all court proceedings, a special guardian (*bijzondere curator*) is appointed for the child by the court *ex officio* – parties do not have to request this. (48) This guardian must protect the child's best interests.

53 The normal procedural provisions in petition procedures apply in all disputes on parenthood. However, since parenthood law is of a mandatory nature, the court has to make its own assessments. If the dispute concerns paternity, the court does not have to order a DNA test, although it may, if it deems this necessary. Other facts than a DNA test may be sufficient to arrive at a conclusion about paternity. The interested parties will have the opportunity to be heard by the court.

54 In international cases on parenthood, the jurisdiction of the Dutch court is based on Article 3 DCCP: if the petitioner or one of the interested parties has their residence (*woonplaats* (49)) or habitual residence in the Netherlands, the Dutch court is competent. (50) The Dutch court also has competence as a *forum conveniens* court, for instance, if all parties involved are Dutch nationals, but do not reside there. (51) The domestic *lis pendens* rule of Article 12 DCCP is applicable. That means that, if in a foreign State, court proceedings have been initiated between the same parties on the same legal issue, the decision of which is in principle recognisable or executable in the

---

(46) The birth mother's life companion (*levensgezel*) at the time that they consented to an act which can have resulted in the conception of the child. This does not need to be a formal relationship.

(47) Art 1:231 DCC.

(48) Art 1:212 DCC.

(49) Art 1:10(1) DCC: Natural persons have their residency in the place where they live and, in the absence of such a place, in the place of their actual abode.

(50) Luc Strikwerda, 'Afstamming' in Fatih Ibili (ed), *Nederlands internationaal personen- en familierecht* (Recht & Praktijk no PFR3, Kluwer 2022) para 4.3.2.

(51) Art 3(c) DCCP.

Netherlands, the court may (not must) decide to wait for the decision of the foreign court. (52) The provision is limited to courts of a foreign state; other authorities are not mentioned.

D. *Parental responsibilities*

1. *Procedures*

55 The law concerning parental responsibilities has a mandatory character and leaves no autonomy to the parents, except the exercise of them. (53) Attribution of parental responsibilities takes place by operation of law, by joint request to the registrar of the Custody Register maintained by the district court or is left to the court. The court is also the only competent authority when it comes to limiting, amending and terminating parental responsibilities.

56 Parents who are married (or who are registered partners) at the time of the child's birth are attributed joint parental responsibility by operation of law from the moment of birth (Article 1:251/253aa DCC). If the parents marry after the child's birth, parental responsibilities are attributed by operation of law from the moment of their marriage.

57 In case parents are not married, a distinction has to be made between children born before 1 January 2023 and children born after. When a child was born before 2023, only the birth mother is attributed parental responsibility by operation of law (Article 1:253b DCC). The second legal parent has to file a joint request with the birth mother with the registrar of the Custody Register (Article 1:252 DCC). The registrar will record the joint parental responsibility, unless parents do not fulfil certain requirements. (54) If the mother refuses to give her consent, the other parent has to file a request for joint or sole parental responsibility with the court (Article 1:253c DCC).

58 As of 1 January 2023, unmarried parents will be attributed with parental responsibility by operation of law if the second parent recognises the child

---

(52) Luc Strikwerda, 'Afstamming' in Fatih Ibili (ed), *Nederlands internationaal personen- en familierecht* (Recht & Praktijk no PFR3, Kluwer 2022) para 4.3.2.

(53) Geeske Ruitenberg, 'Gezag', in Wendy Schrama, Masha Antokolskaia, Geeske Ruitenberg and Machteld Vonk (eds), Familierecht, Een introductie (Boom Juridische uitgevers 2023) 299.

(54) The registrar has to refuse to make a record if either or both parents do not have capacity to exercise parental responsibility; or the parental responsibilities of one or both parents are terminated; or someone has been entrusted with the guardianship of the child; or the provision in the custody of the child has ceased to exist; or the parent who has parental responsibilities exercises it jointly with a person other than a parent.

(Article 1:251b DCC). However, under certain conditions, joint parental responsibility will not be attributed. This is the case if the birth mother does not have parental responsibility, if the child has a guardian, or if parental responsibility is lacking. Furthermore, if the birth mother exercises parental responsibility jointly with someone other than a parent, or if the person who has recognised the child previously exercised parental responsibility over the child, parental responsibility will not be attributed by operation of law. In addition, parental responsibility is not to be attributed by operation of law if the birth mother and the person recognising the child have declared that parental responsibility is exercised solely by the mother, or if the court has granted substitute consent for the recognition (see paras 40ff).

59 The civil status registrar of the Civil Registry, responsible for the recognition, will inform the registrar of the Custody Register. However, since these parental responsibilities are attributed by operation of law, no registration is made. Only attribution, limitation, or termination of parental responsibilities by a court is registered in the Custody Register.

2. *Exercise of parental responsibility*

60 Although the attribution of parental responsibility is not left to the autonomy of the parents and different areas of parental responsibility cannot be assigned to different parties, parents can enter into an agreement regarding the exercise of parental responsibilities. In a parenting plan, they have the freedom to agree, for example, on child maintenance, the main residence, and the division of care. If a parenting plan is included in a judicial (divorce) procedure, the agreements laid down in this plan will be enforceable. In addition, the public notary may draw up a parenting plan. If a notarial deed is established, this will also lead to enforceability of (a part of) the agreements made. ([55]) In case parents were only advised by a lawyer or mediator, or initiated the parenting plan themselves, the plan cannot be executed without the involvement of a court.

E. *Matrimonial property*

61 As of 1 January 2018, a new Act introduced changes to the statutory regime for married and registered couples. The default regime under the new legislation is a more limited community of property than under the old regime. For couples married before 1 January 2018, the old default regime will continue to apply: a universal community of property regime. Both

([55]) District court Den Haag 1 February 2013, ECLI:NL:RBDHA:2013:BZ2444.

default regimes will be explained below. Where there is no difference between the regimes, only the new regime will be dealt with.

62 To start with the old regime: as soon as the spouses are married, a universal community of property regime arises by operation of law (*wettelijke gemeenschap van goederen*). This means that if the spouses have not agreed otherwise in a matrimonial property agreement (*huwelijkse voorwaarden*), the statutory regime applies automatically. The community, in principle, comprises all assets and all debts of both spouses. Included are the assets of each spouse which have been acquired before the marriage and all the assets of both spouses which are, or will be, acquired during the marriage (Articles 1:93 and 1:94(1) DCC). It also includes all the debts of the spouses, regardless of the moment at which they were incurred (Article 1:94(2) DCC), either before the conclusion of the marriage, or during marriage.

63 In principle, under the old regime, the community comprises all the present and future property of both spouses, except:

- Assets which have been obtained by succession or gift if the testator/donor provided that these assets will not fall within the community (by means of an exclusion clause [*uitsluitingsclausule*]) (Article 1:94(1) DCC).
- Assets which have a close link to one of the spouses in any particular manner (*verknochte goederen*). These assets will only fall within the community insofar as this would not be contrary to such affinity (Article 1:94(3) DCC).
- The right of usufruct in Article 4:29 and Article 4:30 DCC is excluded. This type of asset falls outside the community (Article 1:94 (1) DCC).
- Pension rights covered by the Pension Rights Equalisation (Separation) Act and rights to a pension for dependants connected with such pension rights (Article 1:94 (4) DCC).

64 After the dissolution of the community (usually when a spouse dies or upon divorce), the spouses have, in principle, an equal share in the dissolved community of property. This is the most important effect of the community of property.

65 Under the new regime (Article 1:94 DCC), the basic features are the same: a community of property applies unless the spouses agree otherwise in a matrimonial property agreement. The new Act changes the nature of the universal community regime to a more limited community of property regime. The Act applies to marriages concluded from 1 January 2018 onwards. From that date on, assets and debts will only be regarded as part of the community of property if they were acquired during the marriage/registered partnership. Inherited goods or gifts will no longer be regarded as part of the community, regardless of whether they were inherited before or during the marriage. The testator/donor no longer needs to include a specific clause to this effect.

The same rules (and changes to the community of property regime) apply to registered partners (Article 1:80b DCC). For informal cohabitants, there is no legal regulation of their property relations under family law, leaving them subject to general contract and property law. Many informal couples conclude cohabitation contracts, often with the support of a civil notary. The contractual freedom is extensive. **66**

Spouses and future spouses have extensive party autonomy regarding the property relations of marriage. A matrimonial property agreement can be concluded prior to the marriage celebration or during marriage (Article 1:114 DCC). **67**

Matrimonial property agreements must be established in the form of a notarial deed (Article 1:115(1) DCC). Absent such a deed, the agreement is invalid. This implies that a public notary is always involved. Notaries are under a duty to provide the parties with the relevant information. Next, the registration of the agreement is required in order to have effect in relation to third parties (Article 1:116 DCC). The agreement has to be registered in the Public Matrimonial Property Register, kept at the district court within whose jurisdiction the marriage was entered into (Article 1:116 DCC). A matrimonial property agreement is binding, both between the spouses and in principle also vis-à-vis third parties. Courts in the Netherlands will generally enforce matrimonial property agreements. In exceptional cases, this might be different. The same rules apply to registered partners (Article 1:80b DCC). **68**

Matrimonial property issues are often a part of the divorce proceedings. The Civil Procedural Code offers spouses and registered partners an efficient way in which all disputes and issues can be dealt with in one court case, including also disputes on care and contact, maintenance, pension rights, etc. (56) The courts deal with disputes on these issues and no other administrative body is involved. Public notaries play a role in drafting marital agreements and, after a divorce, deal with the necessary notarial deeds, for example, in order to transfer registered property. This is not typical for family law, but a requirement originating from civil law in general. **69**

III. Succession law

Succession law is primarily regulated in Book 4 of the Dutch Civil Code (DDC), and in addition in Book 3 DCC, which contains mainly guiding provisions. As a result, testators have quite some autonomy to provide a last will, and are only restricted by some mandatory regulations to protect the **70**

(56) Arts 822–827 DCCP.

testator's spouse and children. (57) These rights can only be challenged in court. If testators have not drawn up a valid will, heirs will inherit on the basis of intestate succession. Since the purpose of this chapter is to give an insight into the proceedings before non-judicial authorities, the emphasis will be on succession by will, because conflicts based on intestate succession lead to judicial proceedings.

71 A valid testamentary disposition can only be drawn up as a unilateral legal act, whereby a testator makes a disposition which will become operative only upon their death. This last will has to be made by notarial deed or by a handwritten private deed that is deposited with a notary for safekeeping (Article 4:93 and 4:94 DCC). Dutch notaries hold public authority, which results in a certain safeguard with regard to the quality of the will. The formal and content-related requirements for last wills (and notarial deeds in general) are set out in the Notaries Act (*Wet op het Notarisambt*). In addition, this Act includes formalities concerning the execution of the deed. If the will does not comply with these requirements and formalities, it might be void or voidable. (58)

72 The public notary has a unique role in the Netherlands, (59) since last wills have to be drawn up by notarial deed or by a handwritten private deed that is deposited with a notary for safekeeping. Based on the Law on the Central Register of Wills, the notary is obliged to register which last wills are under its responsibility. After the death of a testator, every notary can, upon request, consult the Central Register of Wills in order to verify whether the deceased had a last will and which notary was involved. Based on (a copy) of the last will, the notary will be able to gain insight into who the heirs and legatees of the deceased are and to establish a certificate of succession.

A. *Procedures to accept or waive succession upon death*

73 An heir may choose to accept or waive a succession upon death. Once accepted, the heirs acquire the estate by operation of law (*saisine*, Article 4:182 DCC). Legatees only acquire the goods or the monies after they have been transferred to them. Acceptance takes place either unconditionally (*zuiver*) or subject to the privilege of an inventory of the estate (*beneficiair*). Heirs who choose to unconditionally accept the succession not only become

---

(57) This regards forced shares and statutory rights (Articles 4:63ff and Articles 4:28ff).

(58) Wilbert D Kolkman, 'Testamentary Formalities in the Netherlands' in Kenneth GC Reid, Marius C De Waal and Reinhard Zimmerman (eds), *Comparative Succession Law Volume 1* (Oxford University Press 2011).

(59) Wilhelmina R Meijer, *Gevolgen van de erfopvolging* (Monografiën BW 2005).

liable for the debts of the estate, but creditors may also recover the debts of the estate from the private assets of the heir. (60) If (one of) the heirs choose to accept the succession subject to the privilege of an inventory, they are not liable for any debts of the estate and debts cannot be recovered from the private assets of the heir. A legal representative of an heir is not allowed to accept the succession unconditionally. The representative should accept the succession subject to the privilege of an inventory of the estate or should request that the court waive the succession.

74 Acceptance of a succession can be made explicitly (by declaration at court), but also implicitly. (61) An heir who unambiguously and without reservation acts like an heir, by selling or encumbering goods of the estate or frustrates recourse by creditors in other ways, is deemed to accept the deceased's estate unconditionally unless they have already made a choice earlier (Article 4:192 (1) DCC).

75 Heirs who wish to waive a succession must submit an explicit declaration at the registry of the district court (Article 4:191 DCC). The declaration shall be recorded in the (public) Register of Deceased's Estates. As long as the deceased's estate is not accepted by all the heirs, the court may prescribe the measures which it considers necessary for the preservation of the assets. In addition, the court may, at the request of any interested party, order that the choice to accept or waive the succession is made within a certain period of time. At the request of the heir, the court may grant one or more extensions to the period prior to its expiry, and any extension is to be registered in the Register of Deceased's Estates. If no choice is made, the heir is deemed to have accepted the succession unconditionally (Article 4:192 (2 and 3)) unless another heir has accepted the succession subject to the privilege of an inventory. In that case, the heir is also deemed to have accepted the succession subject to the privilege of an inventory.

76 A bequest is obtained without its acceptance being necessary, except for the right of the legatee to renounce the bequest as long as they have not accepted it. Waiving a bequest must be made unambiguously but is not bound to any form (Article 4:201 DCC).

77 A declaration to accept or waive is irrevocable and has retroactive effect to the time when the deceased's estate devolved. This declaration cannot be

---

(60) Evelien MJMC van Wijk-Verhagen 'Procesrechtelijke aspecten van zuivere aanvaarding, beneficiaire aanvaarding en verwerping van erfstellingen en legaten' in Aniel R Autar, Jan WA Biemans and Tim J Fluitman (eds), Compendium Erfprocesrecht (Sdu 2021) 102.

(61) Ronald E Brinkman and Joe Van Anken, formerly by Barbara E Reinhartz, 'art. 4:190 BW, aant. 2, Uitoefening keuzes' in Tea J Mellema-Kranenburg (ed), Groene Serie Erfrecht (Wolters Kluwer 2024).

nullified on account of errors (*dwaling*) or on the ground that it is to the detriment of one or more creditors (Article 4:190 DCC).

B. *Certificates of succession*

78 In the Netherlands, the public notary is the only authority to draw up a certificate of succession by notarial deed (Article 4:188 DCC). A notarial deed has evidential value; however, it is not compelling evidence of succession and it does not include an enforceable title (*executoriale titel*). (62) Establishing a certificate of succession requires a substantive investigation (*inspanningsverplichting*) of the facts by the notary in order to enable conclusions to be drawn as to the position of the heirs. If the notary does not comply with this obligation, they can be held liable under civil and disciplinary law. In practice, the facts may not be clear, and conclusions as to who the heirs are or who is authorised to dispose of the estate may be difficult to draw. A notary could state this explicitly in the certificate of succession in order to give third parties the opportunity to obtain clarity at an early stage by invoking a court decision. (63)

79 A person who has relied on facts stated in a certificate of succession shall be considered in this respect as acting in good faith, unless this person knew, or as the result of their gross negligence did not know, that the contents of the declaration did not correspond with the real situation. A debtor who, based on facts stated in the certificate of succession, paid someone who had no authority to receive such payment, may, for example, claim that the payment has been discharged vis-à-vis the person to whom payment had to be made.

80 The certificate may mention the position of the heirs: who are heirs or the sole heirs, for which part of the estate, and whether they have already accepted the deceased estate. Furthermore, the certificate may include the fact that the deceased's estate has been divided in accordance with the special intestate succession rules for spouses and children of the deceased. Additionally, the fact that the spouse of the deceased is, or is not, entitled to the usufruct over one or more assets belonging to the deceased's estate may be mentioned in the certificate. The certificate may also state the position of the executor and administrator, for example, whether or not the administration of the deceased's estate has been delegated to personal representatives, administrators or liquidators, who they are and what their powers are.

---

(62) Art 157(1) DCCP.

(63) Barbara E Reinhartz 'art. 4:188 BW' in Tea J. Mellema-Kranenburg (ed), Groene Serie Erfrecht (Wolters Kluwer 2024); Steven Perrick, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 4. Erfrecht en schenking (Wolters Kluwer 2021) no 548.

C. *Cross-border cases*

81 According to the Succession Regulation, the European Certificate of Succession is issued in the Member States whose courts have jurisdiction under Articles 4, 7, 10 or 11 of the Regulation or another authority which has competence to deal with matters of succession (Article 3(2)). In the Netherlands, the notary is the competent authority, as is the case for national certificates of succession (Article 8 Implementation Act). This situation led to a discussion as to whether the Dutch notary only had jurisdiction to issue a national certificate of succession if it had jurisdiction based on the Regulation. Based on the *Oberle* case, (64) this seemed to be the case for courts issuing certificates of succession. However, whether this also applied to notaries was subject to discussion in the Netherlands. (65) In the *WB* case, it was decided that the Polish notary could not be qualified as a court in the sense of the Regulation, and their authentic instruments not as a 'decision'. (66) Due to the similarities with the Dutch notary, it was concluded that Article 59(1)2 of the Succession Regulation applies to the national certificates of succession: 'A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 81(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin'. (67) Finally, in the *E.E.* case, (68) it was decided that if the national notary does not qualify as a 'court', the jurisdiction rules of the Regulation do not apply to national certificates of succession in international cases. As a result of the case-law mentioned, it is generally accepted in Dutch literature that notaries can issue national certificates of succession in internationals

(64) CJEU Case C–20/17 Oberle [2018] ECLI:EU:C:2018:485.

(65) Guus LGA Stille, 'De Erfrechtverordening en de bevoegdheid tot afgifte van een nationale verklaring van erfrecht' (2020) no 67 FJR, 320; Brigitte FP Lhoëst, 'Is de Nederlandse notaris gebonden aan de bevoegdheidsregels van de Europese Erfrechtverordening bij de afgifte van een nationale verklaring van erfrecht?' (2020) vol 5 no 22 JBN, 13, 16.

(66) CJEU Case C–658/17 WB v Przemysława Bac [2019] ECLI:EU:C:2019:444.

(67) Geeske A Tuinstra, 'Court commentary on CJEU 23 May 2019, ECLI:EU:C:2019:444', in: Erfrecht Updates (Boom Juridisch 2019); Barbara E Reinhartz 'art. 4:188a BW, aant. 2, Bevoegdheid Nederlandse notaris om een nationale verklaring van erfrecht af te geven in internationale gevallen' in Tea J. Mellema-Kranenburg (ed), Groene Serie Erfrecht (Wolters Kluwer 2024).

(68) CJEU Case C–80/19 E.E. [2020] ECLI:EU:C:2020:230.

cases, also if the Netherlands does not have jurisdiction under the Regulation. (69)

D. *Liquidation, execution, and administration*

82 Liquidation (winding up) may be effected in accordance with the wishes of the heirs, unless the estate is accepted subject to the privilege of inventory or if the court has nominated a liquidator (vereffenaar). In these scenarios, the law describes the procedure for liquidation, for which the court is the competent authority, and which resembles (and is based on) formal insolvency proceedings in bankruptcy.

83 The testator may appoint one or more executors (*executeur*) and/or fiduciary administrators (*bewindvoerders*) in their last will. If no appointment is made, the heirs have a joint responsibility in this regard. An executor is responsible for the administration (*beheer*) of the estate, for the payments of debts and for the fulfilment of testamentary obligations. Therefore, the executor must, with due expedience, prepare an estate inventory, including a provisional statement of the liabilities of the deceased's estate and notify the creditors who are known to them that they must file their claims. The executor is not responsible for the division of the estate. (70) The heirs may demand a division of a shared asset as co-owner (*deelgenoot*) according to the rules set out in Book 3 DCC. The fiduciary administrator (*bewindvoerder*) who manages one or more assets of the heirs or legatees may demand division for them or even divide the assets among the heirs if granted such authority in the last will. The court, may upon the request of any interested party, appoint a neutral person to represent an heir who does not cooperate with the division of the estate. In this case, the division has to be decided by a notary.

84 The executors and administrators do not have any property rights to the estate – they are considered mandatories of the estate. (71)

---

(69) Sabine H Heijning and Brigitte FP Lhoëst, 'De zaak E.E. van het Europese Hof van Justitie een leerzame casus voor de Nederlandse notaris' (2021) vol 5 no 2 JBN, 4.

(70) Eelco Z Anink and Emma J Lievense, 'Processuele aspecten van executele en testamentair bewind' in Aniel R Autar, Jan WA Biemans and Tim J Fluitman (eds), Compendium Erfprocesrecht (Sdu 2021) 513; Steven Perrick, Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 4. Erfrecht en schenking (Deventer: Wolters Kluwer 2021) 686.

(71) Larissa van den Herik, Ewoud Hondius and Wim Voermans (eds), Introduction into Dutch Law (Kluwer 2022).

IV. Status of natural persons

A. *Name changes*

85 The surname of a person can be changed either by court decision or by the Sovereign. The court is involved if a joint request for a change of surname of a minor is submitted within a procedure on the attribution of joint parental responsibility. This is possible in case a non-legal parent is granted joint parental responsibility together with the legal parent (Article 1:253t DCC) or if two non-legal parents are attributed with joint parental responsibility (Article 1:282 DCC). The court will only reject the request if a child aged 12 years or older does not consent to the request, if the request for joint parental responsibility is rejected, or if it is not in the best interests of the child.

86 In addition, a person or the legal representative of a person may apply to the Sovereign for a change of surname (Article 1:7 DCC). The grounds for granting a change of surname, the manner in which applications may be lodged and processed, and the fees payable for a change of surname are regulated by a separate Regulation (*Besluit geslachtsnaamwijziging*). The grounds for a change of surname are limited (Article 1 of the Regulation). It can be changed if the surname, whether on its own or in connection with the profession, social status, or personal characteristics of the individual, is evidently objectionable or ridiculous. In addition, if the surname is so common that it lacks sufficient distinctive character, it may be changed. Furthermore, non-Dutch surnames and Frisian surnames and surnames that have been misspelled in the civil registry records since their introduction (1810–1838) can be changed. The surname of a minor can be changed to the surname of the (other) parent, the surname of the partner of the parent or the surname of the foster parent if these persons have cared for the child for at least three years (Article 3 of the Regulation). A request is rejected if the minor already has a changed surname, if a minor aged 12 years or older does not consent to the requested surname, and if a parent under certain circumstances refuses to consent to the requested surname change of the minor.

87 A request is lodged to the Minister of Justice and Security. If the Minister rejects the request, this decision may be challenged before the administrative court. If the Minister intends to submit a proposal for a Royal Decree whereby a request is granted, the Minister shall inform the applicant and the person whose surname change is requested. In addition, where an application relates to the surname of a minor, the minor's parents, and the person from whom the surname taken by the child directly originates, will be informed of this intention in writing within 20 weeks. The written notifica-

tion of the intention shall be considered to be an order (*beschikking*), which means that it can be challenged before the court. The Minister will send a copy of the Royal Decree to the civil status registrar, who will register the change of name in the Civil Registry.

88 A change of surname by the Sovereign will not affect the surname of the adult children of the person involved or of children over whom the person does not have parental responsibility. The change of surname will remain in effect notwithstanding any later recognition or judicial determination of parenthood.

89 A change of first name may be sought at the district court. There is only limited guidance for courts in the Civil Code, since there are no grounds for a change formulated (Article 4(4) DCC). The courts have an extensive discretionary power, and the Supreme Court has laid down the requirement that the applicants need to have a very serious interest for the name change. Secondly, the new name needs to meet the general criteria for first names as set out in Article 4(2) DCC, for example, that they may not be inappropriate. Courts have been quite reticent in the past but are nowadays more inclined to grant requested changes. (72)

B. *Gender reassignment*

90 The Dutch law of persons in the Civil Code recognises a right for trans persons to have their registered gender changed. For other gender diverse persons, there is no explicit provision, except for children born with an unclear gender. (73) First, the situation for trans persons will be explained.

91 In 2014, a new Act was adopted which substantially lowered the threshold for transgender individuals to change the registered gender on their birth certificate. This procedure is regulated in Book 1 of the Civil Code, in the law of persons. The applicant must submit a declaration at the civil status registrar on the applicant's gender identity and the person's wish to change the gender registered on their birth certificate. There are no longer (as under the old law) requirements, such as hormone therapy, body surgery or conditions such as infertility. Instead, an expert statement has to be part of the application in which the expert affirms the person's permanent conviction to belong to the other gender.

92 Not only the substantial requirements were profoundly changed, but also the procedure to apply for a change has become much easier. Before 2014, a

(72) Gerard-René de Groot, 'art. 1:4 BW, aant. 8–11' in Sylvia Wortmann (ed), *Groene Serie Personen- en familierecht* (Wolters Kluwer 2024).

(73) Art 1:19d DCC.

change of the registered gender required a court order. This is now simplified with the power vested in the civil status registrar. This option exists for persons of 16 years of age and older; under the law prior to 2014, only adults could ask for a change. For younger persons, the current law does not provide options, although courts may order a change of the registered gender for them. (74) The modification of the birth certificate will be reflected in other official databases, such as the Basic Registration of Persons. This has consequences for passports, other travel documents and school and university diplomas. Simultaneously with the application for a change to the registered gender, the applicant can ask to change their first name. (75)

The expert statement may not be older than six months at the time of the application. The expert statement may be given when the person is not yet 16 years old. The age limit of 16 regards the moment when the statement at the civil status registrar is made. (76) Who qualifies as an expert is not defined in the Civil Code, but in another legal document. (77) The expert's statement includes the information that the person has stated to the expert to have the conviction to be of another gender than that registered on their birth certificate and that the person appeared to the expert to have understood the expert's guidance on the scope and significance of such a status and still expresses the well-considered and persistent desire for a change of sex to be recorded on their birth certificate. The expert will not issue the statement if they have well-founded reasons to doubt the soundness of such a conviction. The person concerned must appear before the civil status registrar in order to declare that they have the conviction to belong to the other gender. This option is open to all persons of Dutch nationality, but also to foreigners when they fulfill a number of criteria, set out in Article 1:28 (3) DCC. If Article 1:28a DCC is complied with, the civil status registrar records the change of the assigned gender in the birth certificate. The change of the gender registration in the birth certificate takes effect from the moment the civil

(74) For instance, District Court Gelderland, 2 August 2022, ECLI:NL:RBGEL:2022:4224.

(75) Art 1:28b (2) DCC.

(76) Eric WM Gubbels, 'art. 1:28a BW, aant. 2, Deskundigenverklaring' in Sylvia Wortmann (ed), *Groene Serie Personen- en familierecht* (Wolters Kluwer 2024).

(77) Besluit aanwijzing deskundigen transgenders, Stb 2014, 222. Medical doctors and psychologists of the Medical Centers of the Universities of Amsterdam, Leiden and Groningen; the Minister may appoint other experts. In the 'Protocol deskundigen transgenders (artikel 28a van Boek 1 van het Burgerlijk Wetboek)' further requirements as to the expertise have been set out: <https://zoek.officielebekendmakingen.nl/blg-359538.pdf> accessed 24 May 2024.

status registrar adds the new gender registration to the certificate. (78) Legal ties of parentage existing at that time are unaffected by the change. In the rare cases where a trans person wishes to change their registered gender again, most likely they will follow a new procedure at the Civil Registry. There are no cases known to the authors where an application has been filed at the district court to annul a change of the gender registration.

94 A bill is currently pending the aim of which is to strengthen the rights of trans persons. (79) It is unclear what its future will be, given the objections from some parties in Parliament.

In cross-border situations, the Netherlands are a party to the 'Convention relative à la reconnaissance des décisions constatant un changement de sexe'. (80) So far, this Convention has only been ratified by the Netherlands and Spain. A court decision or a decision of an administrative authority will be recognised in another State when it concerns a national of the State in which the decision was taken or a person who habitually resides in that State. Regarding the recognition of Dutch 'decisions' of the civil status registrar, it is likely that the civil status registrar will be qualified as an administrative authority in the meaning of the Treaty. This implies that a change in the registered gender in the birth certificate will be recognised in Spain if the other conditions are met. (81)

Apart from this Convention, there is no domestic Dutch private international law specifically for this matter. This means that the recognition of a Dutch decision depends on the private international law of the country where recognition is sought. Little has been written in the Dutch literature on whether a change of the registered gender will be registered in the Netherlands. It appears to depend on whether or not it concerns a Dutch national. For non-Dutch nationals, the gender that will be registered in the Personal Records Database (PDR) is that on the birth certificate. The (im)possibilities are governed by the Basic Registration of Persons Act. There are exceptions. For Dutch nationals, the following facts are decisive: whether the gender is

---

(78) Art 1:28c(1) DCC.

(79) Parliamentary Papers II (Second Chamber of Parliament), 2021–2022, 35 821, no 2. *Voorstel tot wet: Wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het veranderen van de voorwaarden voor wijziging van de vermelding van het geslacht in de akte van geboorte.* Later during the parliamentary debate, an amendment to facilitate a gender-neutral registration was added but withdrawn. Eric WM Gubbels, 'art. 1:28 BW, aant. A' in Sylvia Wortmann (ed), *Groene Serie Personen- en familierecht* (Wolters Kluwer 2024).

(80) Trb 2001, 17. The Treaty has been developed by the International Commission on Civil Status (ICCS/CIEC in French).

(81) Parliamentary Papers II (Second Chambre of Parliament), 2011–2012, 33 351, no 3, 13.

changed in the passport or also in the Register for Dutch people who do not have their habitual residence in the Netherlands and whether there is a birth certificate in the central Hague register or not.

1. *Non-binary persons*

95 For persons who identify as not belonging to either the male or female gender, such as gender fluid or non-binary persons, there is no legal provision in the Civil Code which is aimed at a change of their gender registration as female or male to gender-neutral. (82) Even so, in recent years, courts have been inclined to grant an application for a gender-neutral registration with the registration of an X (instead of F or M), which is based on Article 1:19d DCC. (83) The procedure commences with a request, which will be dealt with by the district court in a regular request proceeding (as most family law proceedings are, and not a summons proceedings). The civil status registrar will be invited as an interested party.

C. *Protection of adults*

96 Book 1 of the Dutch Civil Code governs adult protection measures. (84) The Dutch system regulates three statutory measures of adult protection: full guardianship (*curatele*), financial guardianship (*beschermingsbewind*) and personal guardianship (*mentorschap*).

97 Full guardianship results in full legal incapacitation of the adult at the time the court orders the measure. (85) It regards both financial and personal matters. The guardian takes over most of the legal acts. There are some legal acts which can still be performed by the adult, such as spending money for

(82) Jet Tigchelaar, Marjolein van den Brink and Philipp Reuss 'Out of the Box? Domestic and Private International Law Aspects of Gender Registration' (2015) 17(2) European Journal of Law Reform 282

(83) Supreme Court, 4 March 2022, ECLI:NL:HR:2022:336. For an overview of the rapid developments in this field, see, Jet Tigchelaar and Marjolein van den Brink 'Een sneeuwbaleffect in het recht: hoe geboortegeslacht genderidentiteit m/v werd en uitdijt naar een x' (2022) 7–8 Tijdschrift voor Familie- en Jeugdrecht 196. See <https://dspace.library.uu.nl/bitstream/handle/1874/422730/Tijdschrift_voor_Familie_en_Jeugdrecht_Een_sneeuwbaleffect_in_het_recht_hoe_geboortegeslacht_gend.pdf?sequence=1> accessed 24 May 2024.

(84) See for more detailed information, the Dutch country report by Kees Blankman and Rieneke Stelma-Roorda, 'The empowerment and protection of vulnerable adults' (FL-EUR 2024) <https://fl-eur.eu/working_field_1__empowerment_and_protection/country-reports> accessed 24 May 2024.

(85) Art 1:381(2) DCC. This is not in line with the requirements of the CRPD, see Rieneke Stelma-Roorda, Kees Blankman and Masha Antokolskaia 'A changing paradigm of protection of vulnerable adults and its implications for the Netherlands' (2019) Family & Law.

daily needs. It is also possible for the adult to initiate proceedings concerning the full guardianship. (86) Regarding legal acts in the field of family law, a special regime differentiates between the grounds on which the full guardianship has been ordered, leaving some room to carry out own legal acts by the adult. (87)

98 Financial guardianship aims to offer support from a guardian in financial matters but does not have the effect of full incapacitation. It rather limits the capacity of the adult to perform legal acts which are aimed at the preservation of the assets of the adult; only the financial guardian has the power to perform these acts. Legal acts aimed at the transfer of ownership of assets have to be performed jointly by the adult and the financial guardian. (88)

99 Personal guardianship concerns decision-making in medical and care matters. In all other matters, the adult is free to make legal decisions on their own, since a personal guardianship does not result in an automatic loss or limitation of legal capacity. In medical matters, the medical staff will assess whether the person is capable of deciding on the matter at hand. For matters which are not of a medical nature, but which relate to care, the personal guardian has the power to make the legal decision.

100 Financial and personal guardianship can be ordered simultaneously for the same adult.

101 In all matters regarding adult protection, the subdistrict court is the competent court. (89) The interference in the private life and the far-reaching legal effects of a guardianship require the intervention of an impartial and independent court. The Dutch legal system is not familiar with Guardianship Support/Protection Boards which exist in other jurisdictions. Neither is there a role foreseen for NGOs in this area. The relative competence of the subdistrict court is the court of the place of registered residence or if there is none, the actual place where the adult is living. (90) As for most family law subjects, proceedings are initiated by filing a petition (*verzoekschrift*) directly with the court. The petition may be filed by the adult, the partner, close relatives, and the public prosecutor. A financial or a personal guardian also

---

(86) Art 1:381 (5 and 6) DCC. This includes the application, change or termination of the measure or the dismissal of the guardian.

(87) Art 1:382 DCC.

(88) Art 1:438 DCC.

(89) Art 1:378 DCC regarding full guardianship, Art 1:431 DCC for financial guardianship and Art 1:450 DCC regarding personal guardianship.

(90) Art 266 DCCP.

may request full guardianship. (91) There is no explicit duty of the court to hear the adult in the law. As a minimum procedural safeguard, the adult must be given the opportunity to express their opinion about the petition before the court issues an order. (92) In recommendations formulated by the courts themselves, it is seen as an important aspect of the proceedings to actually talk to the adult. (93) A court can require the adult to appear before the court, (94) but may decide instead to visit the adult at their home. (95) In proceedings on adult protection measures, the adult, their partner and children, or, if there are none, their parents and siblings, are interested parties. (96) They will be informed about the request and may be present at the hearing. They also have a right to appeal a decision. (97)

102 The three adult protection measures may be reviewed or terminated. In theory, it is possible that the court limits the duration of the measure to a specific period. In practice this rarely happens. There is a difference between the issue as to whether the adult still needs this type of protection and the question of whether the appointed guardian is still the right person to represent the adult. After the measure has been in place for five years, the guardian is to submit a report to the subdistrict court in which the continuation of the measure is one of the issues to be addressed. (98) On the basis of this report, the court may consider that a measure is no longer needed. Apart from this, the adult themselves and other interested parties may also request the subdistrict court to terminate the measure at any time. (99) The court may also act *ex officio*. The judge has to assess whether there is no longer a need for the specific adult protection measure. It is also possible to change the specific type of guardianship.

103 Regarding the second issue: the guardian can request to be dismissed as guardian. The court may also dismiss the guardian when they no longer meet the requirements to be appointed or because of important reasons. This

---

(91) Art 1:379 DCC for full guardianship; similar rules apply to the two other statutory measures.

(92) Art 809(2) DCCP.

(93) See <https://www.rechtspraak.nl/SiteCollectionDocuments/Aanbevelingen-curatele.pdf> accessed 24 May 2024.

(94) Art 800 DCCP.

(95) Art 802 DCCP.

(96) Art 798(2) DCCP. The status of these parties as an interested party is not unlimited; for some type of orders, they do not qualify as an interested party. Apart from the qualification of an interested party as a listed person in section 2, there might be persons who also qualify as an interested party on the basis of the more general section 1 of Art 798 DCCP.

(97) Art 806 DCCP.

(98) Art 1:385(2), 446a and 459(3) DCC.

(99) Art 1:389(2), 449(2), 462(2) DCC.

might be mismanagement or a high conflict level in the relationship with the adult. The judge can also *ex officio* dismiss the guardian. A new guardian will be appointed. (100)

1. *Voluntary instrument in the context of adult protection:* levenstestament

104 Apart from these statutory adult protection measures, adults themselves may make use of their autonomy by concluding an agreement or a power of attorney. This is called a *levenstestament* and it finds no regulation in the law yet (other than the general rules of the law of obligations and contract law). This private instrument has been introduced by notaries as a means for people to express wishes and preferences for a future time when decision-making becomes more difficult. Many topics may be part of a *levenstestament*. As there is no legal regulation, there is no set definition of what it exactly is and what it contains. Choices on what to include depend on the wishes of the adult. It may include a continuing power of attorney, a medical treatment advance directive and statements on who is the preferred legal representative if a court ordered a statutory measure. It is now a widespread instrument. There are no formal requirements for a *levenstestament*. Most of them are probably in writing and drawn up by a civil notary. There is no consensus on the exact legal nature of the continuing power of attorney. (101) There is no need to gain the consent of the court (or other body) for the *levenstestament* to take effect. Exercising power of authority under a *levenstestament* is not under judicial review or authorisation.

V. Conclusions

105 Courts play a fundamental role in Dutch family law; there are only few legal disputes or legal issues (without a dispute between parties) where the courts are not essential. Dutch family law is not familiar with specific administrative bodies that take over part of the work of the courts. Public notaries are involved when it comes to succession by will and only to a very limited extent and the civil status registrar plays a role as well. This is the case for an administrative separation of registered partnerships based on mutual con-

(100) Art 1:385 1, *d*), 448(3), 461(2) DCC.

(101) Kees Blankman and Rieneke Stelma-Roorda, 'The empowerment and protection of vulnerable adults' (FL-EUR, 2024) <https://fl-eur.eu/working_field_1__empowerment_and_protection/country-reports> accessed 24 May 2024, answer to question 33 of the Dutch report. The legal basis could be a power of attorney, a service contract, or a mandate. Respectively: Art 3:60–3:79, Art 7:400–413 and Art 7:414–7:424 DCC.

sent, where the partners do not exercise parental responsibilities over minors and for a change of registered gender and first name for transgender persons. The procedure for transgender persons to change their registered gender and name has recently been transferred from the court to the civil status registrar. This is an example of a family law issue where there is no conflict between parties, but where a legal act must be performed in order to effectuate the legal change. The idea that a court always had to be involved was seen as interfering in the private lives of transgender persons without a good cause. In the past, there were discussions about introducing administrative divorces, but this was never implemented. Currently, policy attention has shifted to the better handling of complex divorces. The introduction for parents who divorce or separate to make a parenting plan and the new pilots at several district courts to develop and test alternative divorce proceedings are part of this idea. Apart from that, there is little reflection, not at the policy level, but also not among academics, on what the role of the courts is and how to best make use of its different functions (conflict resolution, mostly in (post-) divorce related matters; issuing constitutive decisions, and supervising guardians). The implicit assumption is that courts are the self-evident bodies to deal with all matters in family law. On a speculative note, the authors think this could change if the government budget for the judiciary were to become even tighter than it is. Having courts involved in divorces where both parties consent to the divorce and its legal consequences and requiring courts to deal with all matters of adult protection measures, including the very high number of supervision cases of legal representatives, is an expensive way of dealing with these matters.

POLAND

by *Katarzyna Kamińska*

I. Introduction

In Poland, the principle has been, and still is, that justice in the area of family law is administered by courts. The process of de-judicialisation practically does not exist. Eventually, each family law case ends up in court. The situation is different with succession law, because in many cases, a notary public is an alternative to the court, eg, when confirming the acquisition of an inheritance. Deadlines in notary offices are much shorter than in courts, it is not necessary to wait for the judgment to become final; however, the fee is higher than in court. This path also relieves the burden on courts (since 2009, approximately half a million inheritance cases have been heard before notaries ([1])). **1**

The meaning of court (*sąd*) is not defined by Polish law. Nevertheless, many normative acts use the concept of court, starting with the Constitution of the Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej*, hereinafter: CRP) ([2]). Article 45 § 1 CRP provides for the right to a court, specifying that everyone has the right to a fair and public hearing of their case, without undue delay, before a competent, impartial and independent court. Also noteworthy is Article 10 § 1 CRP, which states that the system of government of Poland is based on the separation of, and balance between, the legislative, executive and judicial powers. The last is vested in courts and tribunals. In accordance with Article 175 § 1 CRP, the administration of justice in Poland is implemented by the Supreme Court (*Sąd Najwyższy*), common courts (*sądy powszechne*), administrative courts (*sądy administracyjne*) and military courts (*sądy wojskowe*). **2**

The Act on the Organisation of Common Courts of Law (*Ustawa o ustroju sądów powszechnych*, hereinafter: Act), adopted in 2001, ([3]) introduces a three-tier system based on district courts (*sądy rejonowe*), regional courts (*sądy okręgowe*) and courts of appeal (*sądy apelacyjne*). In Article 12, the Act **3**

([1]) <https://prawo.gazetaprawna.pl/artykuly/1326172,notariusze-doradza-jak-zadbac-o-bezpieczenstwo-majatku.html>.

([2]) Act of 2 April 1997, consolidated text, Journal of Laws 1997, item 483 with subsequent amendments.

([3]) Act of 27 July 2001, consolidated text, Journal of Laws 2023, item 1860 with subsequent amendments.

provides for family courts (*sądy rodzinne*) at the district court level. These judicial bodies enjoy a broad spectrum of competence. Family courts decide in the following cases: those falling under family and guardianship law, not restricted to proper regional courts (eg, divorce cases); those pertaining to demoralisation and punishable acts of juveniles (4); those relating to treatment of persons addicted to alcohol, drugs or psychoactive substances (5); and those referred to the jurisdiction of family courts on the basis of separate statutes (Article 12 § 1 point 3 of the Act). According to the Polish Code of Civil Procedure (*Kodeks postępowania cywilnego*, hereinafter: PCCP) (6), the family court is the guardianship court (*sąd opiekuńczy*).

4 As a consequence, family courts decide predominantly in cases falling under the category of family law, guardianship and curatorship enumerated in the PCCP, namely Articles 561ff. These are marital cases regarding: permission to enter into marriage in spite of not having reached the prescribed age, release from the duty to submit to the head of the registry office (*Kierownik Urzędu Stanu Cywilnego*) a document necessary to enter into marriage, refusal by the head of the registry office to issue declarations of entry into marriage, resolving important questions associated with the family in the case of differences between the spouses, and the so-called 'other' family and guardianship cases mentioned in Article 568ff PCCP. Among these, one can enumerate cases pertaining to: care over the child whose interest has become. or may become. endangered, including cases connected with transplantation of tissues, or acts related to the management of the child's property.

5 It is worth mentioning that family law cases are characterised by particular complexity. Besides legal knowledge, the judges deciding such disputes, notably guardianship cases, need to have solid knowledge of psychology, pedagogy and sociology, which seem vital for delivering proper decisions. The judges also need particularly long-standing professional experience. Therefore, it has been alleged that the practice of assigning family law cases to judges without proper experience in hearing this category of disputes is 'defective'. It has been postulated that a separate division of family law courts

---

(4) Act of 26 October 1982 on the Proceedings in Juvenile Cases (*Ustawa o postępowania w sprawach nieletnich*), consolidated text, Journal of Laws 2022, item 1700 with subsequent amendments.

(5) Act of 19 August 1994 on the Protection of Mental Health (*Ustawa o ochronie zdrowia psychicznego*), consolidated text, Journal of Laws 2023, item 1972 with subsequent amendments; Act of 29 July 2005 on Counteracting Drug Addiction (*Ustawa o przeciwdziałaniu narkomanii*), consolidated text, Journal of Laws 2023, item 1939 with subsequent amendments.

(6) Act of 17 November 1964, consolidated text, Journal of Laws 2023, item 1860 with subsequent amendments.

should be established on all levels within the system of common courts of law. (7)

6 When it comes to succession law cases, they are heard by civil divisions of common courts of law. Nevertheless, most of these cases fall under the category of non-litigious procedures. Only certain claims deriving from succession law are heard in common litigation, eg, unworthiness to inherit, a claim for a compulsory portion of the inheritance.

7 The meaning of decision (*orzeczenie*) is also not defined by Polish law. There are two types of decisions in civil proceedings (including family law cases): a judgment (*wyrok*) and an order (*postanowienie*). Article 354 PCCP stipulates that the court issues orders unless that Code provides for a judgment to be issued. Moreover, a judgment is issued when there are grounds for issuing it on the merits of the case, and an order is made when procedural issues need to be resolved. The issue of a judgment is reserved exclusively for decisions resolving the case as to the essence of the dispute. The order is a form less solemn than a judgment, intended to resolve issues concerning the proceedings themselves and any incidental issues arising during court proceedings. (8)

II. Family law

8 One of the fundamental sources of family law is the Polish Constitution. The CRP enumerates the fundamental principles of Polish family law, including: marriage as a relationship between a woman and a man (Article 18 CRP); the protection of marriage as the foundation of a family (Article 18 CRP); durability of the marital bond (Article 18); equal rights of a man and woman in the area of family law (Article 33 CRP); the protection of family (Articles 18, 48, 53 § 3 and 71 CRP); the protection of the child's well-being (Article 72 CRP); special protection of maternity (Article 18 CRP); intimacy of family life and its protection (Article 47 CRP).

9 The fundamental piece of legislation which regulates relationships in the area of family law is the Family and Guardianship Code (*Kodeks rodzinny i opiekuńczy*, hereinafter: FGC) (9), which entered into force on 1 January

(7) Magdalena Habdas, Stanisława Kalus, *Family and Succession Law in Poland* (Wolters Kluwer 2020) 24.

(8) Andrzej Jakubecki, 'Komentarz do art. 354 k.p.c.' in Tadeusz Wiśniewski (ed), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–366* (Wolters Kluwer 2021) 1479.

(9) Act of 25 February 1964, consolidated text, Journal of Laws 2023, item 2809 with subsequent amendments.

1965. The FGC has undergone a number of amendments as a result of social and economic changes, and the consequent need to adjust its rules to EU standards. The most important amendments were introduced in 1975, 1998, 2004, 2008 and 2015. The FGC is composed of the following titles: matrimony (regulations of entering into marriage, rights and duties of spouses, matrimonial property regimes, termination of marriage and legal separation); consanguinity and affinity (provisions referring to the origin of the child and relations between parents and children, adoption, and the alimony obligation); guardianship and curatorship (guardianship over a minor, guardianship over a fully incapacitated person, and curatorship). Furthermore, the PCCP is of crucial importance to family law, because its provisions are applied to enforce the substantive law rights under the FGC.

10 The FGC regulates family law, which, according to the Polish civil law doctrine, forms a part of civil law. (10) In effect, it does not contain rules concerning personal law, particularly the notion of natural person, their legal capacity or capacity to perform acts in law, place of residence, personal interests and their protection. All these matters are referred to in the general provisions of civil law incorporated into the Polish Civil Code (*Kodeks cywilny*, hereinafter: PCC) (11). The FGC does not regulate personal law in the general part, but regulates personal relationships among family members, as well as their material relationships. The legal doctrine indicates that given the specific nature of family law relations, the FGC must cover some differences in relation to other civil law relationships. Examples include a much broader role of guardianship courts and their supervision over various aspects of the functioning of family law relations, the indispensable participation of State authorities in the creation of these relationships, a vast number of mandatory rules accompanied by the impossibility to compulsorily enforce the duties following from the regulated relationships. (12) The existence of a separate code does not, however, create an independent branch of law, and family law is still regarded as a part of civil law. (13)

---

(10) Zbigniew Radwański, 'Miejsce prawa rodzinnego w systemie prawa' (2008) Państwo i Prawo 12.

(11) Act of 23 April 1964, consolidated text, Journal of Laws 2023, item 1933 with subsequent amendments.

(12) Magdalena Habdas, Stanisława Kalus, *Family and Succession Law in Poland* (Wolters Kluwer 2020) 22.

(13) Piotr Fiedorczyk, 'Dyskusja na temat miejsca prawa rodzinnego w systemie prawa Polski Ludowej' (2009) Miscellanea Historico-Iuridica 171.

Apart from internal laws, a number of EU regulations are significant in the area of family law. They are applied directly in Poland and mainly regulate various procedural and conflict-of-laws issues. Among these, the following should be noted: the Brussels IIb Regulation; Regulation No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations; Regulation No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. It should be borne in mind that Poland did not enter into an enhanced cooperation concerning: Regulation No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (the Rome III Regulation) (14); Regulation No 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; Regulation No 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships. (15) **11**

A. *Divorce and legal separation*

First, in Poland, institutions such as divorce (*rozwód*), legal separation (*separacja prawna*) or the annulment of marriage (*unieważnienie małżeństwa*) apply only to spouses. (16) Poland is one of the few EU countries which does not recognise civil partnerships. In addition, there are no out-of-court procedures to be followed by spouses intending to divorce, legally separate or annul their marriage. It is a judgment that finalises each of these three proceedings. The only authority to deal with all of the above cases is a court (Articles 17 and 41 PCCP). **12**

As a rule, according to the PCCP, the same court adjudicates all family issues, ie, parental authority, parental contact, spousal maintenance, and child maintenance. However, this rule is subject to restrictions when there is an international element to the case, such as a foreign citizenship or a **13**

(14) On the prospects of Poland's accession to the areas covered by Regulation No 1259/2010 in the future: Piotr Mostowik, 'Kwestia przystąpienia przez Polskę do rozporządzenia unijnego Rzym III' (2016) Europejski Przegląd Sądowy 36.

(15) On the prospects of Poland's accession to the areas covered by Regulations No 2016/1103 and No 2016/1104 in the future: Marcin Sokołowski, 'Wzmocniona współpraca jako metoda tworzenia unijnych norm kolizyjnych prawa rodzinnego. Perspektywy dla Polski' (2019) Europejski Przegląd Sądowy 16.

(16) Grzegorz Jędrejek, *Kodeks rodzinny i opiekuńczy. Komentarz* (Wolters Kluwer 2017) 44.

habitual residence abroad. Therefore, when hearing a divorce case with an international (foreign or cross-border) element, the court must first determine whether it has the right to decide the merits at all. The court may have full jurisdiction (then it will rule on both matrimonial matters and parental authority and maintenance), partial jurisdiction (when the court will decide on divorce without ruling on parental authority and maintenance), or no jurisdiction at all. Article 1099 PCCP states that the court *ex officio* takes into consideration the lack of domestic jurisdiction at any stage of the case. Lack of domestic jurisdiction constitutes the basis for the proceedings to be declared invalid.

14 The jurisdiction of Polish courts in matrimonial cases and cases involving marital property regimes is exclusive only if both spouses are Polish citizens and have their place of residence or usual residence in Poland (Article 1103^1 § 2 PCCP). However, the Brussels IIb Regulation, as well as ratified international agreements (in particular, the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; furthermore, Poland is a party to several bilateral agreements with non-EU States) exclude the national court from exercising the jurisdictional rules provided for in Articles 1103 and 1103^1 PCCP.

15 A marriage can only be annulled on the grounds provided for in Articles 10–16 FGC, which are associated with age, full legal incapacitation, mental illness or mental disorder, bigamy, consanguinity and affinity, adoption, defective declaration, and defective entry into a marriage by proxy. Each of the spouses may claim the annulment of a marriage on the basis of the above-mentioned circumstances, at any time. On two grounds, it is third parties (aside from spouses) that may claim the annulment of a marriage. According to Article 13 § 2 FGC, anyone having a legal interest can claim the annulment of a marriage on the grounds that one of the spouses remains in a previous marriage (bigamy). Similarly, anyone having a legal interest can claim the annulment of a marriage on the grounds of consanguinity (Article 14 § 2 FGC). (17) However, in any case, an action for annulment of marriage may also be brought by a public prosecutor. Added to that is the fact that the general rules on declarations of intent (Articles 82–88 PCC) do not apply to the annulment of marriage. The applicable law derives from Article 15^1 FGC.

(17) Jakub M. Łukasiewicz, *Instytucje prawa rodzinnego* (Wolters Kluwer 2014) 159.

The provisions on a divorce with respect to the spouses, their children and their property regimes will apply accordingly to an annulment of marriage, except that the spouse who has entered into marriage in bad faith is treated as the spouse guilty of the breakdown of the marriage (Article 21 FGC). ([18]) **16**

Divorce requests are assessed by the court, in accordance with two positive and three negative prerequisites set in Article 56 FGC. ([19]) If there has been a complete and irretrievable breakdown of the marriage between the spouses, either spouse may apply to the court to order the marriage to be dissolved by divorce (Article 56 § 1 FGC). Nevertheless, despite the irretrievable and complete breakdown of marriage, a divorce is not permitted if it would be detrimental to the welfare of the minor children of both spouses, or if there are other reasons why the decision to divorce is contrary to the principles of social co-existence (Article 56 § 2 FGC). Apart from the child's welfare and principles of social co-existence, there is one more negative prerequisite of divorce in family law in Poland, also known as the rule of recrimination (*zasada rekryminacji*). ([20]) A divorce is also not permitted if it has been demanded by the spouse who is solely at fault for the breakdown of the marriage, unless the other spouse consents to the divorce, or the refusal to consent to the divorce is, in the given circumstances, contrary to the principles of social co-existence (Article 56 § 3 FGC). **17**

In its ruling on the divorce, the court rules on whether and which spouse is at fault for the breakdown of the marriage (Article 57 § 1 FGC). Then, the court rules on parental authority for the minor children of both spouses and on parental contact with them and decides to what extent each spouse is obliged to cover the costs of maintenance and upbringing of the children (Article 58 § 1 FGC). If the spouses shared a residence, in the ruling on divorce, the court will also rule on the use of such residence for as long as the divorced spouses are sharing it. In exceptional cases, where the grossly reprehensible conduct of one spouse makes cohabitation impossible, the court may order an eviction on the motion of the other spouse (Article 58 § 2 FGC). On the motion of one of the spouses, the court may, in the ruling on divorce, divide the joint property, as long as the division does not cause **18**

([18]) Andrzej Zielonacki, 'Komentarz do art. 21 k.r.o.' in Henryk Dolecki, Tomasz Sokołowski (eds), *Kodeks rodzinny i opiekuńczy* (2nd edn, Wolters Kluwer 2013) 84.

([19]) Adam Olejniczak, 'Komentarz do art. 56 k.r.o.' in Henryk Dolecki, Tomasz Sokołowski (eds), *Kodeks rodzinny i opiekuńczy* (2nd edn, Wolters Kluwer 2013) 381.

([20]) Katarzyna Kamińska, 'Zasada rekryminacji jako negatywna przesłanka rozwodu' (2019) Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury 95.

undue delay to the proceedings (Article 58 § 3 FGC). The same applies to the maintenance obligations between divorced spouses (Article 60 FGC). It should be noted that within three months of when the divorce becomes final and non-appealable, a divorced spouse who changed their surname as a result of the marriage may submit a statement before the head of the registry office or a consul on reverting to the surname from before the marriage (Article 59 FGC). (21)

19 According to Article 61^1 FGC, if there has been a complete breakdown of marriage between the spouses, either spouse may demand that the court issue a separation order. However, despite the complete breakdown of marriage, separation is not permitted if it would be detrimental to the welfare of the minor children of both spouses, or if there are other reasons why the separation order is contrary to the principles of social co-existence. Moreover, if the spouses have no minor children together, the court may order the separation on the basis of the joint request made by the spouses. In the case of legal separation, a prerequisite of an irretrievable breakdown of marriage is not required for issuing an order; and likewise the rule of recrimination does not apply. (22) A separation order has the same effects as the dissolution of a marriage by divorce with the exceptions specified in Article 61^4 FGC. First, the separated spouses cannot remarry. Second, if fairness so requires, separated spouses are obliged to assist each other.

20 An application for a divorce or separation can be made individually, or jointly with the other spouse. (23) Neither a public prosecutor nor a third party can do so alone.

21 The number of divorces and separation cases (the latter was introduced into Polish family law in 1999) seems relatively low as compared to other European States. The divorce rate in 2003 amounted to only 1.2% covering 47,000 divorced and 3,000 separated couples. In 2008, the number of divorced couples increased considerably and reached 66,000, while the number of separations increased to 4,000. In 2018, there were 62,800 divorces and 1,300 separations. The divorce rate of 1.76% remains rather low, when compared to other European countries. (24)

---

(21) Tomasz Sokołowski, 'Komentarz do art. 58 k.r.o.' in Henryk Dolecki, Tomasz Sokołowski (eds), *Kodeks rodzinny i opiekuńczy* (2nd edn, Wolters Kluwer 2013) 448.

(22) Anna Sylwestrzak, 'Komentarz do art. 61^1 k.r.o.' in Henryk Dolecki, Tomasz Sokołowski (eds), *Kodeks rodzinny i opiekuńczy* (2nd edn, Wolters Kluwer 2013) 498.

(23) In accordance with Article 57 § 2 FGC, upon a mutual request of the spouses, the court will refrain from ruling on fault with regard to the divorce.

(24) Joanna Stańczak, Karina Stelmach, Magdalena Urbanowicz, Małżeństwa oraz dzietność w Polsce, Warszawa 2016 <https://stat.gov.pl/files/gfx/portalinformacyjny/pl/

22 All cases concerning divorce, legal separation and the annulment of marriage ([25]) are settled during judicial proceedings, and Articles 425-452 PCCP apply. It is worth noting the following points. Hearings are held behind closed doors unless both parties request that the case be heard in open court and the court decides that hearing the case in public does not pose a threat to morality (Article 427 PCCP). Minors under the age of 13 and descendants of parties under the age of 17 may not be examined as witnesses (Article 430 PCCP). ([26]) In divorce or legal separation cases, the court orders oral evidence to be taken from the parties (Article 432 PCCP). The court may order a community inquiry to be carried out by a designated person in order to determine the conditions in which the parties' children live (Article 435 PCCP). Where there are reasons to believe that a marriage may survive, the court may refer the parties to mediation (Article 436 PCCP). ([27]) However, the courts seldom make use of this opportunity in all family law matters. ([28]) When it comes to the taking of evidence, it should first of all seek to establish the circumstances of the breakdown of the marriage, the facts relating to children and their situation and, if the petition is acknowledged, also the reasons why the respondent so acknowledges (Article 441 PCCP).

23 The courts' impartiality is guaranteed by the procedure of disqualification of a judge. It is possible to disqualify a judge by operation of law in accordance with the grounds defined in Article 48 PCCP. ([29]) Nevertheless, irrespective of the grounds specified in that provision, the court disqualifies a judge on that judge's or the party's motion if there are circumstances which could give rise to reasonable doubts as to the impartiality of the judge in the case concerned (Article 49 PCCP). ([30])

---

defaultaktualnosci/5468/23/1/1/malzenstwa_i_dzietnosc_w_polsce.pdf> accessed 12 January 2024.

([25]) The proceedings are similar to divorce proceedings. In cases of annulment of marriage, however, a copy of the lawsuit should be served to the prosecutor.

([26]) Older children have the right to remain silent (Art 261 § 1 PCCP).

([27]) Daniela Wybrańczyk, *Sytuacja prawna małoletniego dziecka rozwodzących się rodziców* (Wolters Kluwer 2022) 325.

([28]) Jerzy Słyk, 'Rozstrzyganie o istotnych sprawach dziecka w przypadku braku porozumienia rodziców (art. 97 § 2 k.r.o.)' (2013) Prawo w Działaniu. Sprawy cywilne 111.

([29]) Tadeusz Żyznowski, 'Komentarz do art. 48 k.p.c.' in Tadeusz Wiśniewski (ed), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–366* (Wolters Kluwer 2021) 282.

([30]) Tadeusz Żyznowski, 'Komentarz do art. 49 k.p.c.' in Tadeusz Wiśniewski (ed), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–366* (Wolters Kluwer 2021) 291.

B. *Parenthood*

24 In Poland, the concept of parenthood (*rodzicielstwo*) is associated with the traditional concepts of motherhood (*macierzyństwo*) and fatherhood (*ojcostwo*). Marital status is indivisible, which means that only one man and one woman can be the father and mother of a child. (31) This is illustrated in, for example, Article 72 § 2 FGC, according to which, paternity cannot be determined if a paternity action is pending (one cannot have two fathers at the same time).

25 The mother of the child is the woman who gave birth to them (Article 61^9 FGC). (32) It is possible to demand that motherhood be determined if the child's birth certificate reveals unknown parents, or the motherhood of the woman entered on the child's certificate is denied (Article 61^{10} § 1 FGC). (33) Legal action to determine motherhood can be brought by the child or the mother. It is possible to demand the denial of motherhood if a woman is stated in the birth certificate as the mother, but did not give birth to the child (Article 61^{12} § 1 FGC). Legal action for denial of motherhood can be brought by: the child, the mother, the woman stated in the child's birth certificate as the mother, as well as the man whose paternity was determined in connection with the maternity of the woman stated in the child's birth certificate as the mother. The mother, or the woman stated in the child's birth certificate as the mother, may bring legal action for the denial of motherhood within one year of the date of the child's birth certificate being drawn up. The man whose fatherhood was determined in connection with motherhood of the registered mother can bring legal action to deny the motherhood within one year of when he discovered that the registered mother is not the mother of the child, but no later than when the child reaches the age of majority. According to Article 61^{16} FGC, the prosecutor is also entitled to bring legal action to determine or deny motherhood for reasons of the child's welfare or the protection of public interests. (34)

---

(31) Tadeusz Smyczyński, *Prawo rodzinne i opiekuńcze* (C.H.Beck 2014) 183.

(32) Hanna Witczak, Agnieszka Kawałko, 'Komentarz do art. 61^9 k.r.o.' in Magdalena Habdas, Mariusz Fras (eds), *Kodeks rodzinny i opiekuńczy. Komentarz* (Wolters Kluwer 2021) 685.

(33) Eg, because of an error committed by the hospital. Another example is the child born of rape when the mother is a minor – then, her mother (grandmother of that child) is entered in the child's birth certificate.

(34) Hanna Witczak, Agnieszka Kawałko, 'Komentarz do art. 61^{16} k.r.o.' in Magdalena Habdas, Mariusz Fras (eds), *Kodeks rodzinny i opiekuńczy. Komentarz* (Wolters Kluwer 2021) 718.

26 The FGC provides for three ways in which fatherhood can be established, namely: presumed fatherhood of a child from marriage, recognition of fatherhood, and judicial determination of fatherhood. The first concerns a child born during a marriage, and the latter two, children born out of wedlock (non-matrimonial). (35)

27 According to Article 62 § 1 FGC, if a child is born during a marriage, or within 300 days of its termination or annulment, they will be presumed to be the child of the mother's husband. (36) This presumption will not apply if the child is born more than 300 days after a legal (judicial) separation. Nevertheless, if the child is born within 300 days of the termination or annulment of the marriage, but after the conclusion of the mother's second marriage, they will be presumed to be the child of the mother's second husband. This presumption does not apply if the child is born following a procedure for medically assisted procreation that is approved by the mother's first husband. These presumptions may only be rebutted by bringing a legal action for denial of fatherhood. The mother's husband may bring legal action for denial of fatherhood within one year of when he found out that the child is not biologically his, but no later than when the child reaches the age of majority (Article 63 FGC). (37) Fatherhood may be denied by showing that the mother's husband is not the child's father (Article 66 FGC). Under Polish law, denial of fatherhood is not admissible if the child was born as a result of medically assisted procreation to which the mother's husband consented. It is also worth adding that apart from the mother's husband, legal action to deny fatherhood may be brought by the child and the mother.

28 If the presumption does (or can) not apply or was rebutted, fatherhood may be determined either by acknowledgement of fatherhood, or by judicial recognition (Article 72 § 1 FGC). (38) Fatherhood is recognised when the child's biological father makes a declaration before the head of the registry office and states that he is the father of the child, and the child's mother, immediately or within three months of the man's declaration, confirms that the father of the child is that man (Article 73 § 1 FGC). A declaration for recognition of fatherhood can be submitted by anyone who has reached the

---

(35) Tadeusz Smyczyński, *Prawo rodzinne i opiekuńcze* (C.H.Beck 2014) 193.

(36) Jakub M. Łukasiewicz, *Instytucje prawa rodzinnego* (Wolters Kluwer 2014) 171.

(37) Hanna Witczak, Agnieszka Kawałko, 'Komentarz do art. 63 k.r.o.' in Magdalena Habdas, Mariusz Fras (eds), *Kodeks rodzinny i opiekuńczy. Komentarz* (Wolters Kluwer 2021) 740.

(38) Hanna Witczak, Agnieszka Kawałko, 'Komentarz do art. 63 k.r.o.' in Magdalena Habdas, Mariusz Fras (eds), *Kodeks rodzinny i opiekuńczy. Komentarz* (Wolters Kluwer 2021) 778.

age of 16 if there are no grounds for them to be declared legally incapacitated. Fatherhood can also be recognised before the guardianship court, and abroad before the Polish consul, or a person designated to perform the consul's functions, if recognition involves a child where one or both parents are Polish citizens (Article 73 § 4 FGC). Moreover, if there is any direct danger threatening the life of the child's mother or the biological father, [39] the declaration necessary to recognise fatherhood may be recorded by a notary public or submitted for the record of the head of a municipality (mayor of a town or city), head of a district, marshal of a province, or secretary of a district or municipality. In accordance with Article 75 § 1 FGC, it is possible to recognise fatherhood before the birth of a conceived child. Fatherhood is recognised on the day that the child is born, including when, before transferring the reproductive cells originating from an anonymous donor, or an embryo derived from a(n) (anonymous) donor to the woman's body, the male makes a declaration before the head of the registry office that he is the father of the child born following the procedure of medically assisted procreation. The woman then confirms that the man will be the child's father. She can do so simultaneously (at the time of the man making the declaration) or within three months.

29 A man whose fatherhood has been recognised may bring legal action to determine the ineffectiveness of recognition within one year of when he found out that the child is not his. If fatherhood is recognised before the birth of a child, but after the child was conceived, this period cannot start before the birth of the child (Article 78 § 1 FGC). Legal action to determine the ineffectiveness of recognition may be brought by: the man whose paternity is recognised, the mother or the child. [40]

30 As provided by Article 84 § 1 FGC, court proceedings to determine fatherhood may be demanded by the child, the mother or the presumed father of the child. It is presumed that the father of the child is the man who was in a sexual relationship with the mother of the child between 300 and 181 days before the birth of the child, or the man who was the donor of the reproductive cell in the case of a child born as a result of a partner donation in a medically assisted procreation procedure. The fact that the mother was

---

[39] Mainly cases concerning the mother's or father's health, as well as extraordinary situations. Such circumstances may include war or acts of war, natural disasters or dangerous infectious diseases.

[40] Hanna Witczak, Agnieszka Kawałko, 'Komentarz do art. 63 k.r.o.' in Magdalena Habdas, Mariusz Fras (eds), *Kodeks rodzinny i opiekuńczy. Komentarz* (Wolters Kluwer 2021) 809.

intimate with another man during this period may constitute grounds to rebut the presumed fatherhood, but only if the circumstances indicate that the fatherhood of the other man is more likely. (41)

31 Legal action to determine or deny fatherhood, or to determine the ineffectiveness of fatherhood recognition, may also be brought by the public prosecutor for reasons concerning the child's welfare or the protection of the public interest (Article 86 FGC).

32 The court decides cases concerning motherhood and fatherhood in litigious proceedings. Any judgment is declarative, (42) has retroactive legal effect (*ex tunc*) and applies *erga omnes*. Articles 453-458 PCCP apply. Noteworthy is Article 453^1 PCCP, which states that in the actions for establishing or denying the child's parenthood that render acknowledgement of fatherhood ineffective, the mother and the father of the child have procedural capacity, even if they have limited capacity for acts in law, provided that they are over 16 years of age. (43)

33 The Private International Law Act of 4 February 2011 (44) is applicable to disputes in which there is a cross-border element. According to Article 55 of this statute, determination and negation of the child's origin is subject to the law of nationality of the child at the moment of their birth. If the law of the nationality of the child at the moment of their birth does not provide for the judicial recognition of fatherhood, it is governed by the law of the nationality of the child at the moment of the affiliation. Recognition of the child is subject to the law of the nationality of the child at the time of the recognition. If this law does not provide for recognition of the child, the law of the nationality of the child at the moment of their birth applies, where the latter provides for recognition. Recognition of a child conceived but unborn is subject to the law of the country of their mother's nationality at the time of recognition.

---

(41) Jakub M. Łukasiewicz, *Instytucje prawa rodzinnego* (Wolters Kluwer 2014) 177.

(42) The judgment is declarative in the sense that a child can have only one mother and one father since birth. If motherhood or fatherhood is denied, Poland assumes a legal fiction that this woman or this man has never been the mother or father of the child. The court merely declares it but does not create a new legal situation.

(43) Iwona Koper, Dariusz Dończyk, 'Komentarz do art. 453^1 k.p.c.' in Tadeusz Wiśniewski (ed), *Kodeks postępowania cywilnego. Komentarz. Tom II. Artykuły 367–505^{39}* (Wolters Kluwer 2021) 570.

(44) Act of 4 July 2011, consolidated text, Journal of Laws 2023, item 503 with subsequent amendments.

C. *Adoption*

34 The institution of adoption is of substantive legal nature and is regulated in the provisions of Articles 114ff FGC, while the procedure for adoption cases isregulated in Articles 585ff PCCP. The Polish term *przysposobienie*, as used in the FGC, corresponds to the term *adopcja* found in everyday language, derived from the Latin *adoptio*. Adoption in modern law means the establishment between the adopter (*przysposabiający*) and the adoptee (*przysposobiony*) of a legal family relationship similar to that between parents and child (Article 121 § 1 FGC). The primary social function of adopting a child today is to replace the missing family environment. (45) This function follows directly from the normatively expressed assumption that only a child can be adopted and only if the adoption is in the child's best interests (Article 114 § 1 FGC).

35 In the past, adoption fulfilled various purposes, not only of a family nature, but also of a public nature. First and foremost, adoption was intended to remedy the disadvantageous situation of people who could not fulfil their property and/or, political (dynastic) aspirations due to the lack of descendants. The continuation of the power of a given family (lineage), the possibility of transferring property, becoming a nobleman, were made possible through adoption, thus fulfilling at that time a role far from the one we assign to adoption today. It even came to the point that in some countries only an adult could be adopted (under the French Civil Code and the Russian Collection of Laws, Vol X). Adoption was thus a contract between the parties, the content of which could be shaped. After World War II, adoption as a family law institution became particularly necessary due to the large number of children deprived of parents. In Poland, the previously existing regulations inherited from the partitioners (46) were repealed, and the decree of 22 January 1946 (47) normalised the issue of adoption uniformly for the entire State. However, it was not until the 1950 Family Code (48) that the contractual form of adoption was eliminated, and

---

(45) Henryk Dolecki, 'Komentarz do art. 114 k.r.o.' in Henryk Dolecki, Tomasz Sokołowski (eds), *Kodeks rodzinny i opiekuńczy* (2nd edn, Wolters Kluwer 2013) 820.

(46) From 1795 to 1918, Poland was split between Prussia, the Habsburg monarchy, and Russia and had no independent existence. This was reflected in the law.

(47) Family Law Decree of 22 January 1946 (Journal of Laws 1946, no 6 item 52 with subsequent amendments).

(48) Family Code Act of 27 June 1950 (Journal of Laws 1950, no 34 item 308 with subsequent amendments).

it became exclusively an institution of personal family law. In Poland, it is the guardianship court that rules on the creation of a legal relationship as a result of adoption (Article 586 § 1 PCCP). (49)

36 Therefore, the Polish legislators rejected the contractual form of adoption and gave it a family law character. The creation of the legal relationship of adoption itself is a formal act and occurs by virtue of a decision of the guardianship court, not by the will of the parties. The ruling is constitutive and effective *erga omnes*. The normative model of adoption under the FGC is based on three basic assumptions: the non-financial nature of adoption; the implementation of the principle of child welfare; and the equal treatment of adopted children and natural children (*adoptio naturam imitatur*). Adoption, however, is not a uniform institution. Indeed, the FGC distinguishes between several types of adoption, one of which results in looser family ties (partial adoption) and another constitutes a legal relationship with the adopter's relatives (full adoption), while the so-called 'complete adoption' (50) creates the most permanent family bond – like that which exists between the parents and their biological child – as it is impossible to be dissolved. A departure from the family law nature of adoption can be seen in the permissibility of termination of full and partial adoptions. Dissolution does not occur by 'agreement' of the parties, but is the result of a constitutive decision of the guardianship court, which can be issued only if there are compelling reasons to do so (Article 125 § 1 FGC). (51)

37 The differences between the three main types of adoption are illustrated in the table below:

Type of adoption	Legal basis	Effects	Birth certificate
Partial adoption (*przysposobienie niepełne*)	Article 124 FGC	The effects apply only to the relationship between the adoptee and the adopter, with the exception, however, that they also extend to the adoptee's descendants.	No changes.

(49) Magdalena Kuchnio, 'Komentarz do art. 586 k.p.c.' in Olga M. Piaskowska (ed), *Kodeks postępowania cywilnego. Postępowanie nieprocesowe. Postępowanie w razie zaginięcia lub zniszczenia akt. Postępowanie zabezpieczające. Komentarz* (Wolters Kluwer 2022) 248.

(50) It is an anonymous adoption, where a new birth certificate is issued.

(51) Tadeusz Smyczyński, *Prawo rodzinne i opiekuńcze* (C.H. Beck 2018) 300–301.

Full dissolvable adoption (*przysposobienie pełne*)	Article 121 FGC	The adoptee acquires the rights and obligations (including, among others, to alimony and inheritance) arising from kinship with respect to the adoptee's relatives; the adoptee's rights and obligations arising from kinship with respect to their relatives are extinguished, as do those relatives' rights and obligations with respect to them; the effects extend to the adoptee's descendants.	A supplementary note on adoption is attached to the birth certificate of the adopted person - Article 72 section 1 of the Civil Records Law Act (*Prawo o aktach stanu cywilnego*, hereinafter: CRL) ([52]).
Full non-dissolvable adoption (anonymous) (*przysposobienie całkowite*)	Article 124[1] FGC (Article 589 KPC - anonymous consent)	An extended variation of full dissolvable adoption; the adoptee loses their previous family status and acquires a new one, associated with their incorporation into a new family.	A new birth certificate is issued (Article 71 section 1 CRL).

38 Despite the three types of adoption, based on the norms of the FGC, it is possible to distinguish between common prerequisites that must exist for the court to rule on the adoption of a child. At the forefront is that the adoption must be in the best interests of the adopted child, as the overriding postulate that must be taken into account when evaluating all the grounds designated directly in the FGC or interpreted from it. Thus, it is not fitting to discuss the welfare of the child as a separate premise for adoption.

39 The table below is a summary of the premises for adoption:

Requirements on the part of the adoptee	**Premises on the part of the adopter**	**Other premises**
Minority (Article 114 FGC) – the premise of minority derives from the purpose of adoption, ie, to provide the child with family conditions for upbringing and development.	Expression of the will to adopt – the expression of the will to adopt a child is such an obvious requirement that the FGC does not explicitly formulate this premise. However, it has a legal basis in Article 117 § 1 FGC, which states that adoption is effected by a decision of the guardianship court at the request of the adopter.	Parental consent – the consent of the child's parents is generally needed for adoption (Article 119 § 1 FGC). This consent is not required: when the parents are deprived of parental authority; when the parents are unknown; when an agreement with the parents faces insurmountable obstacles.

([52]) Civil Records Law Act of 28 November 2014, consolidated text, Journal of Laws of 2023, item 1615 with subsequent amendments.

Life (Article 117 § 2 FGC) – the adoptee is alive at the time of the adoption ruling. Consent of the minor (Article 118 FGC) – the consent of the minor who has reached the age of 13 is a prerequisite for a ruling on their adoption. The legislator removed the requirement of the consent of the younger child but imposed an obligation on the court to hear the adoptee if they can understand the meaning of adoption.	The provision is not only concerned with the legal standing to make the relevant request, but also expresses the substantive prerequisite of the adopter's consent. This means that the court cannot rule on adoption against their will. If the adopter is married, the consent of their spouse is also needed, unless they lack the legal capacity or an agreement with them faces insurmountable obstacles (Article 116 FGC). Age difference (Article 114^1 § 2 FGC) – the appropriate age difference between the parties to the adoption relationship is to make them more like the average family based on a biological bond. The legislator did not indicate a strict age difference, but used an undefined phrase, stating that it was to be an 'appropriate' difference. It is generally accepted that the age difference between the adopter and adoptee should be at least 18 years. Full capacity for acts in law (Article 114^1 § 1 FGC) – full capacity for acts in law is a necessary premise, as the lack or limitation of this capacity prevents the exercise of parental authority over an adopted child (Article 94 FGC). Subjective qualifications – the personal qualities of the adopter is a premise that stems from the overriding demand to ensure the welfare of the child. The point is that the upbringing and care of the child's development should be entrusted to a person whose personal qualities, especially morality, allow us	International adoption – with regard to the adoption of a Polish child by a foreigner or by a Polish citizen residing abroad, the FGC contains an additional premise necessary for the ruling on such an adoption, commonly referred to as foreign adoption. Indeed, Article 114^2 § 1 FGC requires finding that the child cannot be provided with a suitable substitute family environment in Poland. To determine the existence of this negative premise, the guardianship court cooperates with adoption centres (the so-called 'central information bank') looking for an adoptive family for the child. An additional premise for foreign adoption is a 'trial period', ie, the court determines a mandatory period of personal contact between candidates for adoption and the child at the child's former place of residence (Article 120^1 § 3 FGC).

	to assume that the child will live in a favourable family environment. The guardianship court is obliged to examine these circumstances also by using the opinion of the adoption centre (Article 586 § 4 PCCP). A candidate for an adopter must also obtain a qualification opinion and a certificate of completion of a training course organised by an adoption centre (Article 114^1 § 1 FGC).	

40 With adoption, the role of the court is extremely important. This is because, under Article 585 § 1 PCCP, the guardianship court initiates proceedings at the request of the adopter. (53) As already indicated, adoption in Poland is not a contract between the parties but is formed as a result of a court decision delivered after holding a hearing. The adopter and the persons whose consent to the adoption is needed are summoned to the hearing. The parents who have consented to the adoption of their child in the future without naming the adopter are not summoned to the hearing – in such a case, the parents may not participate in the proceedings (Article 586 § 3 PCCP). Also, the dissolution of adoption can only occur as a result of a ruling by the guardianship court, at the request of both the adopter and the adopted person. (54) However, the mere – even consensual – request by the parties is not enough; it is subject to an evaluation by the court, in light of the existence of the required premises. The FGC lists *expressis verbis*: compelling reasons and the welfare of the minor child. (55) Like a ruling establishing adoption, a ruling dissolving this legal relationship is constitutive and effective *erga omnes*. Consequently, the ruling has ex nunc effects, as soon as it becomes final and valid. With regard to the situation of the adoptee, the dissolution of adoption causes the effects of the adoption to cease (Article 126 § 1 FGC). (56)

---

(53) Magdalena Kuchnio, 'Komentarz do art. 586 k.p.c.' in Olga M. Piaskowska (ed), *Kodeks postępowania cywilnego. Postępowanie nieprocesowe. Postępowanie w razie zaginięcia lub zniszczenia akt. Postępowanie zabezpieczające. Komentarz* (Wolters Kluwer 2022) 243.

(54) Not only the adopter, but also the adopted person may demand the dissolution of the adoption.

(55) Jakub M. Łukasiewicz, *Instytucje prawa rodzinnego* (Wolters Kluwer 2014) 275.

(56) The adoption cannot be challenged on the ground of undue influence, error, etc.

D. *Parental responsibility*

41 Parental authority (*władza rodzicielska*) is regulated in the provisions of Articles 92ff FGC. The legislator uses the concept of parental authority; however, there are calls to replace this concept with another term, such as parental responsibility (*odpowiedzialność rodzicielska*). (57) The discussion on the application of the concept of parental authority in the Polish legal system began during the work on the 2008 amendment to the FGC. In the justification of the bill, it was pointed out that the term 'parental authority' is established in the public consciousness and does not raise objections. Parents should have executive authority over the person and property of a child who, due to the state of their physical, mental, intellectual development, and lack of life experience, is unable to make decisions on their own, for their own welfare. According to the authors of the amendment, the term 'parental responsibility' excessively reflects only some aspects of the totality of rights and obligations that make up the legal situation of parents in relation to the child and third parties. (58)

42 Under Article 92 FGC, a child remains under parental authority until the age of majority. It can be assumed that in a typical situation, parental authority arises *ex lege* from the birth of the child. However, it may be the case that parental authority is the result of a judgment or legal act. A court decision creates the parental authority of persons who have adopted a child (Article 123 § 1 FGC), as well as the parental authority of the man to whom the court has granted it in a judgment establishing paternity (Article 72 § 1 FGC). In turn, the parental authority of the man who has acknowledged paternity arises by virtue of a legal act.

43 Parental authority continues until the child comes of age, and an adult is a person who has reached the age of 18 (Article 10 § 1 of PCC). As soon as the child comes of age, parental authority expires *ex lege*. Parental authority may expire in the following situations: death of the parent or their child; total or partial incapacitation of the parent; denial of maternity; denial of paternity; determination of the ineffectiveness of the acknowledgment of paternity; deprivation of parental authority; suspension of parental authority. In practice, it can happen that an adult child, due to their mental illness or mental disorder, is incapable of living independently in society and can be declared completely incapacitated by the guardianship court. In this case, after the termination of parental authority of the parents, guardianship (*opieka*) is

(57) Marek Michalak, Pawel J. Jaros, 'Prawo dziecka do obojga rodziców' (2014) Dziecko krzywdzone. Teoria, badania, praktyka 26.

(58) Bill amending the Family and Guardianship Code Act and Certain Other Acts of 7 December 2007, form No. 629.

established for the child. If the incapacitated person was unmarried, the court may appoint their mother or father as a legal guardian (*opiekun prawny*). In turn, in the case of partial incapacitation of a child who is already an adult, no guardianship is established, but a custodian (*kurator*) can be appointed for the child. The custodianship (*kuratela*) may be limited to matters of a certain type or to the handling of a particular case; the guardianship court determines the scope of the custodian's duties and powers. (59)

44 Parental authority is vested in both parents (Article 93 § 1 FGC). However, each parent is connected to the child by a separate legal relationship, namely parental authority (Article 97 § 1 FGC), but this autonomy does not apply to important matters relating to the child. Under Article 97 § 2 FGC, such important matters are decided jointly by the parents; in the absence of an agreement between them, it is the guardianship court that is to decide. The content of parental authority is determined by the duties and rights of parents, which relate to three areas: custody of the child, management of the child's property, and representation (Article 95 § 1 FGC). The rights of parents included in parental authority are closely related to the persons of parents and their children. Therefore, they cannot be transferred or inherited, nor can the parents waive these rights. (60)

45 Article 100 FGC regulates the duty of the guardianship court and other public authorities (including State and local government authorities, the public prosecutor's office, the police) to assist parents insofar as it is necessary for the proper exercise of parental authority. (61) The above provision uses the general term 'assistance' (*pomoc*), which can include various forms of support by authorities. Article 100 § 1 FGC lists two examples of important cases when assistance is provided to the family. These are: the possibility for parents to ask the guardianship court to take the child from an unauthorised person, and the possibility for parents to ask the guardianship court or another competent public authority to provide foster care for the child. (62)

46 An unauthorised person within the meaning of Article 100 § 1 FGC may be a third party who does not have a family law relationship with the child. Unauthorised persons may also be those entitled to contact the child, such as

---

(59) Katarzyna Kamińska, 'Komentarz do art. 92 k.r.o.' in Mariusz Załucki (ed), *Kodeks rodzinny i opiekuńczy. Komentarz* (C.H. Beck) 476.

(60) Bronisław Walaszek, *Zarys prawa rodzinnego i opiekuńczego* (Warszawa 1971) 169.

(61) Piotr Wicherek, 'Komentarz do art. 100 k.r.o.' in Magdalena Habdas, Mariusz Fras (eds), *Kodeks rodzinny i opiekuńczy. Komentarz* (Wolters Kluwer 2021) 995.

(62) The authorities can only act upon the request of the child's parents.

grandparents, and the parents themselves, if the contact goes beyond the scope of their parental authority and right to contact the child. Parents can therefore be unauthorised persons if: they have not been entrusted with the exercise of parental authority in a judgment declaring divorce (Article 58 § 1a FGC) or in the situation of parents living apart (Article 107 § 2 FGC); their parental authority has been restricted as a result of orders of the guardianship court issued pursuant to Article 109 FGC and concerning a change in the child's place of residence, such as by placing the child in a foster family (Article 109 § 2(5) FGC); they have been deprived of parental authority; their parental authority has been suspended. (63)

47 In the case of child abduction outside the borders of the Republic of Poland, the provisions of the following conventions ratified by Poland will apply: the European Convention on the Recognition and Enforcement of Decisions Relating to Custody of Children and Restoration of Custody of Children, implemented in Luxembourg on 20 May 1980, as well as the Hague Convention.

48 It is important to note Article 106 FGC, which stipulates that if the best interests of the child so require, the guardianship court may modify a ruling on parental authority and the manner of exercising it contained in a judgment declaring divorce (Article 58 § 1 and § 1a FGC), separation (Article 61^3 § 1 FGC) or annulment of marriage (Article 21 FGC), or establishing the child's parentage (Article 93 § 2 FGC). (64)

49 Article 107 FGC, on the other hand, deals with the parental authority of parents living apart. (65) The fact that parents with full parental authority live apart may justify a decision to be made by the guardianship court, which will determine the manner of its exercise in a functional manner adapted to such circumstances. This provision is applicable in the case of an involuntary inability of parents to exercise parental authority due to their separation. The current three types of rulings can be distinguished:

- allowing both parents to keep parental authority – if they have presented a written agreement, consistent with the child's best interests, on the manner of exercising parental authority and maintaining contact with the child (Article 107 § 1, second sentence of the FGC);
- a decision on the manner of joint exercise of parental authority and maintaining contact with the child, taking into account the child's right

(63) Jerzy Słyk in Grzegorz Jędrejek, *Meritum prawo rodzinne* (Wolters Kluwer 2017) 816.

(64) Aneta Pośpiech, 'Komentarz do art. 106 k.r.o.' in Magdalena Habdas, Mariusz Fras (eds), *Kodeks rodzinny i opiekuńczy. Komentarz* (Wolters Kluwer 2021) 1025.

(65) Katarzyna Kamińska, *Piecza naprzemienna a władza rodzicielska rodziców żyjących w rozłączeniu* (Wolters Kluwer 2022) 318.

to be raised by both parents who have not presented an agreement (Article 107 § 2, first sentence of the FGC);

- entrusting the exercise of parental authority to one parent and limiting the authority of the other parent to certain obligations and powers regarding the person of the child, if the child's best interests so warrant (Article 107 § 2, second sentence of the FGC). (66)

50 The principle of family autonomy does not exclude the possibility of State intervention aimed at preventing the child from experiencing a disadvantage in the family. It is possible, and sometimes even necessary, to breach this principle and exclude the primacy of the parents in the upbringing of the child, but only in situations where the welfare of the child is at risk and based on a court decision. In general, the guardianship court's means of interference in the sphere of parental authority can be divided into four groups:

- interference measures which are used in situations where, due to legal or factual constraints, parents face obstacles to the exercise of parental authority (see Article 97 § 2, Article 99, Article 101 § 3, Article 102 FGC);
- activities of the court not depriving the parents of parental authority, but interfering – to a greater or lesser extent – with the scope of that authority (see Article 58 § 1, Article 107, Article 109 FGC);
- measures leading to the suspension (Article 110 FGC) or exclusion (Article 111 FGC) of parental authority;
- all forms of assistance that the guardianship court should provide to parents (Article 100 FGC).

51 The provisions of Article 109 (restriction), Article 110 (suspension) and Article 111 (deprivation) FGC are forms of court interference with the scope and content of parental authority, different from each other, and should therefore be applied with great care, based on the specific circumstances of a particular case.

52 In view of the above, the exclusive competence in matters of parental authority rests with the guardianship court. On the one hand, parents are free to exercise authority over their child, but, on the other hand, this authority is not unlimited. This is because the FGC specifies situations in which court intervention is required, and sometimes even necessary. No other authority has the power to interfere with the scope and content of parental authority. (67)

---

(66) Katarzyna Kamińska, 'Komentarz do art. 107 k.r.o.' in Mariusz Załucki (ed), *Kodeks rodzinny i opiekuńczy. Komentarz* (C.H. Beck) 529.

(67) Cross-border: In the absence of relevant bilateral treaties, the Private International Law Act of 4 February 2011 will apply. It governs personal and property relations between

E. *Matrimonial property regimes*

In Polish family law, there are three types of matrimonial property regimes: the joint marital property regime (Article 31 FGC); the contractual regime (Article 47 FGC); or the involuntary regime (Article 52 FGC). **53**

Upon marriage, a joint marital property regime (*wspólność ustawowa*) is established for the spouses by law, which includes property acquired during the marriage by both spouses or by one of them (joint property, *majątek wspólny*). Items not covered by the joint marital property regime belong to the personal property (*majątek osobisty*) of each spouse (Article 31 § 1 FGC). The joint marital property regime is based on marriage as a personal relationship. The cessation of marriage results in the *ex lege* termination of this joint ownership. The events that cause the cessation of the joint marital property regime are: death of one of the spouses; a court decision dissolving the marriage; a court decision annulling the marriage; conclusion of an agreement by the spouses abolishing the joint marital property regime and introducing property separation; a court decision establishing full separation in place of joint marital property; a ruling on the separation of the spouses; incapacitation of one of the spouses; declaration of bankruptcy of one of the spouses. ([68]) **54**

The principle of independent management of joint property applies, which means that each spouse may independently manage joint property, ie, perform all legal acts, except for those that require the consent of the other spouse to be valid and effective (Article 36 FGC). Under Article 40 FGC, for compelling reasons, the court may, at the request of one spouse, deprive the other spouse of independent management of the joint property. 'Compelling reasons' include, among others, a lavish or reckless lifestyle, alcoholism, drug **55**

---

spouses from the date when the law entered into force, 16 May 2011, even if the marriage was contracted earlier.

Under Article 51 section 1 of the Private International Law Act, personal and property relations between spouses are subject in every case to the law of the country of which both parties are citizens.

If there is no such law, the law of the country in which both spouses are domiciled will apply, and if there is no such residence, the law of the State where both spouses have their habitual residence. If the spouses do not have their habitual residence in the same country, the law of the State with which the spouses are both most closely connected will apply (Article 51 section 2).

Poland currently remains outside the group of Member States implementing enhanced cooperation in the area of jurisdiction, applicable law, and recognition and enforcement of decisions in matters of matrimonial property regimes pursuant to Council Regulation (EU) 2016/1103 of 24 June 2016.

([68]) Bogusława Kubica, 'Komentarz do art. 31 k.r.o.' in Magdalena Habdas, Mariusz Fras (eds), *Kodeks rodzinny i opiekuńczy. Komentarz* (Wolters Kluwer 2021) 180.

addiction, concealment of joint assets from the other spouse, or factual separation.

56 Article 37 FGC provides for an exhaustive list of acts that require the consent of the other spouse. The consent of the other spouse is needed, among other things, to make donations from the joint property, except for small, customary donations. However, under Article 39 FGC, if one spouse refuses to give the consent required to perform the act, or if reaching an agreement with them faces insurmountable obstacles, the other spouse may ask the court for permission to perform the act. The court will grant permission if the performance of the act is in the best interests of the family.

57 Either spouse can demand the joint property to be divided. This division can take place at any time, as the claim for the abolition of joint ownership is not subject to the statute of limitations (Article 220 of PCC). In principle, the FGC does not regulate the manner or principles of such a division, and refers to the provisions on division of an estate (Article 46 of PCC) in this regard. Property can be divided in two ways: by agreement, or by court decision (Article 1037 of PCC in conjunction with Article 46 FGC). Spouses (ex-spouses) can divide assets contractually. The contract can be concluded in any form, as no written form is reserved either for evidentiary purposes or to produce certain effects. However, if there are multiple assets, a written form would be desirable for ease of proof (Article 74 § 1 of PCC). However, if the property to be divided includes real estate, for the contract to be valid, it should be concluded in the form of a notarial deed, *ad solemnitatem* (Article 1037 § 2 of PCC). Based on the will of the joint holders of rights, the contractual division may concern the entire estate or be limited to parts of it (Article 1038 § 2 of PCC). The prevailing position is that in the division of property, spouses must not obtain unequal shares. If a consensual division is not possible, it can be done by the district court in non-contentious proceedings at the request of one of the spouses. Proceedings for division of property are comprehensive – for the court decides not only on the division itself, but also on claims for payment of the debts of one of the spouses from the joint property, on the request for determination of unequal shares, on the request for reimbursement of expenditures to separate joint property. Unlike a contractual division, a judicial division covers the entire estate, but Article 1038 § 1 of PCC allows a division of only part of the estate, eg, the real estate, for compelling reasons. (69)

(69) Tadeusz Smyczyński, *Prawo rodzinne i opiekuńcze* (C.H. Beck 2018) 149–150.

Spouses may enter into an agreement in which their property relations are regulated differently from the statutory regime. (70) The prenuptial agreement between spouses (*umowa majątkowa małżeńska*) determines the structure of those property relationships that are part of the marital property regime. The prenuptial agreement may be modified or terminated (Article 47 § 2 FGC). The spouses may, by an agreement in the form of a notarial deed, extend or limit the joint marital property or establish a separation of property or a separation of property with equalisation of accrued gains. As a result, a contractual property regime is established. There is no register of prenuptial agreements in Poland. Extended joint property (*rozszerzenie wspólności*) includes property that, according to the rules of the joint marital property regime, belongs to personal property. When there is a limited joint property regime (*ograniczenie wspólności*), the spouses exclude certain types of property from the joint property by agreement; the limitation of joint property cannot lead to its complete abolition, ie, to separate marital property. (71) In the regime of separate marital property, there is no joint property; there are only two groups of assets: the wife's personal property and the husband's personal property. Upon the establishment of a separate marital property regime, each spouse manages their property independently (Articles 51-51^1 FGC). Separate marital property with equalisation of accrued gains is a variation of separate marital property – in it, the spouses only have personal property, while after the cessation of this regime, there is an obligation to equalise the accrued gains of both spouses. There are only two groups of assets, as each spouse retains both the property acquired before and after the agreement was concluded. Each spouse manages their property independently. After the cessation of the separate marital property regime, the spouse whose accrued gains are worth less than those of the other spouse may demand the equalisation of accrued gains (Article 51^4 § 1 FGC). Article 51^3 § 1 FGC defines the concept of accrued gains: the accrued gains of each spouse is the increase in the value of their assets after the conclusion of the prenuptial agreement. (72)

58

(70) Tomasz Sokołowski, *Swoboda intercyzy. Zakres modyfikacji małżeńskich ustrojów majątkowych* (Wolters Kluwer 2013) 149.

(71) Tomasz Sokołowski, *Swoboda intercyzy. Zakres modyfikacji małżeńskich ustrojów majątkowych* (Wolters Kluwer 2013) 151.

(72) Anna Stępień-Sporek, 'Rozdzielność majątkowa z wyrównaniem dorobków' (2008) Państwo i Prawo 73.

59 Currently, the number of prenuptial agreements entered into by spouses is steadily increasing, as shown in the following table (73):

Year	Prenuptial agreements
2013	47,624
2014	51,236
2015	52,822
2016	54,673
2017	57,806
2018	61,665
2019	64,095
2020	59,367
2021	66,388
2022	56,609

60 The essence of the involuntary regime (*ustrój przymusowy*) is that the joint marital property regime expires, either as a result of a court ruling or by operation of law:

- judicial establishment of separate marital property (for compelling reasons at the request of one of the spouses – Article 52 § 1 FGC, or at the request of a creditor of one of the spouses – Article 52 § 1a FGC);
- incapacitation of one of the spouses (Article 53 FGC);
- declaration of bankruptcy of one of the spouses (Article 53 § 1 FGC);
- ruling on separation of the spouses (Article 54 § 1 FGC).

III. Succession law

61 In Poland, succession law is a branch of civil law that defines the rules for the transition of property rights and obligations after the death of the holder thereof. (74) In this view, succession law defines the rules for acquisition of rights and obligations arising from inheritance (*dziedziczenie*), including the object of inheritance, persons entitled to inherit, persons entitled to acquire rights related to the inheritance other than by descent (legatees), and the liability rules for inheritance debts. Inheritance can occur in two ways: either by intestacy/statutory inheritance (which is the primary mode of inheritance

(73) Source: author's research based on the statistical information in 'Notarial deeds in 2013–2022' posted on the website <www.dane.gov.pl> accessed 12 January 2024.

(74) Liliana Kaltenbek, Waldemar Żurek, *Prawo spadkowe* (Wolters Kluwer 2016) 23.

in Poland) or by testamentary inheritance. (75) Other institutions of succession law include a forced share (compulsory portion of inheritance), division of inheritance (allowing judicial or extra-judicial division in proportions corresponding to the shares in the inherited property), confirmation of inheritance acquisition, deed of succession certification, ordinary bequest, specific bequest, instruction, accrual, or substitution. In Poland, inheritance formalities are generally handled in court, however, some matters can also be dealt with before a notary public.

62 The provisions creating succession law are generally found in two normative acts. The provisions of substantive law, which define the essence of various elements of the law, are to be found in the PCC (Articles 922ff), while the provisions on the procedural aspects of succession law are to be found in the PCCP (Articles 627ff). Provisions of succession law can also be found in other legislation, such as the Notary Public Law (*Prawo o notariacie*, hereinafter: NPL) (76) or the Banking Law (*Prawo bankowe*) (77).

A. *Devolution of the estate*

63 Under succession law in Poland, an inheritance can be acquired by testament inheritance (*dziedziczenie testamentowe*) or by intestacy (*dziedziczenie ustawowe*). Intestacy occurs when the deceased did not leave behind a will (testament), or when the will that was made is invalid, or when none of the persons whom the testator appointed in the will to inherit are willing or able to be an heir. The principles of intestacy are regulated in Articles 931-940 of the PCC. If the heirs receive an inheritance by law, it is a specific set of people that inherit. Heirs are divided by the laws into several groups, and depending on which group the heir is in, they will inherit from the deceased in that order (with other heirs). (78)

64 The deceased's children and the deceased's spouse are the first to be called to inherit by law; they inherit in equal shares, but the spouse's share may not be less than one-quarter of the whole inheritance. (79) If the deceased has no

(75) Anna Sylwestrzak, 'Komentarz do art. 926 k.c.' in Małgorzata Balwicka-Szczyrba, Anna Sylwestrzak (eds), *Kodeks cywilny. Komentarz* (Wolters Kluwer 2022) 1420.

(76) Notary Public Law Act of 14 February 1991, consolidated text, Journal of Laws of 2023, item 1615 with subsequent amendments.

(77) Banking Law Act of 29 August 1997, consolidated text, Journal of Laws 2023, item 2488 with subsequent amendments.

(78) Anna Sylwestrzak, 'Komentarz do art. 926 k.c.' in Małgorzata Balwicka-Szczyrba, Anna Sylwestrzak (eds), *Kodeks cywilny. Komentarz* (Wolters Kluwer 2022) 1459.

(79) Jerzy Ciszewski, Jakub Knabe, 'Komentarz do art. 931 k.c.' in Jerzy Ciszewski, Piotr Nazaruk (eds), *Kodeks cywilny. Komentarz* (Wolters Kluwer 2019) 1640.

descendants, the deceased's spouse and parents are called to inherit by law. In such a case, the share of the inheritance of each parent who inherits together with the deceased's spouse is one-quarter of the total inheritance. In the absence of descendants and of the deceased's spouse, the entire inheritance goes to the deceased's parents in equal shares. If one of the deceased's parents has not lived to see the opening of the inheritance, the deceased's siblings are entitled, in equal parts, to the share in the inheritance that would have accrued to them. ([80]) However, in the absence of descendants, spouse, parents, siblings and descendants of the deceased's siblings, the entire inheritance goes to the deceased's grandparents. In such a case, they will inherit in equal shares. However, if any of the deceased's grandparents has not lived to see the opening of the inheritance, the grandparent's children are entitled, in equal parts, to the share of the inheritance that would have accrued to them. ([81]) If there is no spouse of the deceased and relatives called to inherit by law, the inheritance falls in equal parts to those children of the deceased's spouse, neither of whose parents have lived until the opening of the inheritance. In turn, in the absence of the deceased's spouse, relatives and children of the deceased's spouse called to inherit by law, the inheritance falls to the municipality of the deceased's last place of residence, with the municipality being a statutory heir. If the deceased's last residence was abroad, it is the State Treasury, as the statutory heir, that is entitled to the inheritance.

65 What is noteworthy is Article 935^1 PCC, which provides that the provisions on the eligibility to inherit by statute do not apply to the spouse of the deceased who is separated. One should also recall Article 940 PCC, which allows the exclusion of a spouse from inheritance. A spouse is excluded from inheritance if the deceased requested a decree of divorce or separation due to their fault, and the request was justified. Importantly, the exclusion of a spouse from the inheritance takes place by court decision. Exclusion may be claimed by any of the other statutory heirs eligible to inherit together with the spouse; the time limit for bringing an action is six months from the date on which the heir learned of the opening of the inheritance, but no more than one year from the opening of the inheritance. ([82])

66 An alternative way to acquire an inheritance from a deceased is through a will. Under the provisions of the PCC, the deceased, ie, the person drawing

---

([80]) Jerzy Ciszewski, Jakub Knabe, 'Komentarz do art. 932 k.c.' in Jerzy Ciszewski, Piotr Nazaruk (eds), *Kodeks cywilny. Komentarz* (Wolters Kluwer 2019) 1642.

([81]) Jerzy Ciszewski, Jakub Knabe, 'Komentarz do art. 934 k.c.' in Jerzy Ciszewski, Piotr Nazaruk (eds), *Kodeks cywilny. Komentarz* (Wolters Kluwer 2019) 1644.

([82]) Anna Sylwestrzak, *Skutki prawne separacja małżonków* (Wolters Kluwer 2007) 244.

up the will, has full freedom in the disposition of their assets and in the choice of the beneficiaries. (83) In a will, the deceased may choose one or more persons to inherit all or part of the inheritance, whereby the choice of a testamentary heir excludes statutory inheritance in its entirety. The will may be declared invalid, in which case the division of assets covered by it will not be valid. Under Article 945 § 1 PCC, a will may be declared invalid if it has been made: in a state that precludes conscious or free decision-making and expression of will; under the influence of an error that justifies the assumption that if the testator had not acted under the influence of the error, they would not have made a will with this content; under the influence of a threat aimed at inducing them to write specific content in the will. (84)

Although most wills are drawn up in the ordinary written form, it is worth pointing out that Polish succession law also provides for several other forms, which are presented in the table below:

The form of the will	Characteristics
Holographic will (ordinary will; Article 949 PCC)	This is otherwise known as a handwritten will, drawn up by the testator with their own hand. The testator may draw up a will by writing it entirely with their own hand, signing and dating it.
Notarial will (ordinary will; Article 950 PCC)This	is a will drawn up by a notary public in the presence of the testator who signs it. It is in the form of a notarial deed.
Allographic will (ordinary will; Article 951 PCC)	This is otherwise known as an official will. The testator may make a will in such a way that, in the presence of two witnesses, they declare their last will orally before the mayor, head of the county, marshal of the province, secretary of the county or municipality, or head of the civil registry office. Then, the testator's statement is written down in the form of minutes, while stating the date it was drawn up. The minutes are read out to the testator in the presence of witnesses. The minutes must be signed by the testator, by the person to whom the testator's will was declared, and by witnesses. If the testator is unable to sign the minutes, this should be noted in the minutes, with an indication of the reason for the lack of signature.

(83) Liliana Kaltenbek, Waldemar Żurek, *Prawo spadkowe* (Wolters Kluwer 2016) 37.

(84) Jacek Wierciński, 'Sporządzenie testamentu w stanie wyłączającym świadome powzięcie decyzji i wyrażenie woli w praktyce notarialnej' (2011) Przegląd Sądowy 7.

Oral will (special will; Article 952 of PCC)	If there is a fear of the testator's imminent death or if, due to special circumstances, it is impossible or very difficult to keep the ordinary form of the will, the testator may declare their last will orally, in the presence of at least three witnesses at the same time. The content of an oral will may be stated in such a way that one of the witnesses (or a third party) writes down the testator's statement within one year from when it was made, stating the place and date of the statement and the place and date of drawing it up, and the written document is signed by: the testator and two witnesses, or all the witnesses.
Traveller's will (special will; Article 953 PCC)	When traveling on a Polish ship or airplane, a will may be drawn up in the presence of the commander of the ship or their deputy, in such a way that the testator declares their will to the commander of the ship or their deputy in the presence of two witnesses; the commander of the ship or their deputy writes down the will of the testator, stating the date, and this document is read out to the testator in the presence of the aforementioned witnesses, after which, the document is signed by the testator, the witnesses and the commander of the ship or their deputy.
Military will (special wills; Article 954 PCC)	Selected individuals, such as soldiers, can draw up a military will, under special rules, in times of war, mobilisation of the armed forces or captivity.

68 The inheritance can either be accepted or rejected. The heirs may inherit not only the property (assets), but also debts (liabilities). The institution of rejection of the inheritance means that the heir loses their rights to the inheritance. Under the provisions of the PCC, the heir is treated as if they had not lived to see the opening of the inheritance. The declaration of rejection of the inheritance results in a change in the group of heirs, and in the shares of the respective heirs. The declaration of acceptance or rejection of the inheritance (*oświadczenie o przyjęciu lub odrzuceniu spadku*) can be made before the court or before a notary public, in the form of a notarial deed. Under Article 1015 § 1 PCC, the declaration may be made within six months of the date on which the heir became aware of their entitlement to the inheritance – the failure of the heir to make a declaration within the indicated period will be tantamount to acceptance of the inheritance with the benefit of inventory. ([85]) The inheritance may also be accepted. Acceptance of the inheritance can be done in two ways: by simple acceptance of the

([85]) Since 18 October 2015, Polish law allows the heir to avoid liability for the debts, even without the submission of an appropriate declaration. Silence of the successors is considered as an acceptance of an inheritance with the benefit of an inventory. The potential liability for the debts is limited to the value of the inherited.

inheritance or acceptance of the inheritance with the benefit of inventory (Article 1012 PCC). (86) The differences are shown in the table below:

Simple acceptance of the inheritance (*proste przyjęcie spadku*)	The heir is liable for all debts left by the deceased, regardless of their value and the value of the inheritance.
Acceptance of the inheritance with the benefit of inventory (*przyjęcie spadku z dobrodziejstwem inwentarza*)	The liability of the heir for the debts of the deceased is limited to the value of the assets received.
Rejection of the inheritance (*odrzucenie spadku*)	Rejection of the inheritance by the heir is treated as if they had died before the opening of the inheritance and they thus lose their rights and obligations under the inheritance. In the case of failure by the heir to otherwise notify the court, the heir will be deemed to have accepted with the benefit of inventory.

69 The proceedings to confirm the inheritance acquisition (*stwierdzenie nabycia spadku*) involve determining: when and where the deceased died, and who inherits from them, how much, and on what basis (under the will/the law). If the acquisition of the inheritance is to be based on a will, the original will must be attached to the application for confirmation of the inheritance acquisition. As a result of these proceedings, the court or notary public will determine the fractional share of the heirs in the inheritance. Proceedings for confirmation of the inheritance acquisition can be performed in two modes: before a court – in the form of a decision on acquisition of inheritance (*postanowienie w przedmiocie nabycia spadku*), or out of court, that is, before a notary public – in the form of a notarial deed of succession (*akt poświadczenia dziedziczenia*). The latter is regulated by the provisions of Articles 95aff NPL. (87)

70 The court issues a decision on the acquisition of the inheritance in non-contentious proceedings (Articles 669ff PCCP). (88) The applicant is the person filing the petition with the court, and the participants in the proceedings are the persons who may become heirs under the law or under the will.

---

(86) Grzegorz Gorczyński, 'Komentarz do art. 1012 k.c.' in Magdalena Habdas, Mariusz Fras (eds), *Kodeks cywilny. Komentarz. Tom VI. Spadki (art 922–1087)* (Wolters Kluwer, Warszawa 2019) 531.

(87) Wojciech Gonet, Wiktor Karpowicz, 'Komentarz do art. 95a ustawy – Prawo o notariacie' in Wojciech Gonet (ed), *Prawo o notariacie. Komentarz. Wzory aktów notarialnych i poświadczeń* (Wolters Kluwer 2022) 558.

(88) Magdalena Kuchnio, 'Komentarz do art. 669 k.p.c.' in Olga M. Piaskowska (ed), *Kodeks postępowania cywilnego. Postępowanie nieprocesowe. Postępowanie w razie zaginięcia lub zniszczenia akt. Postępowanie zabezpieczające. Komentarz* (Wolters Kluwer 2022) 475.

In the course of the proceedings, the court examines *ex officio* who belongs to the group of heirs and what the family connections of these persons are. In addition, the court determines whether the deceased left behind a valid will – by opening it and reading it aloud (Article 670 PCCP). It is difficult to determine how long a case may take, as it depends on many different circumstances, such as whether someone contests the will, whether the last will of the deceased is valid, how many heirs there are, etc. Therefore, there are cases that end already at the first hearing, but there are also those that last for several months and require several hearings. During each of them, the court asks the applicant whether they know anything about the wills left by the deceased, whether there were other succession cases pending, whether the testator was conscious when expressing their last will. When the court proceedings cease, the court will issue a decision on the acquisition of the inheritance, which is deemed a document in the same way as a notarised certificate of inheritance, and it confirms the acquisition of inheritance rights by specific persons (Article 676 PCCP).

71 In its decision on the acquisition of the inheritance, the court enters the basis of inheritance, ie by law or by will, lists all the heirs who have acquired the inheritance, and determines the amount of their respective shares. The proceedings are conducted by the district court. The jurisdiction of the court depends on the deceased's last place of residence. The proceedings are conducted against payment. The decision on the acquisition of the inheritance is the basis for any entry in land and mortgage registers, and also allows access to the bank accounts of the deceased. The applicant or participants in the proceedings may obtain a copy of the decision, but they must first apply for it.

72 A far quicker alternative to a judicial decision on the acquisition of inheritance are notarial inheritance proceedings. The notarial deed of succession was introduced in Poland in 2008 as an alternative to court proceedings to declare the acquisition of an inheritance. (89) A decision on the acquisition of an inheritance and a notarised certificate of inheritance are two documents that produce the same legal effects. (90) However, a notarised deed of succession may be obtained immediately after the notary public has performed all the necessary acts, which will significantly facilitate and accelerate

(89) Rafał Kapkowski, 'Sporządzenie aktu poświadczenia dziedziczenia' (2009) Państwo i Prawo 80.

(90) The legal effects of a notarised certificate of inheritance may be challenged following special court proceedings aimed at revoking the certificate. It is regulated in detail in Article 669[1] PCCP. If the notary has doubts about the inheritance, the certificate of inheritance cannot be issued – the case goes to court and the court 'looks for' the heirs.

the handling of succession matters after the death of the deceased. It should be noted that the notarial deed of succession covers both intestacy and testament inheritance. However, it does not cover special wills and therefore only applies to holographic, notarised and allographic wills. (91)

73 In addition, the above solution is only available when there is only one heir or when more heirs do not object to, and do not contest, the will left by the deceased. The deed of succession may be drawn up by a notary public only if the presence at this act of all persons who may come into consideration as statutory or testamentary heirs is guaranteed. In other words, all the persons from the immediate family of the deceased must be present at the drafting of the deed of succession, even if they are not entitled to inherit anything. If this condition is not met, the inheritance proceedings can only take place before court. The persons participating in the act before a notary public must show proof of identity (ID card or passport), a copy of the death certificate of the deceased, copies of the birth certificates of the heirs. In the case of testamentary inheritance, it will also be necessary to present the original will, because then the notary public will open it and read it aloud, from which the minutes are then drawn up. At this point, it should be pointed out that notarial inheritance proceedings cannot take place in a situation where there are already proceedings pending for issuing a decision on the acquisition of the inheritance before a court or where a decision in this regard has already been issued. (92)

74 It is worth noting a significant tendency that every year more and more inheritance cases are handled by notaries in Poland. For example, in 2017, notaries public drew up over 104,000 certificates of inheritance, and courts issued over 86,000 decisions on the acquisition of an inheritance. In 2018, notaries public drew up over 111,000 certificates of inheritance, and courts issued over 100,000 decisions on the acquisition of an inheritance. In this way, the growing trend is clearly visible, where citizens increasingly use the help of notaries, who significantly relieve the burden on courts in inheritance matters. (93)

B. *Certificates of succession*

75 Since many of the answers to the questions in this section were covered in the

(91) Katarzyna Czerwińska-Koral, 'Odmowa sporządzenia aktu poświadczenia dziedziczenia – zagadnienia wybrane' (2012) Przegląd Sądowy 101.

(92) Piotr Borkowski, *Notarialne poświadczenie dziedziczenia* (Wolters Kluwer 2011) 64.

(93) Krzysztof Sobczak, Notariusze potwierdzili już ponad 800 tys. spadków, Prawo.pl 2019 <https://www.prawo.pl/prawnicy-sady/notarialne-potwierdzenie-spadku-juz-ponad-800-tys,452044.html> accessed 13 January 2024.

previous one, the focus below is on cross-border aspects and the European Certificate of Succession (*Europejskie poświadczenie spadkowe*).

76 The notion of 'cross-border inheritance procedures' refers to cases where there are elements of the legislation of several countries. When dealing with a cross-border case, three elements must be ascertained, namely: which courts will be competent to hear a given case; the law of which country should the courts apply when examining/hearing the case; and in which country the judgment will be enforced.

77 As a result of applying the provisions of 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, the competent court to hear the case may be a Polish court, which will apply Polish law (provisions of the PCC) and the judgment will be enforced on the territory of the Republic of Poland. However, a Polish court may be forced to apply, for example, Armenian law and the judgment itself will be enforced, for instance, in Germany.

78 The court competent to hear the succession case is, in principle, the court of the deceased's habitual residence. A place of habitual residence is a place of concentration of life interests – this term does not therefore cover, for instance, cases of death while the deceased was on holiday, a delegation mission or employed on the basis of a short-term contract. If the deceased at the time of their death did not have their habitual residence in any EU Member State, the competent court will be the court of the EU Member State where the estate is located, provided that the deceased, at the time of death, was a citizen of that Member State or, if not being a citizen, was habitually resident in a given country (no sooner than five years before the inheritance case was brought to court).

79 In the case of the European Certificate of Succession, the matter seems to be quite simple. The entities authorised to issue the European Certificate of Succession are notaries and courts. The person concerned is free to choose whether to go to court or to a notary's office for a European Certificate of Succession. The procedure for the European Certificate of Succession is analogous to the two procedures already presented in the previous section relating to the decision on the acquisition of an inheritance (procedure before a court) and the deed of succession (procedure before a notary public). (94) According to Article 95e NPL, a national certificate of succes-

(94) It can only be challenged in court proceedings.

sion cannot be issued if there is lack of national jurisdiction, which is established according to the EU Succession Regulation.

C. *Administration of estates*

80 Under Polish law, each of the heirs is entitled and obliged to participate in the management of the assets of the estate. At the opening of the inheritance (death of the deceased), all the eligible heirs acquire the inheritance. However, until the division of the inheritance, the assets comprising the estate are not the individual property of each of the heirs, but their joint property (*współwłasność*). Indeed, under Article 1035 PCC, if the inheritance is transferred to several heirs, the relevant provisions on fractional joint ownership (*współwłasność w częściach ułamkowych*) apply. Articles 195-221 PCC will apply to the joint ownership of assets of the estate and to the division of the inheritance. ([95]) Therefore, the consent of all heirs is required to dispose of the items of the estate and to perform acts beyond the scope of ordinary management (principle of unanimity). In the absence of unanimity, the heirs, the inheritance shares of whom amount to at least half of the inheritance, may demand that a court issue a decision (Article 199 PCC). The consent of a majority of the heirs, calculated according to the size of their inheritance shares (principle of majority), is required to carry out acts of ordinary management of objects being part of the estate. In the absence of, or inability to obtain, the consent of the majority, any of the heirs may request that the court authorises the performance of an act (Article 201 PCC).

81 If the majority of the heirs decide to perform an act that is blatantly contrary to the principles of proper management of the assets of the estate, any of the remaining heirs may request that a court make a decision (Article 202 PCC). If the consent of a majority of heirs on important matters of ordinary management cannot be obtained, or if a majority of heirs violates the rules of proper management or harms the minority, any heir may apply to the court for the appointment of an administrator (Article 203 PCC). The administrator (*zarządca*) appointed by the court may be one of the heirs or a third party. The appointment of an administrator is tantamount to exclusion of the other heirs from administering the assets of the estate. A court-appointed administrator is entitled to a fee, which is to be determined by the court (Article 205 PCC). Any of the heirs not actually managing the assets of the estate or objects within the estate may demand that the administrator or the managing

([95]) Paweł Zdanikowski, 'Komentarz do art. 1035 k.c.' in Magdalena Habdas, Mariusz Fras (eds), *Kodeks cywilny. Komentarz. Tom VI. Spadki (art 922–1087)* (Wolters Kluwer 2019) 788.

heirs present a management account (Article 208 PCC). If the request is not granted, the heirs have the right to bring an action to the court for submission of a management account. At this point, it should also be pointed out that if the testator has appointed an executor in their will and has not otherwise specified their powers, then only the executor of the will is authorised to manage the assets of the estate, including activities beyond the scope of ordinary management. The heirs are then prevented from managing the estate.

82 The executor of a will (*wykonawca testamentu*) is a position regulated by the provisions of Articles 986-990[1] PCC. The task of the executor of a will is to help the testator realise their will after death. (96) This position is useful especially when the estate includes various components, including income-generating elements, and the testator has provided in the will for ordinary or specific bequests, instructions, substitutions, perhaps disinherited one of their heirs and wants to be sure of the full realisation of their last will, and at the same time has confidence in a certain person whom they want to appoint as executor of the will. The task of the executor is to ensure that the last will of the testator is strictly fulfilled and respected. The executor of a will may be an heir or a legatee, or a third party who is neither. (97) The only requirement for the executor is that they must have full capacity for acts in law; thus, any person of legal age who is not incapacitated can become one. The executor may only be appointed by the testator in the will (Article 986 § 1 PCC). The executor of a will may be appointed to administer the entire estate, an organised part of it, or only a designated component of the estate (Article 986[1] PCC). The testator may also appoint more than one executor to act in parallel, for example, to administer particular organised parts of their estate or specific assets if, for example, they are located in several different places.

83 The executor of a will can act in this capacity as early as upon the opening of the inheritance, that is, from the time of the testator's death. The executor may, and should, request that the court of inheritance or a notary public issue a certificate of appointment to that position. (98) If the certificate is issued by a notary public, they are obliged to send a copy of the issued certificate to the court of inheritance. However, the executor of a will may refuse to hold this

---

(96) Liliana Kaltenbek, Waldemar Żurek, *Prawo spadkowe* (Wolters Kluwer 2016) 74.

(97) Andrzej Kidyba, *Kodeks cywilny. Tom IV. Spadki* (4th edn, Wolters Kluwer 2015) 238.

(98) Tadeusz Żyznowski, 'Komentarz do art. 665 k.p.c.' in Tadeusz Wiśniewski (ed), *Kodeks postępowania cywilnego. Komentarz. Tom III. Artykuły 506–729* (Wolters Kluwer 2021) 590.

position. Article 664 PCCP stipulates two ways to do this, namely through a statement made to the court of inheritance: orally for the record or in writing with an officially certified (eg, notarised) signature, or through a statement made before a notary public (the notary public then sends it to the court of inheritance). (99)

84 The executor of a will acts on their own behalf, but in the interests of the testator as expressed in the will. The testator may, in their will, specify in detail the powers and duties of the executor and the manner of their exercise. In the absence of instructions in the will, the duties of the executor of the will include the management of the estate, the payment of the debts of the estate and the execution of ordinary bequests and instructions (Article 988 PCC). Importantly, however, the executor of a will is not entitled to divide the estate or to request that the court divide the estate; this can only be done by the heirs. The executor may be relieved by the court of inheritance from the performance of their duties for compelling reasons. Any interested person is entitled to apply to the court for the dismissal of the executor of a will; this can be done by the executor themself, but also by the heir or legatee.

85 Another important issue is the division of the inheritance (*dział spadku*). In Poland, proceedings for the division of an inheritance are proceedings in which a court or notary public determines what property the testator held, and then, taking into account the decision on the acquisition of the inheritance or the deed of succession, makes a consensual (or compulsory) division of the physical assets of the estate among the heirs. It is not mandatory to divide the inheritance. There is no time limit within which the heirs must resolve who is to be the exclusive owner of what. In many situations, however, such a division will be necessary for practical reasons. The division of the inheritance can take place in two ways, namely by agreement among all the heirs (all the heirs agree on what is included in the inheritance and consciously divide the inheritance in unison) or by court decision, at the request of any of the heirs (in the absence of consent of all the heirs). (100) Article 1037 § 2 PCC further stipulates that if the inheritance includes real estate, the division agreement should be concluded in the form of a notarial deed.

86 Drawing up an agreement on the division of the inheritance before a notary public requires the consent of all the heirs. (101) Otherwise, the solution is to

(99) Edyta Gapska, Joanna Studzińska, *Postępowanie nieprocesowe* (2nd edn, Wolters Kluwer 2017) 884.

(100) Edyta Gapska, Joanna Studzińska, *Postępowanie nieprocesowe* (2nd edn, Wolters Kluwer 2017) 903.

(101) Liliana Kaltenbek, Waldemar Żurek, *Prawo spadkowe* (Wolters Kluwer 2016) 125.

try to reach an agreement through negotiation, eg, with the participation of a mediator, and if even this does not bring the desired results, the division of the inheritance through litigation, as discussed below. A prerequisite for proceeding with the activity of inheritance division is the establishment of rights to the inheritance, by means of a notarised deed of succession or through a court confirmation of inheritance acquisition. The division of an inheritance before a notary public can be performed in various ways, ie: by physically distributing the assets according to the size of the share of all the heirs; by awarding the assets to only one or some of the heirs with the obligation to make payments to the others; by awarding the respective assets to specific persons without making any payments or additional payments. The act of dividing an inheritance before a notary public involves fees, the amount of which depends on a number of factors, such as the value of the assets of the estate, the type of components of the estate, as well as the degree of relationship of the heirs to the deceased. These include civil law transaction taxes, court fees and the notary fee.

87 In the course of proceedings for a judicial division of the inheritance, the court primarily determines the composition of the assets of the estate and their value (Article 684 PCCP). Accurate findings in this regard make it possible to determine the value of the shares to which the respective heirs are entitled, including the allocation of inherited shares and the amounts of payments and additional payments. As a rule, the composition of the active state of the inheritance, as determined in the inventory, is the basis for the division to be carried out. If the inventory does not include all the items that are part of the inheritance, it is possible to supplement the inventory. If, on the other hand, no inventory has been taken, the court may determine the composition of the estate based on the statements of the participants. What is decisive for determining the state of the inherited property is the moment of the opening of the inheritance, while for determining the value of the respective items, the moment of division. If the participants in the proceedings unanimously agree on the value of the object to be divided, this value is binding on the court. Any discrepancy on this issue will lead to the court determining the state of the inherited property or the value of the respective items on its own or with the help of an expert opinion.

88 In practice, the choice of how to divide the inherited property is made after determining the composition and value of the items included in the assets of the estate. The assets of the estate can be physically divided and allocated to the respective heirs in proportion to the size of their shares. In doing so, it is possible to determine additional payments if the value of the allocated portions does not correspond to the size of the shares of the beneficiaries. In addition, it is possible to award items in full to one or some of the heirs. As

a rule, they are required to make repayments to the others. It is also possible to grant an object or objects to two or more co-heirs as fractional joint ownership. This occurs at their request in accordance with Article 1044 PCC. The court may also perform a so-called civil division of the property from the inheritance – they are then sold, and the amount obtained is divided among the co-heirs in proportion to the size of their shares in the inheritance. The court assesses which method of division should be chosen in a given case. However, it is bound by the method of division indicated by the participants to the proceedings, unless the method chosen by them is contrary to the principles of social co-existence or would violate the legitimate interests of the entitled persons. In the course of the division, the court should take into account the wishes of the testator expressed in their will. Under Article 1038 § 1 PCC, the judicial division of the inheritance should cover the entire inheritance. (102)

89 To summarise the considerations regarding the division of an inheritance, it should be pointed out that if there is no dispute between the heirs on the manner of division of the inheritance, possible settlements, etc, the simplest and quickest way, but also most expensive, is the contractual division of the inheritance carried out by means of a notarial contract at a notary's office. Although the cost of notarial division of the inheritance will be higher than in the case of court proceedings, the notary public will handle all the formalities. However, there is one condition: all the heirs must appear before the notary public in person.

IV. Status of natural persons

A. *Name changes*

90 In Poland, changing one's first name (*imię*) may involve replacing the first name with another one, or adding a middle name. The situation is analogous in the case of a surname (*nazwisko*) or part of a surname. The issue of surname change also appears when the spelling of a first name or surname is corrected, or if the order is changed. The issue of surname change is regulated by the Act on Changing First Names and Surnames (*Ustawa o zmianie imienia i nazwiska*, hereinfafter: CFN). (103) Some provisions can

(102) Paweł Zdanikowski, 'Komentarz do art. 1035 k.c.' in Magdalena Habdas, Mariusz Fras (eds), *Kodeks cywilny. Komentarz. Tom VI. Spadki (art 922–1087)* (Wolters Kluwer 2019) 812.

(103) Act on Changing First Names and Surnames of 17 October 2008 (Journal of Laws 2021, item 1988 with subsequent amendments.

also be found in the CRL. In order to make changes to one's name, it is necessary to file an application with the registry office (*Urząd Stanu Cywilnego*). Under Article 4 section 1 CFN, a change of first name or surname can only be made for compelling reasons, which confirms the principle of stability of name and surname, in particular when they concern a change:

- of the first name or surname that ridicules or disrespects human dignity;
- to the first name or surname being used;
- to the first name or surname that has been changed against the law;
- to the first name or surname held in accordance with the laws of the country whose citizenship one actually holds. (104)

91 The decision of the head of the civil registry office mainly depends on the justification that is included in the application. In addition, parents may make a statement to the selected head of the civil registry office or to the consul about changing a child's first name or first and middle names on the birth certificate within six months of the date of the certificate (Article 70 section 1 CRL). After the change (but before the change as well), one can have only one first name and one middle name, and the surname can consist of no more than two parts (Article 6 section 1 CFN). An exception may be made if the person is a citizen of another country, and the data presented in the application is approved there.

92 Name changes may only be made by submitting an application directly to the head of the registry office of one's choice. The application examination process ends with the issuance of a decision with reasons. It may be positive or negative. The decision may be appealed to the province governor (*wojewoda*). Those who live abroad may submit such an application through the Polish consul, where they must indicate the appropriate head of the civil registry office to which the application should go. An application for minors should be submitted by their legal representatives, eg, parents. (105)

B. *Gender recognition*

93 There is no regulation in Polish law that clearly defines the procedure for the a sex change (*zmiana płci*). Although in 2014-2015, work was underway on the Gender Recognition Act (*Ustawa o uzgodnieniu płci*), which was intended to introduce a less complicated procedure, it was vetoed by the President in the autumn of 2015. It is worth noting that according to the only available

(104) Alicja Czajkowska, Barbara Romocka-Tyfel, *Zmiana imienia i nazwiska. Geneza. Komentarz. Orzecznictwo. Wzory decyzji* (5th edn, Wolters Kluwer 2021) 68.

(105) Currently, there are no contractual methods of resolving issues with name changes.

studies, the average time for gender recognition proceedings is more than seven months (7.16 months to be exact). By contrast, according to the same statistics, the most protracted recognition proceedings lasted 35 months. (106)

94 The most important information in the gender recognition process is that under Polish law, a transgender person has the opportunity to formally change their gender in a civil lawsuit, suing their parents. This possibility is provided only by Article 189 PCCP, which, incidentally, does not apply to gender identity, and stipulates that 'the plaintiff may demand that the court determine the existence or non-existence of a legal relationship or right when they have a legal interest in it.' Thus, on this basis. a transgender person may only request gender recognition in a competent court.

95 As for the gender recognition procedure, a transgender person may file a suit for recognition in the case of a sexologist's diagnosis of a gender identity disorder, defined as the incompatibility of the psychological gender with a person's anatomical sex characteristics, with the simultaneous absence of a mental illness, or hormonal or genetic abnormalities.

96 In the course of the proceedings, the court examines whether the transgender person's sense of belonging to the gender being determined is permanent. For this purpose, it is necessary for the plaintiff to present relevant medical documentation, ie, the opinions of sexologists and psychologists stating that the applicant is transgender. Sometimes the courts also appoint additional forensic experts for this purpose who can confirm the diagnosis of the permanent belonging of the transgender person to the gender to be determined.

97 After obtaining a civil court ruling on their gender, a transgender person may apply to the head of the civil registry office for a new PESEL number (Polish acronym for 'Universal Electronic System for Registration of the Population'; PESEL is a unique identifier that is assigned to each natural person residing in Poland; foreigners will obtain the PESEL number after registering their residence in Poland for a stay of over 30 days; it is helpful, in eg, opening a bank account, signing job contracts, and using public health services in Poland). However, the clerk will then amend the birth certificate by inserting a reference to the change of gender designation based on a court ruling, and then issue a decision on the first name and, in some cases, the surname of the transgender person. Therefore, the information about gender change remains visible on the birth certificate of a transgender person.

---

(106) Elżbieta Holewińska-Łapińska, 'Sądowa zmiana płci. Analiza orzecznictwa z lat 1991–2008' in Krzysztof Ślebzak (ed), *Studia i analizy Sądu Najwyższego. Tom IV* (Wolters Kluwer 2010) 121–122.

C. *Protection of adults*

98 In Poland, the establishment of incapacitation (*ubezwłasnowolnienie*) is a judicial process that aims to deprive a person of the ability to decide their own fate. The overriding goal here is always to safeguard the interests of the physically or mentally handicapped person. Therefore, the establishment of incapacitation occurs only in exceptional and difficult cases. First and foremost, these are situations in which a person is unable to fully understand the consequences of their actions. The court may then decide on total or partial incapacitation. Proceedings in incapacitation cases are regulated by the provisions of Articles 544ff PCCP.

99 The substantive legal basis for full incapacitation (*ubezwłasnowolnienie całkowite*) is Article 13 PCC, under which a person who has reached the age of 13 may be fully incapacitated if, as a result of mental illness or mental disorder, in particular, alcoholism or drug addiction, they are incapable of controlling their own behaviour (§ 1). A guardianship is established for a completely incapacitated person, unless they are still under parental authority (§ 2). Total incapacitation thus involves the complete loss of capacity for acts in law. When the order becomes final and valid, all the acts for the incapacitated person are performed by the guardian appointed for them. An incapacitated person cannot decide any of their own affairs, eg, is not able to sell their assets, make donations or take out loans. The guardian has to care for the person entrusted to them, must manage their assets and represent them before third parties. In turn, the guardian is subject to court review in this regard. They must submit regular reports to the court, while some of their decisions must be additionally approved by a judge. In practice, the most common grounds for total incapacitation are mental disorder, mental deficiency, mental disorders and 'other disorders' usually associated with Alzheimer's disease. (107)

100 Partial incapacitation (*ubezwłasnowolnienie częściowe*) is regulated in Article 16 PCC, pursuant to which, a person of legal age may be partially incapacitated due to mental illness, mental disorder or other mental disorders, especially alcoholism or drug addiction, if the person's condition does not justify total incapacitation, but assistance is needed to manage their affairs (§ 1). A curatorship is established for a partially incapacitated person (§ 2). Partial incapacitation is therefore a milder form of incapacitation and is only a limitation of capacity for acts in law. A person of legal age can be partially incapacitated if they only need assistance to manage their own affairs. Such

(107) Sławomira Kotas-Turoboyska, *Postępowania sądowe dotyczące opieki nad osobą ubezwłasnowolnioną całkowicie* (Instytut Wymiaru Sprawiedliwości 2021) 25.

a person is therefore capable of acting in their own interests but needs support for various reasons. This support is to be provided by the curator appointed by the court in the proceedings. The curator, unlike the guardian, does not manage the assets of the incapacitated person, but only gives consent for the incapacitated person to perform acts in law. (108)

101 The group of persons who can request the incapacitation of a person is strictly defined by law. A request for incapacitation may be submitted by: the spouse of the person who is the object of the request for incapacitation; their relatives in the direct line and their siblings; and their legal representative (Article 545 § 1 PCCP). A case for incapacitation may also be brought by the public prosecutor or the Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*). If, to the best of somebody's knowledge, a person is unable to control their own behaviour or needs support due to their health condition, then one can make an appropriate request to the public prosecutor. Incapacitation cases are initiated by public prosecutors very often as a result of information provided by social welfare workers.

102 Cases of incapacitation fall under the jurisdiction of regional courts. The court hearing the case is that with jurisdiction for the place of residence of the person who is the object of the application for incapacitation, and in the absence of a place of residence, the court with jurisdiction for the person's place of residence (Article 544 PCCP). The application must be accompanied by the documents from which the authority to file it derives. This includes, in particular, civil records confirming kinship with a sick person. If one has the medical records of the person who is to be incapacitated, then they should attach them to the application. This is because, in the proceedings, it is necessary to prove mental illness or a mental disorder of the person to be incapacitated. In order to confirm the health condition of the person, the court must also appoint experts in psychology and psychiatry, who will prepare an expert opinion for the purposes of the proceedings. In addition, witnesses, such as neighbours, social workers, and family members may be interviewed. In the application, the person who is to be appointed guardian or custodian of the incapacitated person can be indicated.

V. Conclusions

103 First, Poland is conservative, where the traditional family plays a central role. Under Polish law, only the court decides on divorce and in many cases, it will be unacceptable to grant a divorce due to other rights, interests or values that

(108) Małgorzata Balwicka-Szczyrba, Anna Sylwestrzak, 'Komentarz do art. 16 k.c.' in *Kodeks cywilny. Komentarz* (Wolters Kluwer 2022) 48.

the institution of marriage protects. This includes, in particular, the child's welfare, the principles of social co-existence, and the rule of punishing a spouse solely guilty for the marital breakdown. Even if there are no negative grounds for divorce (ie precluding the court from granting a divorce), in order to dissolve the marriage before a Polish court, it is necessary to prove a complete and irretrievable breakdown of the marriage between the spouses, something that is not always easy. When it comes to the traditional family, it is also worth adding that same-sex marriages are not legal in Poland. Generally, justice in family law is almost exclusively administered by courts. The process of de-judicialisation practically does not exist and no specific changes are planned.

104 On the other hand, Poland has undergone some liberalisation in the case of succession law. There is an increasing trend to shift the administration of justice from courts to notaries. ([109]) This applies to succession matters, such as, for example, declarations of acceptance or rejection of an inheritance, confirmations of inheritance acquisitions, or divisions of inheritances. These matters can be dealt with both before a court or before a notary public. Undoubtedly, this path relieves the burden on courts for the benefit of citizens. However, some competences lie exclusively with the courts, eg, the division of an inheritance in the absence of the consent of all the heirs.

([109]) No contentious matters can be 'decided' by notaries. The term 'decision' is thus in a way reserved for courts.

PORTUGAL

by *Rute Teixeira Pedro*

I. Introduction and overall considerations

The Portuguese legal system qualifies as a civil law legal system, with its roots in Roman Law, and strongly influenced by the German legal system, especially in the field of private law. **1**

The shape of the current state of law is modelled by the Constitution of the Portuguese Republic (*Constituição da República Portuguesa*, hereinafter: CPR), which came into force in April 1976. As stated in Article 2 of the CPR, the respect for and the guarantee of the effective implementation of fundamental rights and freedoms is one of the grounds upon which the Portuguese Republic is based. As a consequence, a wide range of fundamental rights and duties receive constitutional protection, either as 'rights, freedoms and guarantees' (1) or as 'economic, social and cultural rights and duties' (2). In the new Constitutional framework, the principle of equality plays an important role, not only as a general principle (3), but as a principle that must be applied to the legal solutions regarding family law and succession law matters (4). **2**

---

(1) Within the scope of this report, the following rights must be highlighted: the right to a person's moral and physical integrity (Article 25 of the CPR), the right to the development of personality and other personal rights (Article 26 of the CPR), the right to form a family and to marry under conditions of full equality and to filiation (Article 36 of the CPR).

(2) Regarding the subject of this report, the enshrinement of the social rights concerning the family (Article 67), fatherhood and motherhood (Article 68 of the CPR), childhood (Article 69 of the CPR), youth (Article 70 of the CPR), disabled citizens (Article 71 of the CPR) and the elderly (Article 72 of the CPR) deserve to be stressed. The references to the Constitution of the Portuguese Republic will take into consideration the translated version into English provided on the site of the Portuguese Parliament (at: https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf) accessed 26 January 2025.

(3) The general proclamation of the principle of equality appears in Article 13, no 1 of the CPR: 'All citizens possess the same social dignity and are equal before the law'.

(4) Special references to the principle of equality are made regarding the family in Article 36. For instance, no 1 states that 'everyone has the right to form a family and to marry under conditions of full equality'; no 3 declares that 'spouses have equal rights and duties in relation to their civil and political capacity and to the maintenance and education of their children', and finally, in no 4 it is stated that 'children born outside wedlock may not be the object of any discrimination for that reason, and neither the law, nor official departments or services may employ discriminatory terms in relation to filiation'. This principle, newly introduced in 1976, in this field of law demanded significant amendments to the rules of family and succession law.

3 In Portugal, the most important immediate source of law is the law itself, as is stated in Article 1 of the Civil Code (5). The legislative acts (6) to take into account in the scope of this study are laws (*Leis*) and executive laws (*Decretos-leis*) (7).

4 The main national regulations regarding substantive family and succession law in Portugal can be found in the Portuguese Civil Code (*Código Civil*, hereinafter: PCC), which was enacted in 1966. Following the Pandectist

---

(5) '*Costums*' ('Usos') are legally acceptable only when the law so determines and provided that they are not contrary to the principles of good faith, as is stated in Article 3 of the Portuguese Civil Code. It must be stressed that courts can only resolve according to equity in the three circumstances listed in Article 4 of the Portuguese Civil Code (namely 'a) When there is a legal provision that allows it; b) When there is an agreement between the parties and the legal relationship is disposable; c) When the parties have previously agreed to resort to equity, under the terms applicable to the arbitration clause'). In the Portuguese legal system, the doctrine of precedent does not apply. Consequently, the lower courts are not obliged to follow the principles or rules established by the higher courts, namely by the Supreme Court, when judging subsequent cases, even if the facts and legal issues are similar to those decided in a previous decision. Nevertheless, it must be stressed that there is a special kind of decision – identified as *Acórdão de Uniformização de Jurisprudência* (Decision for the uniformisation of Jurisprudence) – issued by all civil sections of the Portuguese Supreme Court, in demarcated circumstances (Article 688 of the Portuguese Civil Procedure Code), to which a special force is associated as will be referred. This type of judicial decision fulfils the aim of overcoming judicial divergence regarding a particular legal question in order to promote legal certainty and to guarantee the principle of equality. It is issued when contradictory decisions are adopted in two different cases on 'the same fundamental question of law' and under 'the same legal framework'. The decision stated in *Acórdão de Uniformização de Jurisprudência* applies only *inter partes*. Even if it has no extra-procedural binding effect, it plays an important guiding role as if lower courts do not apply the rule stated in *Acórdão de Uniformização de Jurisprudência* to other cases that will be judged in the future, a reason for deviation from the substance of that decision must be expressly presented. The research and works produced by scholarship influence the way law is interpreted by lawyers and other legal professionals and the way the courts apply laws.

(6) Laws are approved by the Assembly of the Republic (*Assembleia da República*), ie the Portuguese Parliament (Article 161 of the CPR). Executive laws are approved by the Government. In the exercise of its legislative functions, the Government has the competence to approve executive laws on matters that do not fall within the exclusive competence of the Assembly of the Republic. Additionally, it has the competence to approve executive laws on matters that fall within the Assembly of the Republic's partially exclusive competence when the required authorisation is provided by the Assembly of the Republic, as well as to approve executive laws that develop the principles or the general bases of the legal regimes contained in laws that limit themselves to those principles or general bases (Article 198 of the CPR).

(7) Equal legal force is legally recognised to laws and executive laws, according to Article 112, no 2 of the CPR. An exception should be made only to executive laws that are published under legislative authorisation and to executive laws that develop the general bases of legal regimes: in these two circumstances, executive laws are subordinated to the corresponding laws.

model, the Portuguese Civil Code adopted the Germanic systematisation (8): thus, including a book dedicated to the 'general part' (from Article 1 to Article 396), this first book is followed by four other books whose provisions regard, respectively, the Law of Obligations (from Article 397 to Article 1250), Property Law (from Article 1251 to Article 1575), Family Law (from Article 1576 to Article 2023) and Succession Law (from Article 2024 to Article 2334). These last two books were subject to a major reform that took place in 1977 (9) as a consequence of the entry into force of the 1976 Constitution of the Portuguese Republic. Afterwards, in the almost five decades that have elapsed since, several important reforms have been introduced concerning specific areas of family and succession law, and these will be examined in this report.

5 In addition to this main core of family and succession law, provisions regarding family matters are included in other Codes (the Civil Procedure Code, the Civil Registration Code, and the Notary Code, for instance) and laws (such as the law governing the *de facto* union, the law governing the process of adoption, the law that introduced a new General Legal Procedure governing Civil Guardianship, the law governing foster relationships, and the law governing the accompanied adult) and executive laws. Special reference has to be made to Executive-Law no 272/2001, dated 31 October 2001, that has transferred the decision-making competence from the judicial courts to the Public Prosecutor's Magistrates (*Magistrados do Ministério Público*) and to the Civil Registrars (*Conservadores do Registo Civil*) in specific non-contentious proceedings (*Jurisdição voluntária*) relating to family relationships.

6 In the past, non-contentious jurisdiction was considered to be that jurisdiction that took place between persons who were in agreement (*inter volentes*), as opposed to contentious jurisdiction which was the jurisdiction that took place between persons who were not in agreement (*inter nolents* or *inter invitos*) (10). This is not the most adequate criterion to draw the distinction, as a non-contentious jurisdiction process may occur, even if the persons involved do not agree on the matter that is to be decided. The appropriate criterion has to be inferred from Article 987 of the Portuguese Civil Procedure Code (hereinafter: PCPC), which states that in adopting measures

(8) Mota Pinto, *Teoria Geral do Direito Civil* (4th edn, by António Pinto Monteiro and Paulo Mota Pinto, Coimbra Editora 2005) 18ff.

(9) The amendments were introduced by Executive-Law no 496/77 dated 25 November 1977.

(10) João de Castro Mendes and Miguel Teixeira de Sousa, *Manual de Processo Civil*, vol 1 (AAFDL 2022) 71 and 72.

within a non-contentious jurisdiction process, 'the court is not subject to criteria of strict legality but must instead adopt in each case the solution it deems most convenient and opportune'. Therefore, non-contentious jurisdiction processes are 'those in which the decision criterion is discretion' (11).

7 According to Article 202, no 1 of the CPR, 'Courts are the entities that exercise sovereignty with the competence to administer justice in the name of the people' (12). The same statement can be found in Article 2, no 1 of the Law on the Organisation of the Judicial System (hereinafter: LOJS), approved by Law no 62/2013, dated 26 August 2013 (13), which contains the legal provisions that state the legal framework and organisation standards of the judicial system. In the same Article, it is stated that: 'The jurisdictional function is exercised by the courts' (no 2).

8 Regarding family and succession law, the jurisdictional function is exercised by courts of law of first instance (14) and second instance (15) and by the

---

(11) As is explained, with further details, by João de Castro Mendes and Miguel Teixeira de Sousa, *Manual de Processo Civil*, vol 1 (AAFDL 2022) 72. The fact that the decision criterion is discretion, which is the characteristic decision criterion of the administrative area, leads to a discussion about the administrative nature of this jurisdiction. Against this qualification, consider the explanations of the same authors, João de Castro Mendes and Miguel Teixeira de Sousa, *Manual de Processo Civil*, vol 1 (AAFDL 2022) 73.

(12) In light of Article 202, no 2 of the CPR: 'In administering justice, the courts are responsible for ensuring the defence of those citizens' rights and interests that are protected by law, repressing breaches of democratic legality and deciding conflicts between interests, public and private'. It is considered that the Constitution has established a reserve of jurisdiction, ie, a reserve of competence to exercise the jurisdictional function exclusively regarding the courts. As the Constitutional Court, in its decision 620/2007, dated 20 December 2007 stated: 'the existence of a reserve of jurisdiction is a necessary result of the application of the principles of separation and interdependence of powers'. In the same decision, it is stated that 'it must be concluded that the constitutional attribution of a certain competence to a certain sovereign body excludes the possibility of it being legally attributed to any other, unless explicit or implicit constitutional authorisation (in this sense, the Decision of the Constitutional Court no 71/84)'. Additionally, it is stressed that difficulties may emerge concerning the scope of this reserve of jurisdiction, namely due to the complexity that surrounds, in specific cases, the 'distinction between administrative function and judicial function'.

(13) This Law was amended several times. The latest amendment was introduced by Law 35/2023, dated 21 July 2023. All mentions of a Law or an Executive-Law in this report refer to the latest version of the legislative act that is in force at present unless otherwise stated.

(14) As a rule, the courts of first instance are the *Tribunais de Comarca*, ie district courts (Article 210, no 3 of the CPR and Article 29, no 3 and Article 79 of the LOJS).

(15) The courts of second instance are the *Tribunais da Relação*, ie Courts of Appeal (Article 210, no 4 of the CPR and Article 29, no 2 and Article 67, no 1 of the Law on the Organisation of the Judicial System). Within the civil jurisdiction there are five, in Coimbra, Évora, Guimarães, Lisboa and Porto.

Supreme Court of Justice (16) (Articles 209, no 1, *a*), 210 and 211 of the CPR) (17). The courts of law are the general courts that decide cases that are not assigned to another jurisdictional order, such as is the case of civil and criminal matters. In addition to these courts of law that are awarded general competence, there are courts of first instance that have specific competences and are specialised in certain matters, for example, the Family and Minors' Courts (*Juízos de família e menores*). As stated in the above-mentioned LOJS, the jurisdictional competence of the Family Courts encompasses several subjects regarding the civil status of the person and family (Article 122) (18), regarding children and adult children (Article 123) (19), as well as measures related to educational guardianship and protection matters (Article 124 of the LOJS) (20).

---

(16) Article 210, no 3 of the CPR and Article 29, no 1, *a*) 31, no 1 of the LOJS.

(17) It must be stressed that, in Portugal, in addition to the Constitutional Court – that is the court with 'the specific competence to administer justice in matters of a constitutional-law nature' (Article 221 of the CPR) – every court has the competence to assess the compliance with the Constitution, as the courts 'may not apply norms that contravene the provisions of the Constitution or the principles enshrined therein' in any case that is submitted to their judgment (Article 204 of the CPR).

(18) For instance, non-contentious jurisdiction proceedings relating to spouses, to the *de facto* union partners or common economy relationships (*vida em economia comum*) members, as well as proceedings regarding divorce, legal separation concerning personal and economic effects of marriage, declaration of inexistence or annulment of civil marriage, and also maintenance between spouses and ex-spouses claims. Family and minors' courts also exercise the jurisdictional competence regarding proceedings to share 'wealth' that is the result of divorce, legal separation concerning personal and economic effects of marriage, declaration of inexistence or annulment of civil marriage, as well as in special cases of separation of assets to which the same procedural regime applies.

(19) For instance, proceedings regarding the establishment of civil guardianship and administration of assets, the creation of legal bond of adoption, regulation of the exercise of parental responsibilities and the decree of total or partial inhibition and the decree to establish limitations on the exercise of parental responsibilities, the decree of a measure to promote and protect trust in the person selected for adoption or the institution with a view to future adoption; the establishment of the foster relationship and its revocation; authorisation of the legal representative of minors to carry out certain acts, the confirmation of those acts that have been carried out without authorisation and the provision for the acceptance of liberalities; proceedings to carry out unofficial investigations into motherhood and fatherhood and to prepare and judge actions to challenge and investigate motherhood and fatherhood; proceedings to decide, in case of disagreement between the parents, on the name and surname of the minor child.

(20) Namely, proceedings relating to the preparation, assessment and decisions regarding promotion (*promoção*) and protection processes; to the application of promotion and protection measures and monitoring their implementation when required, whenever a child or young person is in a dangerous situation and there is no intervention by the protection

9 Considering this judicial hierarchy, an appeal may be filed, as a rule, against a decision of a lower court to a higher court. Thus, in principle, appeals can be submitted by the District Courts to the Courts of Appeal and from there to the Supreme Court of Justice. There are, however, limits to the possibility to appeal, given that the law provides for a quantitative limit (so-called *alçada*) up to which the lower court issues a decision without the possibility of an appeal. In civil matters, which are the most important in terms of the remit of this report, these amounts are currently € 5,000 for the courts of first instance and € 30,000 for the Courts of Appeal (Article 44, no 1 of the LOJS) (21). As a rule, only when these threshold values are exceeded by the case's value (22) is an appeal to the Superior Court admissible (Article 629, para 1 of the Civil Procedure Code). According to Article 296, no 1 of the PCPC, every case must be assigned a certain value, expressed in legal currency, which represents the immediate economic utility of the request. Pursuant to Article 303, nos 1 and 2 of the PCPC, actions regarding the state of persons, such as adult accompaniment measures that will be referred to below under section IV (Articles 138ff of the PCC), affiliation actions that will be referred to below under section II.2 (Articles 1807, 1814, 1838, 1859ff and 1869ff of the PCC), actions for marriage annulment (Articles 1632ff of the PCC), divorce actions (Articles 1773ff of the PCC) that will be referred to below under section II.1 and actions for legal separation concerning the personal and economic effects of marriage (Articles 1794ff of the PCC) that will be referred to below under section II. 5, actions regarding immaterial interests, such as actions regarding the regulation of the exercise of parental responsibilities (Articles 1901ff of the PCC and RC 7/2/2023 (435/22)), actions to inhibit the exercise of parental responsibilities (Articles 1913ff of the PCC), and actions for the allocation of the family dwelling (the majority of the issues that this report deals with are included here) are always considered to have a value equivalent to the *alçada* of the Courts of Appeal plus € 0.01. 'The normative (and fictional) value attributed' to these actions 'means that in these actions it is always permissible to file an ordinary appeal

committee, in the light of Law no 147/99 dated 1 September 1999, which contains the provisions governing the measures to protect children and young adults exposed to danger.

(21) According to Article 629, no 1 of the Portuguese Civil Procedure Code, the ordinary appeal is only admissible when the case in which the decision is being appealed has a value greater than the court's *alçada* and the contested decision is unfavourable to the appellant (value of succumbence, ie *valor da sucumbência*) in an amount greater than half the jurisdiction of that court.

(22) According to Article 296, no 1 of the Code of Civil Procedure, every case must be assigned a certain value, expressed in legal currency, which represents the immediate economic utility of the request.

up to the Supreme Court of Justice' (23). It must be stressed that, within the scope of non-contentious jurisdiction proceedings, decisions issued according to criteria of convenience or opportunity cannot be appealed to the Supreme Court of Justice (24), according to Article 988, no 2 of the PCPC (25).

With regard to international jurisdiction (26), without prejudice to what is established in European regulations and other international instruments (which have precedence over domestic law), Portuguese courts are interna- **10**

(23) Miguel Teixeira de Sousa, 'Commentary on Article 303 of the Civil Procedure Code' in *CPC online* (<https://blogippc.blogspot.com/2024/02/cpc-online-19.html> accessed 26 January 2025).

(24) The Supreme Court of Justice is a court that is specifically charged with controlling the application of the law. As a consequence, within the scope of non-contentious jurisdiction procedures, only decisions made in application of strict law (*ius strictum*) are appealable to the Supreme Court of Justice. As stated by the Supreme Court of Justice, in its decision dated 6 June 2019 (it may be accessed at <www.dgsi.pt> accessed 26 January 2025), 'within the scope of a non-contentious jurisdiction procedure, the intervention of the Supreme Court presupposes, given its special responsibility to control the application of procedural or substantive law, that it be determined whether the contested decision was based on criteria of convenience and opportunity or whether, differently, it corresponds to a process of interpretation and application of the law'. As a consequence, the intervention of the Supreme Court of Justice is not totally excluded in non-contentious jurisdiction proceedings by Article 988, no 2 of the PCPC. The exclusion of that intervention only concerns the application in the case of the criteria of convenience and opportunity. By attributing the power to decide according to these, the aim is to allow the court to adopt measures that are most appropriate to pursue and promote the interest that, in the particular case, the law states that it has to be protected. And that cannot be scrutinised by the Supreme Court. As is stressed in the above-referred decision: 'The choice of the most convenient solution is closely linked to the assessment of the factual situation in which the interested parties find themselves' and the Supreme Court of Justice does not have the power to control the decision on the factual situation. As a consequence, when an appeal is submitted to the Supreme Court within non-contentious jurisdiction proceedings, in order to ascertain if it falls within the Supreme Court's powers, which criteria were adopted by the decision specifically appealed must be verified. Thus, to reach a conclusion about the possibility of submitting an appeal to the Supreme Court, it has to be assessed if the concrete decision that is being challenged corresponds to the result of the application of criteria of convenience and opportunity or if it is the result of the interpretation and application of the law, or of integration of its gaps (*integração de lacunas*). In the former case, the appeal is not admissible, in the latter case it is. In the decision of 6 June 2019, the appeal concerning the exercise of parental responsibilities, regarding the choice of school and the residence regime of the child, and the decisions were guided by criteria of convenience. Consequently, the appeal was rejected regarding the decision on these two matters.

(25) This is one of the specialties of non-contentious jurisdiction. Regarding these specialities in relation to contentious jurisdiction, see João de Castro Mendes and Miguel Teixeira de Sousa, *Manual de Processo Civil*, vol 1 (AAFDL 2022) 71.

(26) João de Castro Mendes and Miguel Teixeira de Sousa, *Manual de Processo Civil*, vol 1 (AAFDL 2022) 171ff.

tionally competent when any of the connecting elements referred to in Articles 62 (27) and 63 (28) are present or when the parties have attributed jurisdiction to them under the terms of Article 94 of the PCPC.

11 In the Portuguese legal system, it has been evident in the last three decades that there is a clear trend of de-judicialisation of decisions, especially regarding some family law and succession law matters, as Civil Registrars (29) (*Conservadores do Registo Civil*) and Notaries (30) (*Notários*) are entrusted with the extra-judicial administration of justice in some cases. It is the

---

(27) According to this Article, 'Portuguese courts are internationally competent: *a*) When the action can be proposed in a Portuguese court according to the rules of territorial jurisdiction established in Portuguese law; *b*) The fact that serves as a cause of action, or any of the facts that comprise it, has been committed on Portuguese territory; *c*) When the right invoked cannot become effective except through an action brought on Portuguese territory or there is considerable difficulty for the plaintiff in bringing the action abroad, provided that between the object of the dispute and the Portuguese legal order there is a strong connecting element, personal or real'. Bearing in mind what is stated in this Article, Miguel Teixeira de Sousa sums up the legal factors that attribute international jurisdiction to Portuguese courts referring to three criteria: (i) the criterion of coincidence, (ii) the causality criterion and iii) the criterion of necessity (*forum necessitatis*). Considering the first criterion, the provisions of Article 62 recognise the rules determining territorial jurisdiction as having dual functionality, given that these rules simultaneously assess territorial jurisdiction and international jurisdiction. See Miguel Teixeira de Sousa, 'Commentary on Article 62 of the Civil Procedure Code' in *CPC online* (<https://blogippc.blogspot.com/2024/02/cpc-online-19.html> accessed 26 January 2025). According to Article 80 of the PCPC, in all cases not provided for in special provisions, the competent court is the defendant's domicile court. Concerning divorce and legal separation regarding personal and economic effects of marriage actions, the court of the plaintiff's domicile or residence has jurisdiction, in light of Article 72 of the PCPC. In matters of succession, the court of the place where the succession is opened has jurisdiction, under Article 72-A of the PCPC.

(28) The Portuguese courts have exclusive jurisdiction in the situations set out in Article 64, namely, among others, in matters of rights over assets and the rental of properties located on Portuguese territory, in matters of the validity of entries in public registers kept in Portugal, in matters of executions on immovable assets located on Portuguese territory, among others.

(29) The professional career of a Civil Registrar is a special career that is regulated by Executive-Law no 115/2018, dated 21 December 2018. According to Article 7 of this Executive-Law, the Civil Registrar is a professional who has completed a degree in law (a Master in law is demanded to have access to this professional career, under Article 14 of the same Executive-Law) who must act responsibly, complying with impartiality, technical and functional autonomy, and subjection to strict criteria of legality and objectivity. In the exercise of their activity, the Civil Registrar has to 'pursue the public interest', attributing 'public faith' to legal acts and 'ensuring legal security and certainty'.

(30) Executive-Law 26/2004, dated 4 February 2004, approved the legal framework applicable to Notaries, endeavouring a major reform as it substantiated their privatisation. According to Article 1, the Notary is a jurist 'whose written documents, drawn up in the exercise of their functions, are conferred public faith' (no 1). As a consequence of the mentioned reform, a Notary is 'simultaneously, a public official who confers authenticity on

Portuguese Constitution which states that: 'The law may institutionalise non-jurisdictional instruments and forms of settling conflicts' (Article 202, no 4 of the CPR).

12 One important landmark in that path was the enactment of the Portuguese Civil Registration Code (*Código de Registo Civil*, hereinafter: PCRC), approved by Executive-Law no 131/95, dated 6 June 1995. This Code introduced the transfer of specific competences to make decisions from courts to the civil registry offices. This Code has given Civil Registrars the competence to decide in several proceedings (31), namely those regarding divorce by mutual consent and legal separation concerning personal and economic effects of marriage (32) by mutual consent, under certain conditions that were set out in the Portuguese Civil Code (33). In the preamble of the Civil Registration Code, it was (34) highlighted that 'the careful technical-legal preparation' of Civil Registrars and 'their special aptitude' in the field of family law justified the transfer of the competence to make decisions to them. This legal change aimed to reduce the number of cases pending in the judicial courts, exempting them from the resolution of issues considered non-contentious, and simultaneously promoting the attainment of agreements between the parties involved. This trend gained momentum in the following decades, considering the 'highly beneficial outcomes' to citizens, the judicature, and society as a whole (35). Another milestone in this de-judicialisation path is marked by the enactment of Executive-Law no

---

documents and ensures their archiving and a liberal professional who acts independently, impartially and at the free choice of interested parties'.

(31) The competence to decide the processes for waiving impediments to the conclusion of marriage, and the processes for the provision of authorisation for the marriage by minors were also transferred to Civil Registrars.

(32) There are two types of legal separations in the Portuguese legal system, as will be explained below (see n 52). One type only affects the economic effects of the marriage and the other affects the personal and economic effects of marriage. At this point, we are referring to the latter.

(33) At that moment, it was required that the married couple did not have any minor child or, if there was a minor child, the exercise of respective parental responsibilities had to be already judicially regulated in order for it to be possible to demand that the Civil Registrar grant a divorce by mutual consent or to declare a legal separation concerning personal and economic effects of marriage by mutual consent (Article 1773 of the PCC, in the version amended by Executive-Law no 163/95, dated 13 July 1995).

(34) The same Civil Registration Code is still in force, even if several amendments have been introduced to its provisions.

(35) In the preamble of Executive-Law no 272/2001, dated 13 October 2001 (that will be referred to subsequently in the text), it was stressed that the transfer of decision-making competence regarding legal separation and divorce by mutual consent to the Civil Registrars, introduced in 1995, had 'resulted in highly beneficial outcomes from the point of view of

272/2001, dated 13 October 2001 ([36]). In fact, Civil Registrars were granted exclusive competence to decide mutual consent divorces and mutual consent legal separation concerning personal and economic effects of marriage proceedings, even if there was a minor child and the exercise of parental responsibilities was still not judicially regulated ([37]). The only exception was when the mutual consent for those legal effects was reached within a unilaterally requested divorce that had (still has) to be judged and decided by a court. Furthermore, this Executive-Law granted Civil Registrars the competence to decide an array of additional matters within family law whenever 'the will of the parties is found to be reconcilable' ([38]). This was the case of proceedings ([39]) relating to a set of non-contentious jurisdiction proceedings, regarding the granting of maintenance to children over the age of 18 or emancipated and the allocation of the family home, the authorisation to use the surnames of the current or former spouse and deprivation of the right to use those surnames and, finally the conversion of legal separation concerning personal and economic effects of marriage into divorce ([40]).

13 The references that have been made illustrate the movement of de-judicialisation as far as family matters are concerned, but such a development has also

---

divorce applicants and the judiciary, with repercussions throughout society through greater decision-making speed'.

([36]) The processes that are listed in Articles 2, 4, 5 and 6, no. 1 of Executive-Law no 272/2001, dated 13 October 2001, are materially encompassed within the non-contentious jurisdiction. João de Castro Mendes and Miguel Teixeira de Sousa, *Manual de Processo Civil*, vol 1 (AAFDL 2022) 73.

([37]) In these cases, Public Prosecutor's magistrates gained a significant intervention in deciding matters related to children under 18 . The Executive-Law we have been referring to transferred decision-making competences from the court (*rectius*, from judicial magistrates) to Public Prosecutor's magistrates, in cases where the need to protect the interests of an incapable or absent person was at stake.

([38]) As is stated in the preamble of Executive-Law no 272/2001, dated 13 October 2001, which is still in force, taking into account amendments introduced by successive laws. If any interested party voices opposition, the proceeding should be transferred to the competent court to deliver the decision on the matter.

([39]) A formal requirement is legally required to recognise competence in the matters that will be referred to subsequently in the text for the Civil Registrar to be granted decisional competence: the request must be processed autonomously in relation to a judicial process. The Civil Registrar is not awarded competence if the claims on the matters referred to in the text are combined with other requests within the scope of the same legal action presented to a court, or constitute an incident or dependence on pending action in a judicial court, circumstances in which they continue to be processed under the terms set out in the Civil Procedure Code.

([40]) By the same Executive-Law, the competence to decide the processes of legal reconciliation of separated spouses was also transferred to the Civil Registrars as those processes, by nature, do not correspond to a dispute.

taken place regarding succession issues. To illustrate this trend, mention should be made of Law 23/2013, dated 5 March 2013 (41), which has approved a new legal framework applicable to the devolution of an estate by inventory (*inventário*), a process that has to be performed by a Notary (notarial inventory, *inventário notarial*) (42) instead of a court, as previously the case. The transfer of powers in this area to Notary offices aimed to reduce the pressure on courts and to enable proceedings to be heard faster. Even if this regime, approved in 2013, was revoked by Law no 117/2019, dated 13 September, the latter Law still recognises the competence of Notaries regarding inventories, with exceptions existing for only a few circumstances that are provided for in Article 1083, no 1 of the Portuguese Civil Procedural Code and which will be considered below (43). If none of these situations exist, the inventory process may be performed by the courts or in Notary offices, at the choice of the interested party who initiates it, or by agreement between all interested parties.

The de-judicialisation trend we are focusing on may be demonstrated by statistical data. Information regarding non-judicial proceedings is available as Registrars and Notaries are obliged to collect statistical data on the acts they carry out (44). For instance, as far as a divorce by mutual consent and legal separation concerning personal and economic effects of marriage by mutual

(41) The regime of inventory approved by the law of 2013 was revoked by Law no 117/2019, dated 13 September 2019, which approved a new legal framework applicable to the inventory that is processed by the Notary.

(42) If all directly interested parties agreed, the devolution of the estate and the operation of the division of assets would be performed at the registry offices or via a Notary. Nevertheless, an inventory was needed in three special circumstances: 1) if there was no agreement from all those interested parties; 2) if an interested party to whom the inheritance was granted was an incapacitated person and the Public Prosecutor's Office considered that their interests implied a beneficiary acceptance; 3) if any of the heirs could not, due to absence at an uncertain location or due to a permanent *de facto* incapacity, intervene in a sharing operation act carried out by agreement. The competence for the inventory process was granted to Notaries by Law 23/2013, dated 5 March 2013, in accordance with Article 2 of this Law. Article 16 of the same Law stated that if a complex controversial issue emerged, it should be referred to the court in order to obtain a definitive decision. As a consequence, when such an issue arose, the Notary determined the suspension of the processing of the inventory until a definitive judicial decision was made. The referral to the court could also occur at the request of any interested party.

(43) In those circumstances, an exclusive decisional competence over inventories is awarded to the judicial courts. We will refer to the situations stated in Article 1083, no 1 of Portuguese Civil Procedure Code below in section III.

(44) Currently this is done electronically and is then integrated into Justice statistics that can be accessed at: <https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas> accessed 26 January 2025.

consent decided by the Civil Registrar are concerned (45), there were 12,974 cases in 2022, 12,141 in 2021, and 12,526 in 2020 (46). The impact of de-judicialisation in this area is evident if one considers the substantial decrease in the numbers of divorces and legal separations concerning personal and economic effects of marriage decreed by courts as a consequence of the reform produced by Executive-Law no 272/2001, dated 13 October 2001: 17,323 divorces and mutual consent legal separations concerning personal and economic effects of marriage were finalised in courts of first instance in 2001, compared to 17,013 in 2002, 10,350 in 2003, 9,597 in 2004, and 8,403 in 2005 (47).

II. Family Law

15 Regarding family law, in Portugal, some proceedings are out-of-court proceedings, with Civil Registrars competent to act. Nonetheless, courts play an important role and many proceedings are currently administered by judicial authorities. The scope of competence of each authority, as well as the differences and similarities between judicial and non-judicial proceedings

---

(45) Regarding notarial inventories, there were 1,384 in 2022, 1,581 in 2021 and 2,147 in 2020 (<https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Atos_registos_e_notariado.aspx> accessed 26 January 2025). In parallel, in the same three years, the following number of judicial inventory processes were finalised at first instance judicial courts: 1,123 in 2022, 596 in 2021 and 192 in 2020, considering situations in which there is exclusive competence of the courts and 2,976 in 2022, 1,568 in 2021 and 460 in 200, considering the situations in which there is the possibility to choose to submit the case to court or to a Notary's office. This information can be found at <https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Processos-civeis-findos-nos-tribunais-judiciais-de-1-instancia.aspx> accessed 26 January 2025.

(46) The oldest recorded data provided on this site dates back to 1998 regarding mutual consent divorce and mutual consent legal separation concerning personal and economic effects of marriage. In that year, 3,217 cases concerned such matters. It should be highlighted that in 2001 (the year Executive-Law no 272/2001, dated 13 October 2001 was enacted), there were 4,951 cases. That number increased to 14,116 in 2002 (when the regime of the mentioned Executive-Law entered into force on 1 January 2022). The highest number (19,540) recorded corresponds to 2010. This information can be found at <https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Atos_registo_civil.aspx> accessed 26 January 2025. In parallel, in the same three years, the following number of judicial cases regarding legal separation concerning personal and economic effects of marriage were finalised at first instance judicial courts: 7,448 in 2022, 7,100 in 2021 and 6,653 in 2020. This information can be found at <https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Processos-civeis-findos-nos-tribunais-judiciais-de-1-instancia.aspx> accessed 26 January 2025.

(47) This information can be found at <https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Processos-civeis-findos-nos-tribunais-judiciais-de-1-instancia.aspx> accessed 26 January 2025.

must be addressed and examined, considering individually each subject, as will be done in the following subsections.

A. *Divorce and legal separation*

16 After the entry into force of the Constitution of the Portuguese Republic and following the additional protocol, signed in 1975, to the 1940 Concordat between the Portuguese State and the Holy See, all marriages in Portugal became dissolvable by divorce. According to the regime that was a result of the amendments introduced by the reform of 1977, the law provided two main forms of divorce ([48]): on the one hand, a contentious divorce (*divórcio litigioso*) arising from the culpable violation of conjugal duties or from the breakdown of the marriage, as defined by law and, on the other hand, divorce by mutual consent (*divórcio por mútuo consentimento*) ([49]). Judicial courts were competent to decide on both types of divorce ([50]).

17 Over the past almost five decades, the legal framework of divorce has been the subject of successive legislative interventions, the most recent of which dates back to 2008 ([51]). Some main outcomes may be inferred from the amendments that have been introduced, namely the mitigation of the conditions that have to be met in order for a divorce to be decreed, the simplification of the procedures that have to be followed, the promotion of the achievement of agreed solutions, and also the de-judicialisation of the administration of justice regarding divorce and legal separation concerning personal and economic effects of marriage. In fact, certain functions that were previously the competence of the judge were transferred to the Civil Registrar.

18 In the Portuguese legal system, at present, two main types of divorce (and

---

([48]) And legal separation concerning personal and economic effects of marriage.

([49]) At that moment, only spouses who had been married for more than three years were awarded the right to request divorce by mutual consent. Even if they did not have to reveal the cause of divorce, they had to reach an agreement on three subjects: the provision of maintenance to the spouse who needed it; the exercise of 'parental authority' (using the terminology that was used then) regarding minor child(ren) and the allocation of the family home.

([50]) Regarding the evolution of the legal regime applicable to divorce in Portugal, Pereira Coelho and Guilherme de Oliveira, *Curso de Direito da Família. Volume I. Introdução. Direito matrimonial* (5th edn, Imprensa da Universidade de Coimbra 2016) 684.

([51]) About this legal reform, see Guilherme de Oliveira, 'A nova Lei do Divórcio' (2010) 7(13) Lex Familiae – Revista Portuguesa de Direito da Família 5 and 'Linhas gerais da reforma do divórcio' (2008) 5(10) Lex Familiae – Revista Portuguesa de Direito da Família 63 and Rita Lobo Xavier, Recentes alterações ao regime jurídico do divórcio e das responsabilidades parentais (Almedina 2009).

legal separation concerning personal and economic effects of marriage ([52])) are recognised: divorce by mutual consent (*divórcio por mútuo consentimento*) and, in light of Article 1773, no 3 of PCC, divorce without the consent of one spouse (*divórcio sem o consentimento de um dos cônjuges*) ([53]). The general substantive provisions applicable to divorce, at present, can be found in Article 1773 and following of the Portuguese Civil Code: Articles 1775 to 1778-A contain the legal framework of divorce by mutual consent and Articles 1779 to 1787 cover the legal framework applicable to divorce without the consent of one of the spouses.

19 A divorce/legal separation without the consent of one spouse occurs when one spouse unilaterally demands a divorce or legal separation from the other. The claim must be presented to the court and must be grounded on 'the

([52]) In the Portuguese legal system, there are two types of legal separation: legal separation concerning personal and economic effects of marriage ('separação de pessoas e bens') that is governed by Article 1794 to Article 1795-A of the Portuguese Civil Code and judicial separation concerning economic effects of marriage ('separação judicial de bens') that is governed by Article 1767 to Article 1772 of the same Code. Legal separation concerning personal and economic effects of marriage does not dissolve the marital link. However, some personal and economic effects of marriage are affected, as stated in Article 1795-A of the PCC, and will be referred to in the text. The provisions regulating divorce in Articles 1773 to 1793-A of the PCC apply to legal separation concerning personal and economic effects of marriage. As a consequence, the rules applicable to each subtype of legal separation concerning personal and economic effects of marriage will be equivalent to those that will be referred to in the text regarding divorce. A judicial separation concerning economic effects of marriage does not dissolve the marital link, and only affects economic effects of marriage. A 'simple' judicial separation concerning economic effects of marriage is a legal measure that is provided when a community property regime applies. In this case, the spouse who is in danger of losing what is owned by him/her due to the mismanagement of the other spouse may request that a simple judicial separation of assets be decreed. The claim must be submitted to a court (the separation concerning economic effects of marriage is always judicial) and will be successful if the claimant proves such danger, the mismanagement of the other spouse and the causal link between both conditions. When the sentence decreeing the judicial separation becomes final, the matrimonial property regime applicable to that marriage will be the separation regime, and the assets that qualify as 'common' will be divided as if the marriage had been dissolved. Within the scope of this work, only the legal separation concerning personal and economic effects of marriage will be referred to. As a consequence, whenever the expression 'legal separation' is used, it will refer only to the legal separation concerning personal and economic effects of marriage. Regarding these two types of legal separation, Guilherme de Oliveira, Manual de Direito da Família (2nd edn, Almedina 2021) 280 and 284. On the effects of the legal separation concerning personal and economic effects of marriage, Rute Teixeira Pedro, 'Comments on Articles 1794 to 1795-D' in Ana Prata (ed), Código Civil Anotado (3rd edn, Almedina 2023) 737ff.

([53]) Law no 61/2008, of 31 October 2008, symbolically, replaced the term 'contested divorce' with the expression 'divorce without the consent of one of the spouses' to describe the divorce requested by one of the spouses against the other.

irretrievable breakdown of marriage' that has to be substantiated with circumstances that correspond to those that are described in one of the paragraphs of Article 1781 of the Portuguese Civil Code (54).

20 If both spouses agree to divorce/legally separate, a divorce/legal separation by mutual consent will be granted upon a bilateral request presented by both spouses. In this situation, there is no need to disclose any ground in such request. The application for a divorce/legal separation by mutual consent has to be presented to the Civil Registrar when some conditions are met – a so-called administrative divorce (*divórcio administrativo*) – and to the court when those conditions are not met – a so-called judicial divorce (*divórcio judicial*). As a consequence, in the Portuguese legal system, there are two types of consensual divorce.

21 In fact, if spouses, in addition to the agreement regarding divorce, also agree on some issues that are referred to in law, the common request is presented to the Civil Registrar. According to Article 1775 of the PCC, the issues spouses have to agree upon in order to avoid the intervention of a court are the following: the exercise of parental responsibilities of any child(ren) under 18 years old if that exercise has not previously been regulated (55); the maintenance of the spouse in need (56); the allocation of the use of the family

---

(54) Article 1781 of the PCC lists the following situations that may ground a claim for divorce: a) *de facto* separation for one consecutive year; b) alteration of the other spouse's mental faculties, when this alteration lasts for more than one year and, due to its severity, compromises the possibility of living together; c) absence of the other spouse, without news of the absentee, for no less than one year; d) any other fact that, regardless of the fault of the spouses, shows the irretrievable breakdown of marriage. Guilherme de Oliveira, *Manual de Direito da Família* (2nd edn, Almedina 2021) 306, Jorge Duarte Pinheiro, *O Direito da Família Contemporâneo* (7th edn, Gestlegal 2020) 613; Rute Teixeira Pedro, 'Comments on Article 1781' in Ana Prata (ed), *Código Civil Anotado* (3rd edn, Almedina 2023) 714ff and 'Da rutura definitiva do casamento como pressuposto do direito ao divórcio sem consentimento de um dos cônjuges: breves reflexões' in André Lamas Leite, Fernando Pereira and Tiago Ramalho (eds), *Estudos em homenagem ao Professor José Tavares de Sousa* (AFDL Editores 2022) 375.

(55) The exercise of parental responsibilities is regulated by Articles 1905 and following PCC. Guilherme de Oliveira, *Manual de Direito da Família* (2nd edn, Almedina 2021) 579 and Clara Sottomayor, *Regulação do exercício das responsabilidades parentais nos casos de divórcio* (8th edn, Almedina 2021).

(56) Rules governing the maintenance of the spouses or former are included in Article 1675 and Articles 2016 and following of the PCC. Maria João Tomé, 'Comments on Article 2016 and the following' in Clara Sottomayor (ed), *Código Civil Anotado* (Almedina 2020) 1098ff and Rute Teixeira Pedro, 'Comments on Articles 2016 and following' in Ana Prata (ed), *Código Civil Anotado* (3rd edn, Almedina 2023) 962ff. For further developments, Paula Vitor, *Crédito Compensatório e Alimentos Pós-divórcio – Contributo para a Compreensão de um Sistema Bimodal* (Almedina 2020).

home (57); and the future treatment of pets (58). These agreements (59) are known as 'complementary divorce agreements' (*acordos complementares de divórcio*) (60). If spouses fail to reach an agreement on any of these subjects, the bilateral request for divorce/legal separation must be presented to a court (61).

22 When all the conditions are met to grant competence to the Civil Registrar, the process of divorce or legal separation by mutual consent is initiated through an application signed by the spouses or their attorneys, which is submitted to the civil registry office, substantiating the facts and law,

---

(57) It is only the use of the immovable that must be the object of the agreement (Article 1793 and Article 1105 of the PCC). The rules applicable to this subject are different depending on whether the immovable where the family dwelling is located is owned or rented by one or both spouses. If the immovable is owned by one of the spouses, jointly owned or if it constitutes a common asset of the couple, under Article 1793 of the PCC, a rental contract between the spouses may be concluded, according to which, the use of the house will be granted to the non-owner or to the non-exclusive owner spouse. According to Article 1105 of the PCC, if the immovable is rented by one of the spouses or by both, the spouses may agree that the contractual position of the tenant is transferred to the spouse who had not rented the immovable (if only the other spouse had rented it) or they may agree that the contractual position of the tenant is concentrated in one spouse (if both spouses had rented the immovable). Rute Teixeira Pedro, 'Comments on Article 1793' in Ana Prata (ed), *Código Civil Anotado* (3rd edn, Almedina 2023) 732ff and Nuno Salter Cid, 'Comments on Article 1793' in Clara Sottomayor (ed), *Código Civil Anotado* (Almedina 2020) 574.

(58) Law (Article 1793-A of the PCC) expressly refers to the possibility of a pet being 'entrusted' to one spouse or both spouses. In the case of joint entrustment, the place where the animal will reside or the places in which it will reside alternately must be defined. In the case of unilateral entrustment, it will be important to ensure contact with the pet by the other spouse and other family members, to ensure the preservation of the interests of the spouses and their offspring and the well-being of the animal.

(59) If nothing else emerges from the documents submitted, it is understood that the agreements are intended both for the period during which the case is pending and for the subsequent period (Article 1775, no 2 of the PCC and Article 272, no 4 of the PCRC).

(60) These agreements need to be approved (ratified) by a public entity as will be referred to in the text. On these agreements, in English, Rute Teixeira Pedro, 'Marital Agreements: What's love got to do with it? Challenges and possibilities of the ex contractu conformation of the patrimonial effects of marriage' in Carol Rogers, Masha Antokolskaia, Joanna Miles, Patrick Parkinson and Machteld Vonk (eds), *Family Law and Family Realities* (Eleven International Publishing 2019) 277.

(61) In fact, the movement of de-judicialisation of divorce and legal separation by mutual consent proceedings is not complete, as there are three groups of situations in which the jurisdiction for these proceedings remains with the courts: 1) if any of the complementary agreements referred to in Article 1775 of the CC are not submitted, as just referred to in the text; 2) if any of the submitted agreements are not approved; 3) if the agreement is reached as part of the separation or divorce process without the consent of the other spouse (which is decided by the court).

indicating the evidence and attaching documentary evidence (Article 14, no 1 of Executive-Law no 272/2001, dated 31 October 2001 and Article 271, no 1 of the Civil Registration Code). This application must be accompanied by some documents (62), namely the agreements that were mentioned above (63). Once the application has been received, the Civil Registrar informs the spouses of the existence of family mediation services (Article 14, no 3 of Executive-Law no 272/2001, dated 31 October 2001). If the spouses still intend to divorce/legally separate, the Civil Registrar summons the spouses to a conference in which the Civil Registrar checks whether all the legal requirements are met and assesses (64) if the above-mentioned agreements regarding the maintenance of the spouse in need, the allocation of the use of the family home and the future treatment of pets protect the interests of both spouses and their children. If this is not the case, the Civil Registrar invites the spouses to change these agreements as they have to be approved by means of ratification' (*ratificação*) of the Civil Registrar (65). In order to make such assessment, the Civil Registrar is authorised to determine the performance of any useful act and to ensure that any necessary evidence has been provided. If it is concluded that all the requirements are fulfilled, the divorce/legal separation is decreed and this is correspondingly registered. If one of the agreements is not approved, the case is sent to the court (Article 1776.º- A, no 4 and Article 1778 of the Civil Code).

If there is a minor child and an agreement on the exercise of parental responsibilities over them is presented, the process of assessment of the case includes particular proceedings set out in Article 14, no 4 to no 7 of Executive-Law no 272/2001, dated 31 October 2001. When such an agreement is presented, it is sent to the Public Prosecutor's magistrate at the first instance court competent in relation to the matter within the jurisdiction to which the registry office belongs. The magistrate has to analyse the agreement to verify if it adequately safeguards the interests of the minor. If this is not the case, the applicants (spouses) may amend the agreement accordingly or present a new agreement. In the latter situation, the Public Prosecutor's

(62) The documents are referred in Article 1775, no 1 of the PCC and in Article 272, no 1 of the PCRC.

(63) At the request of the spouses, the agreements may be drawn up by the Civil Registrar or by the registration officers, as stated in Article 272, no 2 of the PCRC.

(64) The assessment is substantial in nature.

(65) They are not considered contracts. See Rute Teixeira Pedro, 'Marital Agreements: What's love got to do with it? Challenges and possibilities of the ex contractu conformation of the patrimonial effects of marriage' in Carol Rogers, Masha Antokolskaia, Joanna Miles, Patrick Parkinson and Machteld Vonk (eds), *Family Law and Family Realities* (Eleven International Publishing 2019) 278.

magistrate will examine the new agreement and, if they consider that the agreement duly safeguards the interests of minors or if the spouses have changed the agreement under the terms indicated by the Public Prosecutor's magistrate, the divorce is decreed. Whenever the applicants do not comply with the changes indicated by the Public Prosecutor's magistrate and maintain the intention of divorcing/legally separating, the divorce/legal separation case is referred to the court of the district to which the registry office belongs.

24 The Civil Procedure Code is subsidiarily applicable to the processes that Civil Registrars are competent to decide under the de-judicialisation movement we are referring to (Article 19 of Executive-Law no 272/2001, dated 31 October 2001). The applicants (former spouses) are notified of the decision issued by the Civil Registrar, and an appeal may be presented within 15 days to the competent Court of Appeal, in accordance with Articles 274, no 1 and 288 of the Civil Registration Code.

25 Divorce and legal separations, as facts subjected to registration (under Article 1, no 1, q), of the Civil Registration Code), must be registered in the birth and marriage records (Article 69, no 1, a), and Article 70, no 4 of the same Code) (66).

26 The decision of the Civil Registrar is enforceable and produces the same effects that would be produced by court decisions on the same subject, as is stated in Article 1776, no 3 of the Civil Code and Article 17, no 4 of Executive-Law no 272/2001, dated 31 October 2001. The decision concerns the divorce and legal separation decree and the issues that are the object of the agreements presented and approved. Its effects are exactly the same as those that are produced by judicial decisions: there is a functional equivalence. Irrespective of being issued by the Civil Registrar or the court, the decision regarding the decree of divorce or legal separation is constitutive in nature: it produces legal effects, extinguishing the marriage (in the case of divorce) or changing its content (in the case of legal separations). The decision also contains binding determinations (with executive force) regarding the maintenance of the spouse in need, the allocation of the use of the family home, the future treatment of pets and the exercise of parental responsibilities in the event that there is a child under the age of 18 whose parental responsibilities were not regulated prior to the divorce.

27 By decreeing the divorce, the marital link is extinguished *ex nunc*, for the future. In addition to the termination of the marriage bond, divorce puts an

(66) The date of registration is particularly relevant with regard to the production of effects of the divorce and legal separation in relation to third parties, under Article 1789, no 3 of the PCC. Pereira Coelho and Guilherme de Oliveira, *Curso de Direito da Família. Volume I. Introdução. Direito matrimonial* (5th edn, Imprensa da Universidade de Coimbra 2016) 746.

end to the personal relationship between the spouses (Article 1688 of the Civil Code), eliminating the legal binding of former spouses to marital duties contained in Article 1672 of the PCC. There is also the loss of succession rights – not only those derived from legal succession (imperative and non-imperative succession), but also those that are derived from a will – and this occurs even if the decision is issued after the death of the spouse, in accordance with Article 1785, no 3, Article 2133, no 3 and Article 2317 d) of the Portuguese Civil Code. The spouses lose the right to use the other one's surname that was adopted upon marriage (67), unless authorised by the former spouse or authorised by the Civil Registrar, in accordance with Article 1677-B of the PCC and Article 5, no 1, d) of Executive Law 272/2001, dated 13 October 2001. Furthermore, the rules that define 'marital illegitimacies' (*ilegitimidades conjugais*), which prevent spouses from validly acting alone regarding some assets, no longer apply: each of the spouses can dispose freely of their assets. Patrimonial relations between the spouses cease (Article 1688 of the PCC), and if a communitarian regime is applied, either of them may request a 'sharing' (*Partilha*) of the common assets to be performed (68). Moreover, all the benefits – gifts, liberalities (69) – that one or both spouses already received or that they would receive in the future, from the other spouse or from another person, in view of the marriage or in consideration of the married status, are automatically lost whether the stipulation is either prior or subsequent to the conclusion of the marriage. Thus, according to Article 1791 of the PCC, the decree of divorce (70) works, by law, as a resolutive condition with a reversion clause for the donor. Finally, the law also provides for compensation in Article 1676, nos 2, 3 and 4 of the PCC if three requirements are met: 1) the contribution by one spouse (the creditor) to family life was considerably higher than that required under Article 1676, no 1 of the Portuguese Civil Code (ie 'in accordance with the

(67) It is not mandatory but a possibility that is stated in Article 1677 of the PCC. Increasingly fewer spouses are using this possibility. We will refer to this below in section IV of this paper.

(68) There are no provisions regarding social security/pension rights. Each spouse is entitled to the corresponding rights. The compensatory credit provided in Article 1676, nos 2, 3 and 4 of the PCC and what will be referred to below is an attempt to solve the imbalances that marriage may have created between spouses.

(69) Donations in accordance with social uses under Article 940, no 2 of the PCC are excluded from the scope of Article 1791 of the PCC. Pereira Coelho and Guilherme de Oliveira, *Curso de Direito da Família. Volume I. Introdução. Direito matrimonial* (5th edn, Imprensa da Universidade de Coimbra, 2016) 768 and Rute Teixeira Pedro, 'Comments on Article 1791' in Ana Prata (ed), *Código Civil Anotado* (3rd edn, Almedina 2023) 726.

(70) And also the decree of legal separation, as both decisions have the same effects concerning economic effects.

possibilities of each spouse'); 2) if that contribution represented an excessive renunciation of the satisfaction of their interests in favour of life in common, namely professional life and 3) if significant economic losses have been caused to that spouse.

28 When the legal separation concerning personal and economic effects of marriage is decreed, the marital link is not dissolved. Spouses are still married to each other. Nevertheless, some personal and economic effects of marriage are affected, as stated in Article 1795-A of the PCC. Regarding personal effects, even if spouses remain obliged to fulfil some of the spousal duties that are stated in Article 1672 of the PCC (namely the duties of respect, cooperation and fidelity), they are exempted from the fulfilment of the duty of cohabitation and the duty to contribute to the family expenses (even if the maintenance obligation may arise to the benefit of a spouse who needs financial support, according to Articles 2016 and following of the PCC). Regarding the economic effects, separation produces the same effects that are produced when a marriage is dissolved by divorce.

29 In addition to a review of the decision by judicial authorities, the impartiality (71) of the Civil Registrar is guaranteed by the definition of impediments to act under Article 47, no 1 of the Portuguese Registration Code, which states that Civil Registrars are not allowed to perform acts in proceedings in which their spouse or any relative or spouses' relatives in the direct line (72) or in the second degree of the collateral line (73) intervene, as parties or as attorneys or representatives. Additionally, a Civil Registrar who practises law, as a lawyer, is prohibited from accepting a mandate in the proceedings regulated in Executive-Law no 272/2001, dated 31 October 2001 and under Article 47, no 3 of the Registration Code. Besides these special limitations, the impediments that are set out in the Administrative Procedure Code (*Código de Procedimento Administrativo*) are applicable (74). There is no express rule that determines that the limitations stated in the Civil Procedure

---

(71) The Civil Registrar has to respect the general duties of those who perform public functions and special duties stated in Article 9 of Executive-Law 115/2018, dated 21 December 2018, namely the guarantee of the legality of the acts performed; the safeguarding of the pursuit of public interest and equal treatment of citizens and exemption regarding their legitimate interests.

(72) Direct line encompasses ascendents (parents, grandparents, ...) and descendants (offspring).

(73) Relatives in the second degree of the collateral line are brothers and sisters.

(74) In accordance with Article 69 of the Administrative Procedure Code, any person who holds a position in Public Administration bodies or acts as their agent, as well as any other entities that, regardless of their nature, exercise public powers, cannot intervene in administrative proceedings in the cases listed in 6 subparas of its number 1, such as i) when they have an interest in it, for themselves, as representatives or as business managers (*gestio*

Code (these limitations will be mentioned below) regarding judges apply to Civil Registrars when they decide non-contentious jurisdiction cases, which they are competent to decide. As the Civil Procedure Code is subsidiarily applicable to the processes that Civil Registrars are competent to decide under the de-judicialisation movement (Article 19 of Executive-Law no 272/2001, dated 31 October 2001), it could be said that those rules in the Civil Procedure Code may be applicable to Civil Registrars. On the contrary, it may be affirmed that the limitations stated to the intervention of the judge in the Civil Procedure Code are connected to the judicial status that do not concern Civil Registrars.

The annulment of a civil (75) marriage is always decided by a (State) court. **30**
Catholic marriages are regulated both by Canon law and by State law, depending on the subject that is considered, according to an international treaty between the Portuguese State and the Holy See (Concordat of 2004). The assessment of validity of and declaration of nullity of a marriage performed according to the rites of the Roman Catholic Church, under the circumstances stated in the Concordat, is reserved to the competent eccle-

---

dominus) of another person; ii) when, by themselves or as representatives or business managers of another person, their spouse or person with whom they live in a *de facto* union, any relative or similar in a direct line or up to the second degree of the collateral line have an interest in it, as well as any person with whom they live in a common economy relationship or with whom they have an adoption, guardianship or civil foster relationship; iii) when, by themselves or as representatives or business managers of another person, they have an interest in an issue similar to the one that needs to be decided, or when such a situation arises in relation to the person covered by the previously stated circumstances; iv) when they have intervened in the procedure as an expert or representative or have given their technical opinion (expertise) on an issue to be resolved; v) when their spouse or the person with whom they live in a *de facto* union, relative or similar in a direct line or up to the second degree of the collateral line, as well as any person with whom they live in in a common economy relationship, has intervened in the procedure as an expert or common representative or with which they have an adoption, guardianship or civil foster relationship; vi) when it is an appeal against a decision handed down by those persons, or with their intervention, or given by any of the people referred to in situation above mentioned under ii) or with their intervention. Additionally, the persons who exercise public powers must request exemption from intervening in a procedure or in an act or contract of public or private law of the Public Administration when a circumstance arises in which the impartiality of their conduct or decision may reasonably be seriously doubted. For that purpose, there are some situations that are listed in no 2 of Article 73 of the Administrative Procedure Code.

(75) Civil marriage is regulated by the law of the Portuguese State. Civil marriage may be performed by the Civil Registrar or by clerics of some religions (other than the Catholic Church, which will be referred to subsequently in the text), when this possibility was admitted in Law 16/2001, dated 22 June 2001, known as the Law of Religious Freedom. Pereira Coelho and Guilherme de Oliveira, *Curso de Direito da Família. Volume I. Introdução. Direito matrimonial* (5th edn, Imprensa da Universidade de Coimbra 2016) 326.

siastical courts under Article 1625 of the PCC. The effects produced by the annulment of a civil marriage and by the declaration of nullity of a marriage performed according to the rites of the Roman Catholic Church are regulated by Portuguese State law: the marital link and all the legal effects that were produced by marriage are retroactively eliminated (Article 289 of the PCC that defines the effects of annulment and nullity in general). Thus, once the annulment decision has become final, it is, in principle, as if that marriage had never been concluded and such a bond had never been created. To mitigate these destructive effects, the regime of 'putative marriage' (*casamento putative*) is governed by Articles 1647 and 1648 of the PCC. As a consequence, the effects that were produced by an invalid marriage until the decision of annulment or the declaration of nullity became final will not be eliminated and may be invoked between spouses and towards third parties if the marriage was concluded in good faith (*boa-fé*) by both spouses (Article 1647, no 1 of the PCC). If only one spouse concluded the marriage in good faith, only that spouse can claim the benefits of the marital status and invoke those effects towards third parties, provided that, in relation to those third parties, those marital effects are a mere reflection of the relationship between the spouses (Article 1647, no 2 of the PCC).

31 As far as cohabitation outside marriage is concerned, in Portugal, the so-called *de facto* union (*união de facto*) is a *de facto* situation, in which some legal effects are recognised. This recognition does not depend on any special act of formalisation of the relationship. Each cohabitant is entitled to freely terminate the cohabitation, at any time, without having to present any reason. There is no special procedure to put an end to the relationship. Nevertheless, in some circumstances, a judicial declaration of the dissolution of the *de facto* union is required, such as when its dissolution is grounded upon a unilateral decision and one cohabitant intends to exercise a right that is connected with that dissolution under Article 8 of Law 7/2001, dated 11 May 2001 (76).

32 'Although any procedural act presupposes a declaration of will, the guiding principle in this matter is the irrelevance of the lack or defects of will in carrying out procedural acts by the court and the parties. In more concrete terms: the provisions contained in civil legislation on the lack and defects of will (Articles 240 to 257 and 297 of the Civil Code) are not applicable, neither directly nor through an argument by analogy, to procedural acts'. On

(76) This Law is commonly known as the *de facto* union Law (*lei da união de facto*).

the contrary, 'regarding the acts of the parties, the relevance of the fault and defects of will in procedural matters is recognised' (77).

33 In general, international jurisdiction or competence is assessed in light of Articles 62 and 63 of the Civil Procedure Code. If there is a European Regulation or international convention, its rules will be applicable. Regarding the rules of competence and recognition, the rules apply to non-judicial authorities when they act in the performance of their competence to make decisions, as in cases regarding divorce: Regulation (EU) 2019/1111, of 25 June (Brussels IIb Regulation). The Civil Registry Offices (non-judicial entities), when dealing with divorce and/or separation cases, are equated to courts and are therefore subject to the rules of international jurisdiction. As regards citations (*citações*) and notifications (*notificações*), Regulation (EU) 2020/1784, of 25 November, or the 1965 Hague Convention for States that are not bound by the European Regulation, but by this Convention (for example, for notifications in the United Kingdom) apply.

34 No information could be found on whether certificates have already been issued, but if a certificate is requested, it must be issued by the court or authority that issued the decision or authentic act.

B. *Parenthood*

35 Rules governing the establishment of parenthood (78) are provided in Articles 1796 to 1873 of the PCC: Articles 1803 to 1825 regarding motherhood (*maternidade*) and Articles 1826 to 1873 regarding parenthood (*paternidade*) (79). These provisions were introduced taking into account natural procreation, ie the procreation that results from sexual intercourse.

36 Law no 32/2006, dated 26 July 2006 (80), the Medically-Assisted Procreation Law (*Lei da procriação medicamente assistida*), created a legal framework for the use of medically-assisted procreation techniques in Portugal (81). Article

(77) João de Castro Mendes and Miguel Teixeira de Sousa, *Manual de Processo Civil*, vol 1 (AAFDL 2022) 39.

(78) The word used in the Portuguese Civil Code is *filiação* (a term that has its roots in the Latin word referring to son/daughter) to aggregate motherhood and parenthood.

(79) Guilherme de Oliveira, *1* (2nd edn, Almedina 2021) 457.

(80) This Law has been amended several times. The version in force will be taken into account.

(81) About the regime introduced by this law, in English, see Rute Teixeira Pedro, 'The dawn of a brave new world in Portugal? — A critical overview of the new legal framework applicable to medically-assisted procreation' in Margaret Brinig (ed), *The International Survey of Family Law: 2017* (Jordan Publishing 2017) 271 and 'Surrogacy in Portugal' in Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019) 229. And in Portuguese, Guilherme de Oliveira, *Manual de*

20 contains the central rule concerning the establishment of parenthood when those techniques are used (82).

37 Regarding the legal regime in the Portuguese Civil Code, the establishment of motherhood (*maternidade*) usually results from the identification of the woman who gave birth to the child that is included in the statement of the person who declares the birth (Articles 1803 to 1805 of the PCC) (83). If the birth registration occurs and motherhood is not established, the woman who presents herself as the mother may declare her motherhood at the Civil Registry Office at any time (Article 1806 of the PCC). Lastly, if the motherhood is not established through the two ways just mentioned, motherhood may be established through the filing of an action to a judicial court (84), within the time frame stated in Article 1817 of the PCC (85). As far as the establishment of fatherhood (*paternidade*) is concerned, the legal

---

Direito da Família (2nd edn, Almedina 2021) 521 and Rute Teixeira Pedro, 'Uma revolução na conceção jurídica da parentalidade? – breves reflexões sobre o novo regime jurídico da Procriação Medicamente Assistida' in Luísa Neto e Rute Teixeira Pedro (eds), *Debatendo a procriação medicamente assistida* (Faculdade de Direito da Universidade do Porto 2018) 149.

(82) In this Article, the neutral word *parentalidade* is used and no reference is made to motherhood and fatherhood. Besides this rule, Article 21 of the Medically-Assisted Procreation Law excludes the possibility of the donors to be considered parents of the child that is created through the use of the medically-assisted techniques. Article 23 of the Medically-Assisted Procreation Law is dedicated to regulating the parenthood of the child who is born as a consequence of a post mortem use of medically assisted techniques. In this Article, the word *paternidade* (fatherhood) is used, as the post mortem use of medically-assisted techniques is allowed only for couples formed of a man and a woman (contrarily to the use of those techniques in general as will be mentioned subsequently in the text).

(83) Under Article 96 of the PCRC, births that occurred on Portuguese territory must be declared electronically or in person at any civil registry office, within 20 days from the date of birth; or in person, at the health unit where the birth took place or where the parturient was transferred, when it is possible to declare the birth there, until the moment the parturient is discharged. According to Article 112 of the PCRC, the person who declares the birth must identify, when possible, the mother of the registrant. Under Article 101-A of the PCRC, within 24 hours after birth, health units must enter into a computer register with exclusive access to health units, the Institute of Registries and Notaries and the Institute of Security Social, data on the birth, indicating the respective date and time, the sex of the minor and the name and residence of the woman giving birth.

(84) The judicial action has to be presented against the woman who is claimed to be the mother or against her heirs, according to Article 1819 of the PCC.

(85) This action, as a rule, has to be submitted up to ten years starting from the age at which the child reaches adulthood ('legal capacity by majority'). Consequently, the action has to be submitted before the moment the child reaches the age of 28. The existence of a time limit to submit a judicial action regarding the establishment of motherhood (and the same limits apply to actions regarding the establishment of fatherhood) is disputed in Portuguese legal doctrine and jurisprudence. On this, in English, see Rute Teixeira Pedro, 'An ongoing (r)evolution unfolded step by step: redefinition of the Legal Concept of Parentage and

regime in the Portuguese Civil Code treats the children who are born within marriage and children who are born outside a marriage differently (86). When the conception of the child or its birth occurs during the marriage of the child's mother, the presumption *pater is est* stated in Article 1826 of the PCC, in principle (87), applies. If the fatherhood is not established as a consequence of this presumption, its establishment may result from a statement of the man who declares himself to be the father (88) or from a judicial decision as a consequence of a judicial action brought against the man who is claimed to be the father or his heirs (89) if he has already died, within the time frame stated in Article 1817 (90). In light of the brief description of the regime in the Civil Code, neither multi-parenthood nor co-motherhood or co-fatherhood is recognised. The termination of established motherhood or fatherhood – an exception has to be made to the motherhood or fatherhood established as a consequence of a decision of a court in a judicial action – is possible, through a judicial decision issued by a court when an action to challenge motherhood (Article 1807 of the PCC) or fatherhood (Articles 1838, 1839 and 1859 of the PCC) is submitted, within which is proven the inexistence of the biologic reality upon which the establishment of motherhood or fatherhood, under the Portuguese Civil Code provisions, is based: the mother is the woman who gives birth to the child and the father is the man whose sperm fertilised the egg. The judicial action to challenge motherhood may be submitted, at any time, by the person registered as the mother, by the child, by anyone who has a moral or patrimonial interest in the action (for instance, the woman who claims to be the mother) or by the Public Prosecutor's magistrate (Article 1807 of the PCC). If fatherhood was established by the application of the presumption

---

Promotion of Children's Autonomy – An overview of the current developments in the Portuguese Law regarding Children's Rights and affiliation' in Bill Atkin (ed), *The International Survey of Family Law: 2016* (Jordan Publishing 2016) 402.

(86) Even if Article 36, no 3 of the Constitution forbids the distinction. This difference in treatment concerns registry and it is not considered arbitrary as is explained by the existence of the marital link and the personal duties that it creates between spouses (fidelity and cohabitation), from which is derived a sufficient legal base for the presumption stated in Article 1826 of the PCC that will be referred to subsequently.

(87) Articles 1828, 1829 and 1832 list circumstances that lead to the non-application of the referred presumption.

(88) This statement is called *perfilhação* and it is governed by Articles 1849 to 1863 of the PCC.

(89) Article 1873 determines the application of Article 1819 of the PCC to the action regarding fatherhood.

(90) Article 1873 determines the application of Article 1817 of the PCC to the action regarding fatherhood.

pater is est ([91]), the judicial action to challenge fatherhood may be submitted, within a specific time period defined in Article 1842 and Article 1841, no 2 of the PCC ([92]), by the mother's husband, by the mother, by the child or by the Public Prosecutor's magistrate at the request of the person declaring himself to be the child's biological father, under the terms of Articles 1839, no 1 and 1841 of the PCC.

38 The Medically-Assisted Procreation Law provides for the possibility to use medically-assisted techniques to any woman regardless of her civil (marital) status and sexual orientation, to (married or cohabiting) couples composed of a man and a woman and to married or cohabiting couples composed of two women, under its Article 6. According to Article 20 of the same Law, the parent or parents of the child is/are the person(s) who use the medically-assisted procreation technique. The establishment of parenthood is based upon the consent expressed regarding the use of such techniques, in accordance with Article 14 of the Medically-Assisted Procreation Law. As a consequence, co-motherhood may legally arise from medically-assisted procreation techniques used by a couple composed of two women. Sole motherhood is also possible if a woman benefits from the techniques, using genetic

---

([91]) If parenthood is established as a consequence of the statement of the father (*perfilhação*), fatherhood may be challenged, not only when it does not correspond to the biologic truth as depicted in text (it is proven that the man who voluntarily recognised the fatherhood is not the genetic father), but also when *perfilhação* is considered voidable, as the act of recognition was vitiated by error or moral coercion (Article 1860 of the PCC) or if the incapacity of the person who recognised the fatherhood is proven (Article 1861 of the PCC). In these situations, established fatherhood by *perfilhação* will be destroyed even if it corresponds to the genetic truth. In any case, a judicial decision issued by a court is needed.

([92]) The time limits vary depending on the person who presents the judicial action to the court and are the following: i) three years beginning from the time the husband became aware of circumstances in which his non-paternity could be concluded if the claim is submitted by the mother's husband; ii) three years after the birth if the claim is submitted by the mother and iii) up to ten years beginning from the age at which the child reaches adulthood ('legal capacity by majority') or later, within three years from the date on which they became aware of circumstances that could lead to the conclusion that they were not the child of the mother's husband; the request must be sent to the court within 60 days from the date on which the fatherhood of the mother's husband is recorded in the Civil Registry when the action is submitted by the Public Prosecutor's Magistrate. The existence of a time limit to present a judicial action regarding challenging parenthood is disputed in Portuguese legal doctrine and jurisprudence. On this, in English, see Rute Teixeira Pedro, 'An ongoing (r)evolution unfolded step by step: redefinition of the Legal Concept of Parentage and Promotion of Children's Autonomy – An overview of the current developments in the Portuguese Law regarding Children's Rights and affiliation' in Bill Atkin (ed), *The International Survey of Family Law: 2016* (Jordan Publishing 2016) 402–403. Guilherme de Oliveira, *Manual de Direito da Família* (2nd edn, Almedina 2021) 476 and 505.

material of a donor (93). The termination of established parenthood is possible through a judicial decision issued by a court. For that purpose, an action to challenge parenthood has to be submitted and within that action it has to be proven either that there was no consent upon which the parenthood could be established or that the consent did not fulfil the legal requirements stated in Article 14 of the Medically-Assisted Procreation Law. The competence to make final decisions within this section is reserved for the courts. The impartiality of the courts is guaranteed by the respect of provisions that state impediments to the judge to act (Article 115 of the PCPC) (94) and grounds of suspicion that may be invoked (95) in order to exempt the judge from hearing a case (Article 120 of the same Code) (96).

(93) As referred to above, donors are not considered parents, nor do they have any rights or duties in relation to the child, under Articles 21 and 27 of the Medically-Assisted Procreation Law. Article 20, no 3 states that whenever there is only the consent of the person who undergoes the medically-assisted procreation technique, the birth registration will be drawn up with the establishment of parenthood of that person (woman), without the need for a further unofficial investigation process to search for the establishment of the second parenthood (fatherhood). Article 20, no 3 widely differs from the regime in the PCC: Article 1864 of the PCC determines that whenever a minor's birth registration is drawn up with only the motherhood established, the official must send the full registration certificate to the court, in order to officially ascertain the father's identity. In a similar way, Article 1808 of the PCC determines that whenever maternity is not mentioned in the birth registration, the official must send to the court a full registration certificate and a copy of the declaration file, if any, in order to ascertain maternity *ex officio*.

(94) A judge is forbidden from exercising their functions, in contentious or non-contentious jurisdiction cases in the following circumstances listed in Article 115 of the PCPC: i) when the judge is a party to the case, either by themself or as a representative of another person, or when the judge has an interest in it that would allow them to be a main party of the action; ii) when the judge's spouse or any of the judge's relatives or legal relatives, either directly or in the second degree of the collateral line, is part of the case, either by themselves or as a representative of another person, or when one of those people has a stake in the interests of the case that allows them to appear in the action as the main party; iii) when the judge has intervened in the case as a representative or expert or when it is necessary to decide an issue on which they have given a technical opinion, even orally; iv) when the judge's spouse or any of the judge's relatives or legal relatives in the direct line or in the second degree of the collateral line have intervened in the case as a legal representative; v) in the event of an appeal filed in a case in which the judge was involved as a judge of another court, either delivering the disputed decision or otherwise taking a position on issues raised in the appeal; vi) in the event of an appeal filed in a case in which the decision was issued by a judge's relative or legal relative, in a direct line or in the second degree of the collateral line, or of an appeal of decision that referred to a decision issued by these persons; vii) when a party of the action is a person who has filed a civil action against the judge for compensation of damage, or a person who has brought criminal charges against the judge, as a result of acts committed in the exercise of their functions or because of them, or when the party of the action is the spouse of the referred person or their relative or legal relative, in a direct line or in the second degree of the collateral

40 There are no European regulations regarding the establishment of affiliation. Thus, in general, international jurisdiction or competence is assessed in light of Articles 62 and 63 of the PCPC.

C. *Adoption*

41 Constitutional protection has been awarded to adoption (*adoção*) by Constitutional Law no 1/82, that was the first amendment to the Constitution of the Portuguese Republic. By this Law, no 7 was added to Article 36 of the Constitution, which states: 'Adoption is regulated and protected under the terms of the law'. 15 years later, the Constitutional Law no 1/97, which implemented the fourth constitutional revision, added a final section to Article 36, no 7 of the CPR, stating that the law 'must establish rapid forms for the respective processing'. In successive amendments to the ordinary law, these legislative trends are visible: a reduction of adoption requirements, an expansion of the scope of potential adopters; an acceleration of the procedure that leads to the creation of the adoption link, and an emphasis added on the idea that adoption serves the best interests of the child, giving

---

line, provided that the civil action or the criminal charge has already been admitted; viii) when the judge has testified or has to testify as a witness; ix) when, in all the circumstances just mentioned, a person who lives in a common household with the judge is involved. If any of the just mentioned situations arises, the judge must declare themself impeded, and the parties may request a declaration of impediment until the decision.

(95) They may be invoked by the judge (Article 119 of the PCPC) or by the parties (Article 120 of the PCPC).

(96) The request for a judge's excuse or refusal grounded in suspicion is based on the assessment of the risk that, in a given case, their intervention may be considered suspicious, as there is a serious and severe reason apt to generate distrust regarding their impartiality. The law provides examples by listing some circumstances that qualify as grounds for suspicion: i) if there is kinship or affinity, not included in Article 115, in a straight line or up to the fourth degree of the collateral line, between the judge or their spouse and any of the parties or the person who has, in relation to the object of the cause, an interest that would allow them to be a main party to it; ii) if there is a case in which the judge or their spouse or cohabiting partner or any relative or legal relative of any of them in a direct line is a party and one of the parties is the judge of that case; iii) if there is, or has been in the previous three years, any case, not included in Article 115, between any of the parties or their spouse and the judge or their spouse or any relative or akin to any of them in a straight line; iv) if the judge or their spouse, or any relative or kin of any of them in a direct line, is a creditor or debtor of one of the parties, or has a legal interest in the decision of the claim being favourable to one of the parties; v) if the judge is a presumed heir, donee or employer of any of the parties, or a member of the management or administration of any legal person party to the case; vi) if the judge has received donations before or after the initiation of the process and because of it, or if they have provided means to cover the expenses of the proceedings; and vii) if there is great enmity or great intimacy between the judge and any of the parties or their representatives.

relevance to 'the quality and continuity of the emotional bonds inherent to filiation'.

Currently, provisions regarding adoption can be found in Articles 1973 to 1991 of the Civil Code and in Law no 143/2015, dated 8 September 2015, which has approved the Legal Framework for Adoption Procedure (*Regime Jurídico do Processo de Adoção*).

42 Adoption ([97]) is recognised by the Portuguese legal system, but only regarding minors. The adoptee must be under the age of 18 at the time of the adoption application ([98]). It aims to fulfil the best interests of the minor and serves protection and assistance purposes for minors, similar to the relationship between parents and children (*Adoption natura imitator*, as the Latin expression states). Consequently, as provided for in Article 1974, no 1 of the PCC, the adoption bond can only be established: i) if it brings real advantages to the adoptee; ii) if it is based on legitimate reasons; iii) if it does not involve unfair sacrifices for other children of the adopter's and, finally iv) if it is reasonable to assume that a bond similar to filiation will be established between the adopter and the adoptee, which presupposes a dual judgement ([99]): a prognosis assessment based on probability and an ethical assessment based on the ideas of convenience or reasonableness.

43 The possibility of adopting a child is recognised to a single person – single adoption (*adoção singular*), as well as to married or *de facto* cohabiting couples – joint adoption (*adoção conjunta*), irrespective of the gender of the persons who form the couple ([100]). The marriage or the cohabitation must have lasted for at least four years (Article 1979, no 1 of the PCC).

([97]) On adoption, Guilherme de Oliveira, *Manual de Direito da Família* (2nd edn, Almedina 2021) 539 and Jorge Duarte Pinheiro, *O Direito da Família Contemporâneo* (7th edn, Gestlegal 2020) 168.

([98]) This regime is a result of Law 46/2023, dated 17 August 2023. Until the entrance in force of this Law, only children under 15 could be adopted, but for two exceptions that allowed the adoption of a child until the age of 18. In fact, in the previous regime, it was legally allowed to adopt anyone who, on the date of the application, was under 18 years of age and was not emancipated when the adoptee, since a moment he/she was under 15 years, had been entrusted to the adopters or to one of them or when the adopter was a child of the spouse of the adopter. Law 39/2025, dated 1 April, prohibited the marriage of minors. Until this law came into force, in Portugal, marriage was permitted over the age of 16 and the celebration of marriage determined the emancipation of spouses under the age of 18. The reference to emancipated minors disappeared as a consequence of the entry into force of Law 39/2025, dated 1 April.

([99]) Guilherme de Oliveira, *Manual de Direito da Família* (2nd ed, Almedina 2021) 543.

([100]) The possibility to jointly adopt a child was awarded to same-sex (married or *de facto* cohabiting) couples by Law no 2/2016, dated 29 February 2016. Since 2001, different-sex *de facto* cohabiting couples have been allowed to jointly adopt, as a consequence of the

44 The adopters must be over 25 and under 60 years old (Article 1979, no 2 and 3 of the PCC). To prevent the adoptee from having parents who are too old, the law requires, as a rule, that once the adopter is 50 years old, the age-gap between the adoptee and the person being adopted cannot be greater than 50 years (Article 1979, no 3 of the PCC) ([101]). Nevertheless, exceptionally, the age gap may be greater than 50 years when there are serious reasons and when the best interests of the adoptee justify the deviation from the 50 years gap requirement. As an example of an exceptional situation, the Law presents the circumstance of adoption of two or more children who are brothers or sisters when only one or some of the children (not all of them) present an age gap greater than 50 years (Article 1979, no 4 of the PCC).

45 The link between adoptee and adopter(s) is created by a judicial decision (Article 1979, no 1 of the PCC). Prior to the judicial decision, a succession of administrative and judicial entities intervene in the procedure that aims to evaluate 'the personality and health of the adopter and the adoptee, the suitability of the adopter to raise and educate the adoptee, the economic and family situation of the adopter and the reasons that determined the request for adoption' (Article 1974, no 1 PCC).

46 This procedure that precedes the judicial action begins with a 'preparatory phase' ([102]), which is carried out by a social security entity (Article 7 of the Legal Framework for Adoption Procedure) or an authorised private institution (Article 15 to 25 of the Legal Framework for Adoption Procedure). In this first phase, once one of the communications ([103]) provided for in Article 39 of the Legal Framework for Adoption has been received, there is an examination of the children that may be adopted (focusing on their specific needs, in the various relevant areas of growth and development, as well as their family and legal situation, under Article 41, no 1 of the Legal Framework for Adoption Procedure). A technical intervention appropriate to the implementation of the adoption takes place (Article 41, no 2 of the Legal Framework for Adoption Procedure) and the child is monitored (Article 9, no 1 of the Legal Framework for Adoption Procedure and Article 41, no 2

---

entry into force of Law no 7/2001, dated 11 May 2001. The possibility to jointly adopt was traditionally awarded to different-sex married couples in the Portuguese legal system.

([101]) The maximum limit (60 years old) and the maximum 50-year gap do not apply whenever the adoptee is a child of the spouse of the adopter, according to Article 1979, no 5 of the PCC.

([102]) As it is legally named (Articles 40, a) and regulated by Articles 41 to 47 of the Legal Framework for Adoption Procedure.

([103]) The communications stated in Article 39 are the following: prior consent for adoption or application of a measure of trust with a view to future adoption in a process of promotion and protection of the rights of a child.

of the Legal Framework for Adoption Procedure). During this preparatory phase, the adoption team communicates with the court regarding the steps that are being taken in the adoption project, updated quarterly and whenever relevant supervening facts occur (Article 42 of the Legal Framework for Adoption Procedure). In this first phase, regarding the adult(s) who has(have) the will to adopt a child, they have to submit an application (Article 43 of the Legal Framework for Adoption Procedure), either in person or electronically, to an adoption team of the social security entity or to an authorised private institution. As a consequence of the formalisation of the application accompanied by the documents provided for in Article 43, nos 3 and 4 of the Legal Framework for Adoption Procedure, a certificate of formalisation of the application (Article 43, no 6 of the Legal Framework for Adoption Procedure) is issued by the Social Security entity or to an authorised private institution and it is delivered to the applicant (the candidate). Afterwards, a set of procedures take place regarding the candidates, consisting of training sessions, psychosocial interviews and other complementary technical assessment instruments, namely a psychological assessment (Article 44 of the Legal Framework for Adoption Procedure). These procedures aim to allow the issuing of a decision on the applicant's request to adopt, considering, among other things, the personality, health, suitability to raise and educate the child, the family context and economic situation of the candidate to adopt and the reasons upon which the request is based. In the event of an unfavourable decision, a prior hearing of interested parties is mandatory according to provisions of the Administrative Procedure Code, under Article 44, no 4 of the Legal Framework for Adoption Procedure. Once the procedures have been completed, the social security entity or authorised private institution delivers a reasoned decision and notifies it to the candidate. In the event of a negative decision that rejects the application, it is possible to appeal to a court. The references to this possibility, as well as the mention of the deadline to file the appeal and the identification of the competent court have to be included in the notification of the decision. In the event of a positive decision that accepts the application, a certificate is issued. This certificate is valid for three years and is renewable for identical periods at the express request of the adoption's applicant (Article 45 of the Legal Framework for Adoption Procedure).

After the 'preparatory phase', the 'adjustment phase between children and candidates' ([104]) follows, as the adoptee must be under the care of the adopter for a sufficient period of time to enable the assessment of the

47

([104]) As it is legally named (Articles 40, b) and regulated by Articles 48 to 51 of the Legal Framework for Adoption Procedure.

establishment of the adoptive bond. The social security entity or authorised private institution carry out the required activities, which occur in three different periods ([105]): i) the 'period for measuring the correspondence between the child's needs and the candidates' abilities' (Article 48 of the Legal Framework for Adoption Procedure); ii) the 'transition period' (Article 49 of the Legal Framework for Adoption Procedure) and iii) the 'pre-adoption period' (Article 50 of the Legal Framework for Adoption Procedure).

48 In the first period, the social security entity or authorised private institution search national lists of candidates to find one or two candidates whose characteristics and abilities are adequate to the needs of the child. The concrete proposal to send a child to the adopting family results from a collaborative and consensual decision between the team that studied the child and the team that carried out the preparation, evaluation and selection of candidates. The proposal must be confirmed by the National Council for Adoption (Article 11 of the Legal Framework for Adoption Procedure) and after that confirmation, the social security entity or authorised private institution presents the adoption proposal to the identified candidate (Article 48, no 3 of the Legal Framework for Adoption Procedure). In the 'transition period', it is intended to assess the existence of indications favourable to the formation of an emotional bond between the adoptee and the candidate to adopt, through the promotion of meetings, duly prepared and observed. This period lasts for the shortest time strictly necessary to achieve its aims, no longer than 15 days. It will cease immediately when it appears that evidence favourable to an emotional bond is lacking. Finally, the 'pre-adoption period' aims to monitor the child's integration into the adopting family, evaluating the feasibility of establishing a parental relationship and promoting the creation and consolidation of the family bond (Article 50, nos 1 to 3). A report must be prepared during the pre-adoption period. This period may last up to six months, with the possibility of extension for a further three months. It ends whenever the protection of the child's best interests demands it.

49 After the 'adjustment phase between children and candidates', the 'final phase' ([106]) follows. This phase comprises the judicial procedure, the purpose of which is to obtain the court decision on the establishment of the bond.

([105]) An exception applies in the case of adoption of the spouse's child (Article 34, no 3 of the Legal Framework for Adoption Procedure), as, in that event, only the pre-adoption period takes place and lasts up to three months.

([106]) As it is legally named (Articles 40, c) and regulated by Articles 31, 31 and 52 to 59 of the Legal Framework for Adoption Procedure.

This is a non-contentious jurisdiction action (Article 31 of the Legal Framework for Adoption Procedure and Article 986 and following of the Civil Procedure Code). It qualifies as an urgent and secret (respectively, Article 31 and Article 4º of the Legal Framework for Adoption Procedure) procedure.
The judicial decision that creates the link between adoptee and adopter(s) is **50**
constitutive in nature and produces *ex nunc* effects (Article 1973, no 1 PCC) (107). This decision creates a relationship that the law treats in a similar way as the relationship between parents and children based on the biological link. In accordance with Article 1986, no 1 of the PCC, the adoptee acquires the legal status of son/daughter of the adopter and he/she is integrated, with his/her descendants, in the adopter's family, and, at the same time, the legal connections between the adoptee and his/her biological ascendants and collaterals are extinguished, except for the purpose of evaluating the legal ability to celebrate marriage.
Being judicially decreed, adoption is not revocable (Article 1989 of the PCC), **51**
even if the mutual consent of the adopter(s) and adoptee is given. There is the possibility of reviewing the adoption judicial decision, only under the (strict) circumstances provided for in Article 1990 of the PCC (108). As the grounds for this revision are based upon original 'defects' of the decision, the review of the judicial decision produces retroactive effects, destroying the adoptive relationship from the moment it was created and re-establishing relationships with the biological family (109), as if these relationships had never legally ended. Additionally, it is possible to challenge the judicial

(107) A 'post-adoption period', as it is legally named (Article 60), may occur. Its existence is not mandatory, as it depends on express request. It lasts until the adoptee reaches the age of 18 and may be extended, upon the request of the adoptee, until they reach the age of 21. The aim is to provide specialised technical intervention to the adoptee and their family, offering advice and support in overcoming difficulties arising from the adoptive relationship. The activities in this period are carried out by the social security entity or an authorised private institution, but other technicians or entities may be involved (Article 60, nos 3 and 4 of the Legal Framework for Adoption Procedure).

(108) The circumstances listed in the Article are the following: i) If the consent of the adopter or the consent of the adoptee's parents was lacking, if it was necessary and was not legally waived; ii) if the consent of the adoptee's parents has been unduly waived, as the conditions listed in Article 1981 had not been met; iii) if the adopter's consent has been vitiated by an excusable and essential error concerning the person of the adoptee; iv) if the consent of the adopter or the consent of the adoptee's parents was determined by moral coercion, as long as the harm with which they were unlawfully threatened was serious and the fear of its realisation was justified; and v) if the consent of the adoptee person was lacking if legally needed (which is the rule if the adoptee is over 12 years old, under Article 1981, no 1, a) of the PCC).

(109) As a consequence, being revised the judicial decision, the former adoptee will be called to the succession of a natural relative who has died in the meantime.

decision that created the adoptive link on exceptional grounds (110) upon which a judicial decision that is a *res judicata* may be reviewed in general terms: those that base the process of extraordinary review of a judicial decision in general terms under Articles 696 and following of the CPC (111).

52 The adoption is registered on the adoptee's birth certificate, in accordance with Article 1, no 1 c) and Article 69, no 1 d) of the Civil Registration Code (112).

53 As a consequence of the above mentioned, in the Portuguese legal system, the creation of the adoption link may lead to co-motherhood or co-fatherhood, as not only (married or cohabiting) couples composed of a man and a woman may adopt, but also (married or cohabiting) couples composed of two men and two women. Additionally, any person per se may adopt, as single adoption is recognised. Consequently, a sole motherhood or a sole fatherhood may arise as a result of adoption.

54 In the Portuguese legal system, multi-parenthood is not recognised, as it is not possible to legally consider more than two legal parents (113).

D. *Parental responsibilities*

55 The substantive legal framework concerning the exercise of parental responsibilities (*Responsabilidades Parentais*) can be found in Articles 1901 and following of the PCC. The procedural rules on the same matter are contained in the General Legal Procedure Governing Civil Guardianship (*Regime Geral do processo tutelar cível),* which was approved by Law 141/2015, dated 8 September 2015, as far as the procedures that must be carried out by a court, and in the Civil Registration Code, as far as the procedures that must

---

(110) The final decision may be reviewed only on the serious grounds enumerated in Article 696 of the PCPC. For instance, if in another definitive judicial decision it was proven that the adoptive decision resulted from a crime committed by the judge in the exercise of their duties.

(111) In the past, it was discussed if the process of extraordinary review of the sentence, as defined in general terms, could be applied to the judicial decision that creates the adoptive relationship. Today it is expressly stated in Article 1990, no 1 of the PCC.

(112) Under the terms of Article 123, no 1 of the same Code, at the request of interested parties, a new birth certificate may be created in which adoption is integrated into the text itself, thus eliminating natural filiation from it. If this happens, only from this new birth certificate may full copies be made or narrative certificates extracted. In any case, even if the aforementioned request is made, the initial birth certificate is not 'cancelled' (Article 123, no 3) and, in exceptional situations regulated in the same provision, copies may be extracted from it.

(113) In accordance with Article 1975, no 1 of the PCC, as a rule, being decreed the adoption of a child, it is not possible to create another adoption regarding the same adoptee, except if the adopters are married to each other.

be carried out by a Civil Registrar, under the terms that will be explained subsequently.

56 Since 2008 (114), the joint exercise of parental responsibilities applies as a rule, not only if the parents live together as a married couple or as a *de facto* union cohabiting couple (115), but also if their (marital or cohabiting) relationship ends. When parents live as a couple, according to Articles 1901 and 1902 of the PCC, decisions regarding the child have to be adopted by the parents upon mutual agreement. However, if one of the parents carries out an act related to the exercise of parental responsibilities, it is presumed, based on Article 1902, no 1 of the PCC, that they act in agreement with the other parent, except in cases where the law expressly requires the consent of both parents or when the act is an 'act of particular importance' (*ato de particular importância*). Furthermore, in the latter case, if agreement is not reached, either of the parents may appeal to the court to decide the matter that needs to be resolved. The court will seek conciliation between the parents and, if this is not achieved, the court will decide, and must, for this purpose, hear the child, unless there are serious circumstances that advise against so doing.

57 In the event of a breakup of the parents' relationship (116), according to Article 1906, no 1 of the PCC, parental responsibilities regarding issues of particular importance for the child's life continue, as a rule, to be exercised jointly by both parents, in a similar way to what happens during the parents' (*de facto* or based upon marriage) cohabitation, except in situations of

---

(114) A reform on the legal framework applicable to divorce has taken place through the enactment of Law 61/2008, dated 31 October 2008. This Law also amended the rules on the exercise of parental responsibilities. On the exercise of parental responsibilities, Guilherme de Oliveira, *Manual de Direito da Família* (2nd edn, Almedina 2021) 579 and Clara Sottomayor, *Regulação do exercício das responsabilidades parentais nos casos de divórcio* (8th edn, Almedina 2021.

(115) Under the provisions of Article 1911 of the PCC, the legal regime provided for the exercise of parental responsibilities during marriage (Article 1901 and following of the PCC) and that provided for divorce/separation of married (Article 1905 and following of the PCC) couples is to be applied, *mutatis mutandis*, to *de facto* cohabitation and to its extinction.

(116) The legal regime we are referring to applies when the parents' marital relationship is extinguished by a decree of divorce or by declaration of nullity or annulment of marriage, as well as when the parents' marital relationship is modified by the decree of the legal separation concerning personal and economic effects of marriage (see n 52), according to Article 1906 of the PCC. The same regime also applies if the married couple live apart, as a *de facto* separation, under Article 1909 of the same Code and also under Article 43, no 1 of the General Legal Procedure Governing Civil Guardianship. As was mentioned in n 114, it is also applicable to the breakup of the *de facto* cohabitation of a (non-married) couple, under Article 1911, no 2 of the PCC.

urgency (117). Regarding the acts of the child's daily life (118), parental responsibilities may be exercised by either of the parents, under the terms of Article 1906, no 3 of the PCC: the parent with whom the child usually resides, or the parent with whom the child is living temporarily. However, the latter, in the exercise of parental responsibilities, must not contradict the 'most relevant educational guidelines' as they are defined by the parent with whom the child usually resides.

58 The joint exercise will not apply only in exceptional cases, by means of a reasoned judicial decision (119), when the joint exercise is contrary to the best interests of the child (Article 1906, no 2 PCC), in which case, a judicial decision will decide that parental responsibilities are to be exercised, unilaterally, by one of the parents (the one the decision will determine). According to Article 40, no 9 of the General Legal Procedure Governing Civil Guardianship, the joint exercise of parental responsibilities is presumed to be contrary to the best interests of the child when a measure of coercion is ordered against one parent or an additional penalty prohibiting contact between the parents is imposed. In addition to the above, with the entry into force of Law no 24/2017, of 24 May, which introduced a new wording in Article 1906-A of the PCC, the law now determines that the joint exercise of parental responsibilities may be judged contrary to the interests of the child also in situations where the rights and the safety of victims of domestic violence and the victims of other forms of violence in the family context, such as child abuse or sexual abuse, are at serious risk (120).

59 In the event we are referring to (lack of cohabitation of the parents as a consequence of any of the circumstances depicted above), besides the definition of the way (unilaterally or jointly) parental responsibilities will be exercised, three other issues must be determined: i) definition of the parent with whom the child will reside: ii) the way the right of visitation by the parent with whom the child does not reside will be exercised; iii) the

---

(117) In these situations, either parent can act alone, and must provide information to the other party as soon as possible.

(118) According to Article 1906, no 4 of the PCC, it is possible to delegate the exercise of parental responsibilities only with regard to the practice of everyday life acts, but not with regard to issues of particular importance.

(119) From the need for a reasoned judicial decision demanded by Article 1906, no 2 PCC, it may be inferred that that type of exercise of parental responsibilities may not be decided within the procedure that takes place in the Civil Registry, even if, in that case, as will be said, it always involves the assessment of the Public Officer's magistrate.

(120) In the new Article 44-A of the General Legal Procedure Governing Civil Guardianship, an urgent regulation or change in the exercise of parental responsibilities is to be initiated by the Public Prosecutor's magistrate in cases of domestic violence.

maintenance amount the parent with whom the child does not reside must pay. All specific circumstances of the case and particularly the interests of the child will be considered in the consideration of these matters.

60 As far as the entities that are competent to decide on the regulation of the exercise of the parental responsibilities (121), it must be stressed that, if the parents cannot reach an agreement on this subject, an action will have to be brought before the court. Diversely, if parents intend to regulate by mutual agreement the exercise of parental responsibilities, they will jointly require the agreement's judicial approval by the court or, alternatively, they will file a joint request at the Civil Registry Office (122) according to Articles 274-A to 274-C of the CRC (123).

---

(121) At this point we are taking into consideration the situation of the regulation of the parental responsibilities being decided autonomously. Afterwards the circumstance of that issue will be considered in the context of a divorce/legal separation.

(122) The possibility of regulating parental responsibilities through a decision of the Civil Registrar is, innovatively, accepted by Law no 5/2017, dated 2 March 2017, when that regulation is not part of a divorce or legal separation regarding personal and economic effects of marriage by mutual agreement that takes place before a Civil Registrar. For this purpose, a proceeding for regulating parental responsibilities by mutual agreement was created and regulated by Articles 274-A to 274-C of PCRC, within the scope of which the Civil Registrar is responsible for approving the agreement with the mandatory intervention of the Public Prosecutor's magistrate as will be explained in the text and similarly to what happens when the exercise of parental responsibilities is regulated within the mutual consent divorce or legal separation regarding personal and economic effects of marriage decided by the Civil Registrar. It must be highlighted that in this autonomous procedure, we are referring to at the moment in the text – unlike what occurs in the regulation of parental responsibilities within the scope of the mutual consent divorce or legal separation regarding personal and economic effects of marriage under the jurisdiction of the Civil Registry Office – the scope of powers of assessment recognised to the Civil Registrar includes the analysis of the agreement presented by the parents, assessing whether or not it protects the interests of the children, as well as the possibility of inviting the parents to change it, and the possibility of determining the performance of acts and the production of evidence that may be necessary on this specific matter.

(123) Law no 5/2017, dated 2 March 2017, extended the possibility (that already was recognised to married couples when they intended to divorce and had reached all the complementary agreements referred to above and the previous note) to regulate parental responsibilities by mutual agreement approved through a decision of the Civil Registrar to parents that faced a *de facto* separation within their marriage or the dissolution of their *de facto* union, as well as to parents who were neither married nor cohabiting, amending the Civil Code and the Civil Registration Code. It is a possibility that is awarded as an alternative to the recourse to a court to achieve the same result. In fact, an alternative option is legally provided to parents: either they request judicial approval of the agreement regulating parental responsibilities or they request the approval from the Civil Registrar. This results from the use of the disjunctive 'or' in Article 1909, no 2 of the Civil Code, interpreted in conjunction with the provisions of Article 274-A of the PCRC. Adopting this conclusion, see Decision of the Court

61 Considering, firstly, the latter situation, it must be stressed that the request may be submitted at any time at any Civil Registry Office, not only when parents intend to regulate by mutual agreement the exercise of parental responsibilities, but also when they intend to change, by mutual consent, an agreement that had previously been approved. Once the application is received, the Civil Registrar assesses the content of the agreement, bearing in mind the best interests of the child(ren). If, according to this assessment, the agreement does not protect the interests of the children, the Civil Registrar invites the parents to change it and may determine for this purpose the practice of acts and the production of evidence. After this assessment, the case is sent to the Public Prosecutor's magistrate at the first instance court competent in relation to the matter within the jurisdiction of the minor's residence. This magistrate will submit their remarks on the agreement within 30 days. As stated in Article 274-B, no 4, of the PCRC, the Public Prosecutor's magistrate promotes the hearing of the child(ren) to ensure the safeguarding of the child's best interests ([124]). If the referred magistrate considers that the agreement does not properly safeguard the interests of the child(ren), the applicants may amend the agreement accordingly or submit a new agreement. In the latter case, the Public Prosecutor's magistrate may decide either to assess the new agreement or to summon the parents in order to overcome the deficiencies identified in the agreements (Article 274-B, no 1 of the PCRC). If the applicants do not comply with the changes indicated by the Public Prosecutor's Office and maintain the will to keep the presented agreements, the case is referred to court ([125]) (Article 274-B, no 1 of the PCRC). If the Public Prosecutor's magistrate considers that the presented agreement duly safeguards the interests of the minors, or if the parents have changed the agreement in the terms indicated by the Public Prosecutor's magistrate, this magistrate issues a statement and the process is sent to the civil registry office for approval (*homologação*), according to Article 274-B,

---

of Appeal of Lisbon dated 21 June 2018, Process no 28114/17.0T8LSB.L1-6 (at <www.dgsi.pt> accessed 26 January 2025).

([124]) The provisions of Articles 4 and 5 of the General Legal Procedure Governing Civil Guardianship apply, with the required adaptations.

([125]) If the agreements submitted do not sufficiently safeguard the interests of the minors, approval is refused by the Civil Registrar and the process of regulating the exercise of parental responsibilities is sent in full to the competent court of the minor's residence at the time the procedure was initiated (Article 174-C, no 1 of the PCRC). Once the application is received, the judge assesses the agreements that the parents have submitted, inviting them to change them if they do not protect the interests of the children (Article 174-C, no 2 of the PCRC). The judge may determine the performance of acts and the production of any necessary evidence, in general terms, according to Article 174-C, no 3 of the PCRC, and the terms of regulation of parental responsibilities are judicially decreed afterwards.

no 1, of the PCRC. As stated in Article 274-A, no 6 of the PCRC, the approval (*homologação*) decisions issued by the Civil Registrar produce the same effects as court sentences on the same matter.

62 As an alternative to submitting the request to the Civil Registrar, either parent may demand the agreement's judicial approval by a court, in accordance with Article 34 of the General Legal Procedure Governing Civil Guardianship.

63 If the parents cannot reach an agreement on the regulation of the exercise of parental responsibilities, a judicial procedure must be initiated, which is governed by the General Legal Procedure Governing Civil Guardianship (Article 3, c) and Articles 34 to 44-A). The 'regulation of the exercise of parental responsibilities and decisions regarding related issues' (*a regulação do exercício das responsabilidades parentais e o conhecimento das questões a este respeitantes*) qualifies as one of the 'civil guardianship proceedings' (*providências tutelares cíveis*) listed in Article 3 of this Law. These proceedings are urgent (Article 13 of the General Legal Procedure Governing Civil Guardianship) and they correspond to so-called non-contentious jurisdiction (Article 12 of the General Legal Procedure Governing Civil Guardianship). The judge summons the parents to a conference, and may decide that grandparents or other family members or another person who has a 'special emotional bond' to the child be present at the conference, in accordance with Article 35 no 1 of the same Law. A child over 12 years old and, as long as they have the capacity to understand the matters under discussion, a child under 12 years old, is heard by the court, taking into account their age and maturity, unless the protection of their best interests advises against it. The court will hear the child, under the terms set out in Articles 4 and 5 of the General Legal Procedure Governing Civil Guardianship. The 'consultation and participation of the child' (126) is one of the most important guiding principles (127) applicable to the decision-making process of public authorities (judicial and administrative) within the proceedings affecting a child, as stated in Article 4, 1 c) in the General Legal Procedure Governing Civil

(126) The conditions to substantiate consultation and participation of the child are listed in Article 5 of the General Legal Procedure Governing Civil Guardianship. On this, in English, Rute Teixeira Pedro, 'An ongoing (r)evolution unfolded step by step: redefinition of the Legal Concept of Parentage and Promotion of Children's Autonomy – An overview of the current developments in the Portuguese Law regarding Children's Rights and affiliation' in Bill Atkin (ed), *The International Survey of Family Law: 2016* (Jordan Publishing 2016) 389.

(127) Under Article 4 of the General Legal Procedure Governing Civil Guardianship, other major principles that apply to 'civil guardianship proceedings' are the promotion of the simplified and oral procedural acts and the promotion of consensual solutions, using specialised technical hearings and/or mediation.

Guardianship and in Article 4 j) of the Law that contains the provisions governing the measures to protect children and young adults exposed to danger, enacted in 1999 ([128]). If both parents are present or represented at the conference, the judge seeks to reach an agreement that corresponds to the child's interests regarding the exercise of parental responsibilities. If agreement is reached, the judge will register what was agreed in the conference and issue an approving (*homologação*) decision. Otherwise, if both parents are present or represented in the conference, but they do not reach an agreement that can be approved, the judge provisionally decides on the matter based on the information already obtained, suspends the conference and refers the parties either to mediation for a maximum period of three months or to a specialised technical hearing, for a maximum period of two months. Once mediation or the intervention of the specialised technical hearing has ended, the court is informed of the result and notifies the parties to attend a conference to be held within the next five days, with the aim of reaching an agreement on the regulation of the exercise of parental responsibilities. If the parents do not reach an agreement, the judge notifies the parties to, within 15 days, present allegations or to identify ten witnesses and gather documents. After the deadline for the allegations, and whenever they deem it necessary, the judge orders investigative measures, such as, for example, testimony from the parties, family members or other relevant people, statements from technicians of the multidisciplinary technical advisory teams.

64 Afterwards, the court issues a decision in which the exercise of parental responsibilities is regulated in harmony with the interests of the child. According to Article 32 of the General Legal Procedure Governing Civil Guardianship, an appeal may be filed against the court decision. The appeal does not suspend the execution of the judicial decision until the appeal is judged.

65 As referred to above, if parents are married and agree to divorce or legally separate regarding personal and economic effects of marriage and the exercise of the parental responsibilities has not been previously regulated, that matter will have to be regulated in the decision on divorce or legal separation. When all the agreements stated in Article 1775 of the Portuguese Civil Code ('complementary agreements' that were mentioned above), namely the agreement on the exercise of parental responsibilities is presented, the mutual consent divorce/legal separation is decided by the Civil

([128]) Law no 147/99 dated 1 September 1999, amended by Law no 142/2015 dated 8 September 2015.

Registrar (129) and the parents' agreement on parental responsibility has to be assessed by the Public Prosecutor's magistrate and if it adequately properly protects the best interests of the child(ren), the agreement will be approved by the Civil Registrar, as explained previously. When parents do not reach an agreement that is approved, the process is transferred to a court, which issues a decision on the request of divorce/legal separation and all other issues, namely in the case we are bearing in mind now, the exercise of parental responsibilities. In contrast, if parents are married and agree to divorce or legally separate regarding personal and economic effects of marriage but they do not reach one of those 'complementary agreements', the mutual consent divorce/legal separation is decided by the court. The judicial decision on the divorce/legal separation has to regulate the issue of parental responsibilities. As a consequence, in the event of a mutual consent divorce or separation regarding personal and economic effects of marriage (whether decided by a Civil Registrar or by a court), the exercise of parental responsibilities is always regulated within the scope of the respective process, as explained above. However, the same does not necessarily occur in the event of a divorce or separation regarding personal and economic effects of marriage without the consent of one of the spouses, nor when a marriage is annulled or declared null. Thus, Article 34 of the General Legal Procedure Governing Civil Guardianship determines that either parent requires the approval of the agreement on the regulation of parental responsibilities, within ten days following the final judgment of a court decision regarding divorce, separation regarding personal and economic effects of marriage, declaration of nullity or annulment of the marriage. If approval of the agreement is not requested or if the presented agreement is not approved, the Public Prosecutor's magistrate is notified so that within the next ten days, they must request regulation. It has to be highlighted that, within the regulation of parental responsibilities, it is possible that the decision may deviate from the model in which the parents – one of them or both – exercise parental responsibilities. Currently, according to Articles 1903 to 1905-A of the PCC, the exercise of parental responsibilities may, in certain circumstances (130), be judicially attributed to the spouse or *de facto* partner of either parent or to someone in the family of

(129) As explained above, the Civil Registrar has competence to decide a mutual consent divorce/legal separation if spouses also agree on the issues stated in Article 1775 of the PCC.

(130) These circumstances are the following: i) if there is an impediment (absence, incapacity or other impediment decreed by the court) of both parents exercising the parental responsibilities (Article 1903 of the PCC); ii) if one parent has died (Article 1904 of the PCC); iii) if the parenthood is legally established regarding only one parent (Article 1904-A of the PCC).

either of them (131). These rules express the recognition of the importance in the lives of children of their parent's spouses or *de facto* partners, given the significant number of 'patchwork' families. Additionally, these persons are usually able to exercise parental responsibilities in accordance with the interests of the minor. If parenthood is established regarding both parents, the intervention of the spouse or the *de facto* partner of one of the parents will only take place through a court decision if the impediment concerns both parents. If parenthood is established regarding only one parent, parental responsibilities may be exercised not only by the parent, but also, jointly, with their spouse or *de facto* partner. Both the constitution and the extinction (132) of this joint exercise depend on a judicial decision, in which the interests of the minor must be considered, according to their age, and other circumstances, such as the relationship with the parent's spouse or *de facto* partner and their parental capabilities.

67 Under Article 1907 of the PCC, through an agreement (133) or court decision, or if any of the circumstances set out in Article 1918 (134) exist, the child may be entrusted to the custody of a third person. In this situation, the third person is responsible for the exercise of some powers and the performance of some parental duties: the powers and duties that are required for the adequate performance of the entrusted functions (135). The other powers and

---

(131) If the parenthood is legally established regarding both parents and the impediment to exercise parental responsibilities concerns only one parent, parental responsibilities will be exercised by the other parent with no need for a judicial intervention (Articles 1903 and 1904 of the PCC).

(132) For other reasons than the reaching of majority – or, before the entry into force of Law 39/2025, dated 1 April, emancipation (see n 98 and n 224) –, as in that situation the exercise of parental responsibility will end *ope legis*. Besides this automatic extinction of the exercise of parental responsibilities, the exercise of these responsibilities may end upon the grounds legally provided in Articles 1913 and following for the inhibition and limitations of the exercise of parental responsibilities.

(133) This possibility was expressly stated in the law, by the 2008 reform.

(134) According to Article 1918 of the PCC, 'when the safety, health, moral formation or education of a minor is in danger and it is not a case of inhibition of the exercise of parental responsibilities, the court may, at the request of the Public Prosecutor's magistrate or any of the persons indicated in paragraph 1 of Article 1915, decree the appropriate measures, in particular entrusting it to a third person or to an education or assistance establishment'.

(135) At least those regarding the acts of the minor's current life (those, according to Article 1906, no 4 of the PCC may be, in any case, delegated to third persons). But other powers and duties may be allocated to third persons to whom the child is entrusted. This allocation of powers and duties must be made on a case-by-case basis, and above all considering the concrete interests of the child.

duties that are allocated to the third person will be exercised under the terms that the court defines (136).

68 Additionally, Article 1887-A of the Portuguese Civil Code recognises the possibility to determine the maintenance of personal contact between the child(ren) and some persons. The words used in Article 1887-A only expressly refer to the child(ren)'s sisters or brothers and ascendents, but this provision may be interpreted in such a way as to include other persons who are relevant to the healthy and complete development of a child (137), irrespective of the existence of a biological link to the child(ren). Consequently, if the maintenance of contact is considered important to the child, the right of visitation of any of those persons may be recognised in the decision regarding the exercise of parental responsibilities.

69 The decisions issued by the Civil Registrar are functionally equivalent to those that courts issue on the same matter. Regarding parental responsibilities, they have declarative effects and executive force, being enforceable.

E. *Matrimonial property regime*

70 In the Portuguese legal system, when people marry, special rules apply to qualify the assets each spouse is entitled to, at that moment, and to qualify the assets they acquire afterwards during the marital relationship. Those rules compose the matrimonial property regime (*regime de bens do casamento*) (138) and may be legal rules or rules created by the spouses (139),

---

(136) They may be exercised by one parent or jointly by both.

(137) This interpretation has been accepted in some judicial decisions. See, for instance, the Decision of the Court of Second Instance of Porto dated 7 January, 2013 (<http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/b8d307bda3e9296d80257afc004fc804?OpenDocument> accessed 26 January 2025) and the decision of the Court of the Second Instance of Coimbra dated 20 June, 2012 (<http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/94d01a78963e00ea80257a370048565d?OpenDocument> accessed 26 January 2025) that awarded the right to visit to a 'godfather', who had been taking care of the child and, consequently, should be qualified as their primary caretaker. On this provision, see in English, Rute Teixeira Pedro, 'An ongoing (r)evolution unfolded step by step: redefinition of the Legal Concept of Parentage and Promotion of Children's Autonomy – An overview of the current developments in the Portuguese Law regarding Children's Rights and affiliation' in Bill Atkin (ed), *The International Survey of Family Law: 2016* (Jordan Publishing 2016) 400–401.

(138) This matrimonial property regime must not be confused with the primary matrimonial property regime that encompasses legal rules that govern other aspects of the economic effects of marriage, namely the administration of assets, the power to dispose of the assets and the liability for debts. Pereira Coelho and Guilherme de Oliveira, *Curso de Direito da Família. Volume I. Introdução. Direito matrimonial* (5th edn, Imprensa da Universidade de Coimbra 2016); 433 and 558; Guilherme de Oliveira, *Manual de Direito da Família* (2nd edn,

exercising their private autonomy (140). In fact, the principle of freedom of stipulation applies, in principle, broadly, regarding matrimonial property regimes. The future spouses may conclude a prenuptial agreement (*Convenção antenupcial*) and decide which matrimonial property regime will apply. Formal requirements must be respected in order to conclude a valid prenuptial agreement. This contract, which is an accessory contract to marriage (141), has to be concluded either by a declaration made before the Civil Registrar (Article 189 of the CRC) or by a public deed drawn up by a Notary. In order to produce effects towards third parties (142), the prenuptial agreement has to be registered (143) (Article 1711 of the Portuguese Civil Code).

71 The above is only possible in the period prior to the conclusion of marriage. Matrimonial property regimes only apply to married couples. The economic effects of a *de facto* union cohabitation (144) are governed by the general civil provisions and not by special rules, neither by the marital rules.

72 As a rule (145), the future spouses may opt for one of the three property

---

Almedina 2021) 165 and 237 and Jorge Duarte Pinheiro, *O Direito da Família Contemporâneo* (7th edn, Gestlegal 2020) 498 and 524.

(139) As will be explained: those rules may be created by the spouses only before the conclusion of the marriage.

(140) On the private autonomy regarding the economic effects of marriage, in English, Rute Teixeira Pedro, 'Marital Agreements: What's love got to do with it? Challenges and possibilities of the ex contractu conformation of the patrimonial effects of marriage' in Carol Rogers, Masha Antokolskaia, Joanna Miles, Patrick Parkinson and Machteld Vonk (eds), *Family Law and Family Realities* (Eleven International Publishing 2019) 269, and in Portuguese, Rute Teixeira Pedro, *Convenções Matrimoniais. A autonomia na conformação dos efeitos patrimoniais do casamento* (Almedina 2018) and Rita Lobo Xavier, *Limites à autonomia privada na disciplina das relações patrimoniais entre os cônjuges* (Almedina 2000).

(141) Marriage is also a contract under the qualification of the law. Article 1577 of the PCC defines marriage, stating that 'marriage is the contract entered into between two persons intending to form a family through full communion of life'.

(142) Heirs of the spouses and heirs of the other persons who participate in the prenuptial agreement do not qualify as third parties, in accordance with Article 1711, no 2 of the PCC.

(143) The prenuptial agreement is registered by mentioning it in the text of the marriage certificate or adding it to that certificate (Article 190 of the PCRC). Under Article 1711, no 3 of the PCC, 'registration of the prenuptial agreement does not dispense with the need for registration in the land registry of the facts therein contained'.

(144) There are no registered partnerships governed by the Portuguese legal system. On this, in English, see Rute Teixeira Pedro, 'De facto relationships in Portugal', in Jens M. Scherpe (ed) (being printed).

(145) This possibility is totally waived in two situations: whenever a spouse marries over the age of 60 and whenever the marriage is concluded without the previous process of assessing the existence of matrimonial impediments (Article 1720, no 1 of the PCC). In these

regimes that are defined and regulated by the law: the community of acquired assets property regime (regulated in Articles 1722 to 1731 of the PCC), the full community of property regime (Articles 1732 to 1734 of the PCC), and the separation of property regime (Articles 1735 to 1736 of the PCC). They may also choose one of these matrimonial property regimes, introducing deviations to the terms legally defined. Additionally, they may create an innovative regime that totally differs from the legal regimes (146). Any of these options has to be stated in the prenuptial agreement. If no valid prenuptial agreement is concluded, the community of acquired assets property regime applies, as it is the default matrimonial property regime in the Portuguese legal system (Article 1717 of the PCC).

73 The principle of immutability (*princípio da imutabilidade*) of property regime still applies (Article 1714 of the PCC) in the Portuguese legal system. As a consequence, spouses are not allowed to agree to change the matrimonial property regime during marriage, irrespective of whether it is a regime chosen by the spouses, the default regime or a mandatory legally imposed regime.

74 According to Article 1715 of the PCC, there are some circumstances that, exceptionally, result in a change of the matrimonial property regime during marriage: a decree of the judicial separation concerning economic effects of marriage (Articles 1767 to 1772 of the PCC) (147); a decree of separation

---

two situations, the regime of separation of assets is legally imposed upon the spouses, aiming to prevent that marriage could be used only as a legal device merely to achieve economic benefits. Additionally, another restriction to the principle of freedom of stipulation of the marriage property regime must be stressed. It is stated in Article 1699, no 2 of the PCC. Under this provision, it is forbidden to choose the full community of property regime or any other regime with a broader community than that provided by the default regime of the community of acquired assets, when at the time of the marriage, one of the spouses already has descendants from a different relationship. Pereira Coelho and Guilherme de Oliveira, Curso de Direito da Família. Volume I. Introdução. Direito matrimonial (5th edn, Imprensa da Universidade de Coimbra 2016) 560.

(146) They may be inspired or modelled on regimes in force under foreign law. In this case, the normative content of such regime must be, primarily and in detail, identified in the prenuptial agreement. In fact, Article 1718 of the PCC prohibits the choice of a regime provided for in a foreign law when such option is made through a mere reference to the foreign law contemplated. This provision aims to ensure that the content of the spouses' agreement is sufficiently determined (in light of the general rule that applies to any legal agreement, as stated in Article 280 of the PCC) and to ensure that third parties (namely, persons who conclude contracts with the spouses) are able to acknowledge the rules that apply to the matrimonial property regime the spouses have chosen.

(147) The judicial separation concerning economic effects of marriage we are referring to is a result of an autonomous judicial action grounded upon the conditions stated in Article 1767 of the PCC. See above n 52.

concerning economic effects of marriage, during the marital relationship, in particular situations provided by law (148), namely the situations governed in Article 740 of Civil Procedure Code (149) or in Article 141, no 1, c) of the Insolvency and Companies Recovery Code (150); a decree of the separation concerning personal and economic effects of marriage (Articles 1794 to 1795-D of the PCC) (151).

75 All these measures will determine the cessation of the matrimonial property regime that was applicable. The matrimonial property regime will cease if the economic effects of marriage cease as it happens as a result of the decree of a divorce or the declaration of nullity or annulment (Articles 1688 and 1795-A of the PCC). These measures extinguish the matrimonial link with *ex nunc* effects in the first case and with *ex tunc* effects in the latter case (152).

---

(148) The decree of the 'separation of assets' in particular situations provided by law (namely under Article 740 of PCPC or under Article 141, no 1, c) of the Insolvency and Companies Recovery Code referred to in the text) produces the same effects as the 'separation concerning economic effects of marriage' governed in Articles 1767 and following of the PCC. In the latter situation, there is a judicial autonomous action to the decree of economic separation; in the former situations, there is judicial action filed to obtain a different goal, but, in the same process, there is also the decree of economic separation.

(149) This Article refers to an execution action filed against only one spouse regarding a debt for which the executed spouse is the only debtor, within which common assets of the couple are seised, as a consequence of the own assets of the debtor not being sufficient to cover the due amount. When this happens, the defendant's spouse is summoned to, within 20 days, request the separation of assets or attach a certificate that evidence is pending in another action in which separation has already been requested. If the defendant's spouse does not do any of this, the execution will continue over the seised common assets.

(150) Within the insolvency process of a person, the need to separate from the estate the unduly seised third-party assets or any other assets, over which the insolvent person does not have full and exclusive ownership, or which are foreign to the insolvency or legally impossible of being seised, may emerge. If the insolvency process concerns a married a person, this incident may occur to separate the common assets. As a consequence, within the insolvency process, the separation concerning the economic effects of marriage will be decreed.

(151) If judicial separation concerning economic effects of marriage, under Articles 1767 and following of the PCC, or if the decree of separation concerning economic effects of marriage is decreed within an action that is directed to produce a different goal (see previous notes) is decreed, the community matrimonial property regime (one of the community matrimonial property regimes provided by law or another one designed by the spouses) is replaced by the separation matrimonial property regime. This replacement is irrevocable (Article 1772 of the PCC applies in any of those circumstances). If the separation concerning personal and economic effects of marriage is decreed, the matrimonial property regime (any regime) that was applicable within the matrimonial relationship ceases and no matrimonial property regime applies (see above n 52).

(152) As already explained, the decree of the legal separation concerning personal and economic effects of marriage also involves a cessation of the economic effects of marriage,

When a community of matrimonial property regime ([153]) applies ([154]), there is a need to liquidate the matrimonial property regime that was in force and, as a consequence, to share the common wealth (*partilha do património comum*). The sharing operation is a complex operation consisting of a succession of several steps. Firstly, the assets that qualify as 'common assets' (*bens comuns*) have to be distinguished from those that qualify as 'own assets' (*bens próprios*) of each spouse. Afterwards, the common assets are used to pay any debts which they are legally determined to cover. Afterwards, when the net common wealth (*património comum líquido*) is defined, the share that each spouse is entitled to (corresponding to one-half of the 'common wealth', as stated in Article 1730 of the PCC) will be determined ([155]), either by mutual consent or by means of a judicial decision. In fact, spouses may conclude an agreement on the division of assets or, if they do not agree on the matter, an inventory has to be taken. **76**

Firstly, the former situation will be considered. If spouses reach an agreement over the 'sharing operation' (*partilha*) and the 'common wealth' does not include any immovables, no formal legal requirements are to be respected. Article 219 of the Civil Code, stating the 'freedom of form', is applicable. However, whenever the 'common wealth' encompasses one or more immovables, the law demands that the agreement meet formal requirements. Spouses/former spouses may choose one of these options: a public deed concluded in a Notary office; a private document that has to be authenticated by a public authority (Article 22, f) of Executive-Decree 116/2008 dated 4 July) or procedures in the Civil Registration Offices within the process of divorce or legal separation regarding personal and economic effects by mutual consent, or later, following the decree of divorce (Article 272-A of the PCRC) ([156]). **77**

---

even if the matrimonial link is not extinguished. When legal separation concerning personal and economic effects of marriage is decreed, the spouses will be treated as divorced only regarding the economic effects of divorce.

([153]) When a communitarian matrimonial property regime applies, the common assets constitute a Germanic-type community. As a consequence of the cessation of the matrimonial property regime, the Germanic-type community converts to a Roman community.

([154]) When the separation matrimonial property regime applies, there may also be the need for a liquidation operation, but it does not technically qualify as a sharing operation (*partilha*) and it is not autonomised by law. On this Rita Lobo Xavier, 'Regime de Separação de bens e sua liquidação' in *Atas das Jornadas Internacionais "Igualdade e Responsabilidade nas Relações Familiares"* (Escola de Direito da Universidade do Minho – Centro de Investigação em Justiça e Governação 2020) 159.

([155]) The share of each spouse will be provided either in kind (in species) or in cash.

([156]) This possibility is the result of the enactment of Executive-Law no 324/2007, dated 28 September 2007, which amended the Civil Registration Code, 'introducing several

78 If spouses are not able to reach an agreement on the sharing operation of the common assets, an inventory will be taken. The regime applicable to the inventory process was considerably amended by Law 117/2019, dated 13 September 2019 and it is applicable either to an inventory regarding the sharing operation of the matrimonial common wealth or to an inventory regarding the devolution of the hereditary estate as a consequence of death. This regime will be dealt with in the next section. At this moment, it will only be mentioned that the inventory process, as a rule (Article 1083, no 2 of the PCPC), may take place either in proceedings before a notary or in a judicial process, except for some particular situations provided in Article 1083, no 1 of the PCPC, which demand the necessary intervention of the court.

III. Succession Law

79 As stated above as regards family law, within succession law matters, in Portugal, also some proceedings are out-of-courts proceedings. In particular Notaries, but also in some circumstances Civil Registrars, are competent to act. Nonetheless, courts continue to play an important role and many proceedings are exclusively administered by judicial authorities, as will be explained. The scope of competence of each authority, as well as the differences and similarities between judicial and non-judicial proceedings, must be addressed and examined, considering individually each subject, as will be done in the following subsections.

80 The substantive rules applicable to succession law, that are mainly found in the Civil Code, were subject to two main reforms in the past decades: in addition to the 1997 reform that was referred to above, Law 48/2018, dated 14 August 2018, introduced important changes, as it allowed, in some

---

simplifications and deformalisation measures related to people's lives, reducing bureaucratic obstacles and unnecessary formalities in the areas of civil registration and related notarial acts', as stated in Ordinance (*Portaria*) 1594/2007, dated 17 December 2007. A service, referred to as the 'Divorce with Sharing Counter' (*Balcão Divórcio com partilha*) provides the possibility for all acts, procedures and formalities related to divorce and the sharing operation to be carried out in a single service. It may occur within the context of divorce and legal separation concerning personal and economic effects of marriage by mutual consent that is processed in the civil registry offices or, outside that context, in any other divorce or legal separation concerning personal and economic effects of marriage. As a consequence, in a single service, preventing several trips to different registry offices, Notary offices and finance services, the common assets will be shared, the due taxes will be paid, and all the required registrations will be performed (civil registry, estate registry regarding not only movable assets that are subject to registration but also immovables).

circumstances (157), the conclusion of contracts to waive mandatory succession, which is a significant deviation from the principle of prohibition of *mortis causa* succession contracts that is stated in Article 2028 of the PCC. As far as the procedure regarding the devolution of an estate is concerned, there have been some legal reforms in the past years, namely that as a consequence of the enactment of Law no 117/2019, dated 13 September 2019, some competences have been delegated to non-judicial authorities, mainly to Notaries.

81 The Portuguese succession system is strongly based upon the protection of the family principle, in spite of recognising a certain margin of private autonomy regarding the way estates are divided upon death.

82 When a person dies, their successors (heirs and legatees (158)) who have to fulfil three conditions in order to be called to the succession (*pressupostos de vocação sucessória*), assessed as a rule in reference to that moment, are called to the succession. These three conditions are the following (159): the entitlement to be designated as a prevalent successor, the capability to receive *mortis causa* (160) and the existence of the successor (161). The titles upon which a successor designation may be grounded are the law, the will and, exceptionally, the *mortis causa* contract (Articles 2026 to 2028.º of the PCC).

---

(157) In English, Rute Teixeira Pedro, 'What's mine is mine and won't be yours — the newly introduced possibility of opting out of the succession effects of marriage in Portugal' in Margaret Brinig (ed), *The International Survey of Family Law: 2019* (Jordan Publishing 2019) 261, and in Portuguese, Rute Teixeira Pedro, 'Pactos Sucessórios renunciativos entre nubentes à luz do artigo 1700.º, n.º 1, alínea c) do Código Civil – análise do regime introduzido pela lei n.º 48/2018, de 14 de agosto' (2019) Revista da Ordem dos Advogados 415.

(158) The criterion to distinguish the two types of successors is legally established in Article 2030 of the PCC. Heirs are called to a share of the estate with no determination of the assets they will receive as their share. Legatees are called to determined assets, excluding all other assets. Capelo de Sousa, *Lições de Direito das Sucessões*, vol 1 (4th edn, Coimbra Editora 2000) 52, Rita Lobo Xavier, *Manual de Direito das Sucessões* (Almedina 2022) 81 and Jorge Duarte Pinheiro, *O Direito das Sucessões Contemporâneo* (5th edn, Geslegal 2022) 51.

(159) Capelo de Sousa, *Lições de Direito das Sucessões*, vol 1 (4th edn, Coimbra Editora 2000) 282, Rita Lobo Xavier, *Manual de Direito das Sucessões* (Almedina 2022) 87 and Jorge Duarte Pinheiro, *O Direito das Sucessões Contemporâneo* (5th edn, Geslegal 2022) 223.

(160) The capability to receive is defined by exclusion: a successor is capable to succeed if neither the 'lack of successor dignity' as stated in Article 2034 of the PCC, nor the 'disinheritance' apply.

(161) As a rule, a successor has to be born and alive at the moment of the death of the deceased to be called to their succession. Under some circumstances established in Article 2033 of the PCC, persons who are not yet been born nor conceived may be called under the (legal) condition of being born. The effects of the successor calling are suspended until the moment of birth.

83 The liability of heirs (*herdeiros*) and legatees (*legatários*) for debts of the estate (Article 2068 of the PCC) is legally defined and cannot be limited ([162]). Under Article 2071 of the PCC, the heir responds *intra vires hereditatis*, ie, within the scope of the inheritance, even if it will be important to distinguish whether the heir opted for simple acceptance or for acceptance with the benefit of inventory, as will be explained below. Legatees are only responsible, in principle, for the debts associated to the legacy they are called to receive, and always within the limits of the value of that legacy. Exceptionally, legatees are liable for debts of the estate. This will be the case provided for in Article 2277 of the PCC (if the inheritance is distributed entirely in legacies, the debts of the estate are borne by all legatees in proportion to their legacies, unless the testator has provided otherwise) and in Article 2278 of the PCC (if the assets of the inheritance are not enough to cover the debts of the estate, legacies will be satisfied partially applying a proportionality principle, with an exception made for remunerative legacies, which are qualified as estate debts).

84 In the Portuguese legal system, heirs are not mere creditors towards the deceased's estate. They have a legal right regarding a share that can be demanded in kind (it is a right *in rem*). In light of Article 2133, no 1 of the PCC, there are five classes of legal heirs: the surviving spouse and the descendants (1st class); the spouse and the ascendants (2nd class); the siblings and their descendants (3rd class); other collateral relatives up to the fourth degree of kinship (4th class) and the State (5th class). Only the first two classes are forced heirs and a principle of preference (priority) of classes applies as the heirs of each previous class of successors are called to inherit in detriment of those of the immediate classes.

85 According to Article 2157 of the PCC, a legitimate portion ([163]) of the estate of the deceased is granted to legally defined heirs, who are close members of

---

([162]) Capelo de Sousa, *Lições de Direito das Sucessões*, vol 2 (3rd edn, Coimbra Editora 2002) 73 and Jorge Duarte Pinheiro, *O Direito das Sucessões Contemporâneo* (5th edn, Geslegal 2022) 420.

([163]) Under Articles 2159 to 2162 of the PCC, the extent of this share varies, depending on the range, number and degree of kinship of relatives (descendants or ascendants) who qualify as forced heirs in the specific situation. For instance, if the deceased leaves a surviving spouse and descendants, they are mandatorily entitled to two-thirds of the hereditary estate; if the deceased leaves a surviving spouse and ascendants and no descendants exist, the spouse and ascendants will be mandatorily entitled to two-thirds of the hereditary estate. Finally, if the deceased does not leave either descendants or ascendants, the surviving spouse is mandatorily entitled to half of the hereditary estate.

the deceased's family: surviving spouse (164), the descendants and the ascendants are forced heirs (Article 2158 of the PCC). All forced heirs, including the surviving spouse, receive, in full, property, tangible assets of the hereditary estate that correspond to the respective portion they are entitled to. They are forced heirs, as they may not be excluded from the inheritance upon the simple expression of the will of the deceased (165). Their exclusion only occurs in two circumstances. The first constitutes a narrow space to the exercise of private autonomy of the deceased: they may disinherit forced heirs (166) who have incurred in one of the disinheritance's causes that are listed in Article 2166, no 1 of the PCC (167), by declaring this in a will and disclosing the cause of disinheritance. The other situation that leads to the exclusion of succession rights occurs when the behaviour of the successor (heir or legatee) corresponds to one of the circumstances stated in Article 2034 of the PCC, (168) which leads to the lack of capability to inherit grounded upon the lack of dignity (*indignidade*) to inherit, as it is legally named (169). Regarding the successorship position of the surviving spouse, Law no 48/2018, dated 14 August 2018 gave future spouses the possibility of reciprocally waiving the spousal status of forced heir, under specific legal

(164) The *de facto* union partner is neither a legal heir, nor a forced or intestate heir. They do have some succession rights, namely as a legal legatee, regarding the family home. In English, Rute Teixeira Pedro, 'Balancing the protection of the partner and of the descendants in case of death – the role played by law of successions on the choice of getting married again: an overview of the Portuguese legal system' in Hugues Fulchiron (ed), *Les solidarités entre générations / Solidarity between generations* (Éditions Bruylant 2013) 571.

(165) Below we will refer to the possibility of waiving the spouse as forced heir.

(166) Disinheritance only applies to forced heirs and determines the deprivation of the corresponding forced heir and the lack of capability to inherit any other share or asset by succession of that deceased (Article 2166, no 2 of the PCC). Capelo de Sousa, *Lições de Direito das Sucessões*, vol 1 (4th edn, Coimbra Editora 2000) 302.

(167) Conduct that may lead to the disinheritance of the forced heir are the following: the successor's conviction for an intentional crime committed against the person, property or honour of the deceased, their spouse, or any descendant, ascendant, adopter or adoptee, provided that the crime may legally lead to a sentence of over six months' imprisonment; the successor's conviction for slanderous denunciation or false testimony against the same persons; the refusal of the successor, without justified grounds, to give economic assistance (alimony) to the deceased if they needed that support.

(168) Some of those behaviours correspond to conduct that is qualified as crimes (homicide, slanderous or false testimony, for instance, when they were directed against the deceased, their spouse or any of their ascendants or descendants, adopter or adoptee). Capelo de Sousa, *Lições de Direito das Sucessões*, vol 1 (4th edn, Coimbra Editora 2000) 294, Rita Lobo Xavier, *Manual de Direito das Sucessões* (Almedina 2022) 92 and Jorge Duarte Pinheiro, *O Direito das Sucessões Contemporâneo* (5th Edition, Geslegal 2022) 232.

(169) The lack of dignity to inherit (*indignidade sucessória*) may affect any heir or legatee. It creates a lack of capability to receive *mortis causa*.

requirements. This decision has to be included in the prenuptial agreement and constitutes one of the few *mortis causa* contracts that are allowed in Portugal (170).

86 According to the principle of preference of classes (Article 2134 of the PCC), whenever, at the moment of the death, there is a surviving spouse and descendants, they will be legally called to the inheritance as forced heirs, even if there are ascendants (who will not be called). If at the same moment, there are no descendants, but the deceased leaves a surviving spouse and ascendants, the surviving spouse and ascendants will be called to the inheritance as forced heirs. Finally, the spouse will be legally called to the inheritance alone if there are neither descendants nor ascendants, in light of Article 2133, no 2 of the PCC.

87 When there is one or more forced heirs, the deceased may determine – in principle, expressing their wishes through a will – to whom they want to leave the disposable quota of their estate (171). When there are no forced heirs, the deceased may determine to whom they want to leave their entire estate. If the deceased does not exercise their autonomy regarding the disposition of property upon death, intestate succession will be applicable (Articles 2131 and following of the PCC). Intestate heirs are those stated in Article 2133 of the PCC in the classes that were mentioned above.

88 The most significant expression of private autonomy concerning the hereditary estate, ie, regarding dispositions of property upon death, is the will (*testamento*). Article 2179 of the PCC provides a legal definition of will as a 'unilateral and revocable act by which a person disposes upon death totally or partially of their assets'. (172) The will is widely accepted as a title to

---

(170) On this regime, in English, Rute Teixeira Pedro, 'What's mine is mine and won't be yours – the newly introduced possibility of opting out of the succession effects of marriage in Portugal' in Margaret Brinig (ed), *The International Survey of Family Law: 2019* (Jordan Publishing 2019) 261, and in Portuguese, Rute Teixeira Pedro, 'Pactos Sucessórios renunciativos entre nubentes à luz do artigo 1700.º, n.º 1, alínea c) do Código Civil — análise do regime introduzido pela lei n.º 48/2018, de 14 de agosto' (2019) Revista da Ordem dos Advogados 415.

(171) If the testator disposes of more assets than they could dispose of and thus their dispositions affect the share of the forced heirs, those acts (which are considered to be *inoficiosos*) may be reduced, in accordance with Articles 2168ff. The liberalities considered to be *inoficiosos* are reduced if the forced heirs or their successors request it, and to the extent that it is needed for the share of forced heirs to be protected.

(172) Wills may be challenged in a number of cases, for instance:

a) When there is a violation of Articles 2192 ff that list cases that make the will completely void (*nulo* in Portuguese). These situations concern particular relationships between the will's author (*testador*) and the person to whom they provide any benefit (for instance, the doctor who treated the deceased from the disease that caused their death and the

succession, but must respect some special formal requirements. There are two general types of will, as far as form is concerned: the public will (*testamento público*) and the closed will (*testament cerrado*). The public will is drawn up by a Notary in their book of wills (Article 2205 of the PCC). The closed will is written by the testator, but this private document has to be approved (173) by a Notary in order to produce the recognised legal effects as a will (Article 2206 of the PCC).

The will is necessarily characterised by its revocability (174). If the testator **89**
states that they want to waive the faculty of revoking the will in whole or in part, that statement is deemed to have not been written and no effect is given to it, in accordance with Article 2311 of the PCC. In order to guarantee the

---

will is drawn up while the testator is suffering from the disease; the same applies to a priest; the same applies to the Notary or the lawyer who takes part in the process of making the will. It must be stressed that these rules apply without the need to prove any undue influence or any coercion.

b) When there is a violation of other mandatory rules, for instance, the form legally demanded (Articles 2204ff).

c) When the testator does not have the legal capacity (*capacidade testamentária*) provided in law to make a will (for instance, if the testator is under 18 (Articles 2189 and 2190).

d) When there is accidental inability (*incapacidade acidental*) of the testator (Article 2199).

e) When simulation (*simulação*) takes place (Article 2200).

f) When error (*erro*), a mistake provoked by another person (*dolo*), coercion (*coação*) takes place (Article 2201).

g) When error regarding the motivation/grounds (*erro sobre os motivos*) takes place (Article 2202).

h) When error regarding the indication of the legatee/heir or the assets takes place (Article 2203).

(173) This approval does not concern the content of the will. According to Article 108 of the Notary Code, once the testator submits the will, for approval purposes, the Notary must draw up the approval instrument, which begins immediately after the testator signs the will. The approval instrument must contain the references listed in Article 108, no 2 of the PNC. They concern some statements the testator will make and the notary will include in the approval instrument, such as the following: the written document submitted to the Notary contains the testator's last will; a statement that it was written and signed by the testator, or written by someone else, at the testator's request, and only signed by the testator, or that it was written and signed by someone else, at the testator's request, since the testator could not, or did not, know how to sign (if the will was not written by the testator, a testator's declaration stating that the testator knows its contents has to be included in the instrument of approval); that the will does not contain amended, truncated words, written between lines, blots or marginal notes, or, if it does, that it is duly reserved. The Notary must also register in the approval instrument the number of complete pages, and lines of any incomplete page.

(174) Capelo de Sousa, *Lições de Direito das Sucessões*, vol 1 (4th edn, Coimbra Editora 2000) 166.

free revocability of a will, Article 2181 of the PCC legally prohibits the joint will, ie, a unique will of two or more testators is not allowed.

90 As a consequence of the importance of preserving the possibility to change the dispositions that produce effects upon death, the prohibition of *mortis causa* succession contracts ([175]), which are concluded before the opening of the succession to which they are concerned, is legally stated in Article 2028 of the Portuguese Civil Code ([176]). Nevertheless, the law provides exceptions to this prohibition that are justified by the idea of promoting marriage (*favor matrimonii*). As a matter of fact, *mortis causa* succession contracts allowed by law have to be inserted in a prenuptial agreement and have to correspond to one of the types that are listed in Article 1700, no 1 of the PCC: i) a contract in which a future spouse or a third person names as heir or appoints as legatee one future spouse; ii) a contract in which a future spouse names as heir or appoints as legatee a third person; iii) a contract in which both future spouses reciprocally waive the status of forced heir as surviving spouses. The first two contracts are designative, institutive or attributive succession contracts. The last one, which was added by Law 48/2018, dated 14 August 2018, qualifies as a renunciative succession contract.

A. *Devolution of the estate*

91 Upon the death of a person, their succession opens, precisely at that moment, in light of Article 2031 of the PCC, and the successors (heirs and legatees) who fulfil the three conditions stated above are called to the succession (Article 2032, no 1 of the PCC) and acquire the *ius delationis* (the right to accept or to waive the inheritance or legacy they were called to). As a matter of fact, in Portugal, the successor acquisition does not operate automatically, but is dependent on an expression of will of the successor. The successors may accept or reject the inheritance or legacy they were called to. This can be done after the opening of the succession (ie, after the death of the deceased whose estate is considered).

([175]) As they are contracts, they would need mutual consent for their alteration or revocation, under the general rule of contracts stated in Article 405 of the PCC. There are other reasons that are invoked to explain the prohibition of *mortis causa* succession contracts.

([176]) Consequently, pursuant to Article 294 of the PCC, those contracts are invalid (null), as a rule, as they disrespect a mandatory rule (Article 2028). In some circumstances stated in Article 946, no 2 of the PCC, a *mortis causa* donation may be converted *ope legis* in a will. This will be the case if the formal requirements of wills are respected.

92 Acceptance (*aceitação*) (177) is governed by Articles 2050 to 2061 (178) of the PCC and it is the *conditio sine qua non* of succession acquisition. If the successor accepts the inheritance, they legally acquire control and possession over the inheritance assets (under the terms of Article 2050, no 1 of the PCC), regardless of any act of material apprehension. These effects are deemed to be produced *ex tunc* since the opening of the succession (Article 2050, no 2 of the PCC). A married successor, irrespective of the matrimonial property regime that applies to the marriage, does not need the consent of the spouse to accept the inheritance or legacy, in accordance with Article 1683 of the Civil Code.

93 Pursuant to Article 2056 of the PCC, the successor may accept the inheritance or legacy, either expressly (as is the case if the successor declares in a written document that they accept or undertake the title of heir with the intention of acquiring it) or tacitly (under Article 217 of the PCC, this occurs when the successor adopts any behaviour from which it could be concluded that the behaviour is the expression of the intent to accept) (179).

94 In light of Article 2052 of the PCC, there are two forms of acceptance of the inheritance and, depending on the one chosen by the heir, some legal consequences, as far as the liability for estate debts is concerned, will follow: an heir may opt for the acceptance with the benefit of inventory (*aceitação a benefício de inventário*), on the one hand, or for pure and simple acceptance (*aceitação pura e simples*), on the other hand. If the heir chooses the former, only the inventoried assets will be liable for the debts of the estate, unless creditors or legatees prove the existence of other assets, according to Article 2071 of the PCC. If the heir chooses the latter, it will be the heir who has to prove that there are not enough assets in the estate to fulfil the debts of the estate, to avoid execution of the heir's personal assets. Even if the liability of the heir does not exceed the inherited assets, the burden of furnishing evidence on those limits will be borne by the heir, as stated in Article 2071, no 2 of the PCC.

---

(177) Capelo de Sousa, *Lições de Direito das Sucessões*, vol 2 (3rd edn, Coimbra Editora 2002) 18, Rita Lobo Xavier, *Manual de Direito das Sucessões* (Almedina 2022) 133 and Jorge Duarte Pinheiro, *O Direito das Sucessões Contemporâneo* (5th edn, Geslegal 2022) 385.

(178) These rules concern the acceptance of inheritance but they apply *mutatis mutandis* to acceptance of legacies, as a consequence of what is provided in Article 2249 of the PCC.

(179) An exception is made for acts that correspond to mere administration of the inheritance or legacy according to Article 2056, no 3 of the PCC. Acceptance cannot be derived from the performance of acts of mere administration of the inheritance or legacy.

95 Otherwise, instead of accepting the inheritance or legacy they were called to, the successors may reject it (180), and as a consequence they will be retroactively (181) considered not called to succession, as stated in Articles 2062 and 2249 of the PCC. The repudiation, rejection or waiver (*repúdio*) (182) of the inheritance is regulated by Articles 2062 to 2067 of the Portuguese Civil Code (183) and, unlike the case of acceptance, special formal requirements have to be met, in accordance with Article 2063 of the PCC. A specific form has to be respected in order to realise the transfer (*alienação*) of the inheritance, which is the form stated in Article 2126 of the PCC and in Article 80 of the Notary Code (hereinafter: PNC): a public deed if there are immovable assets in the deceased's estate or a private written document if not. If the successor is married, under a legally typical or atypical community matrimonial property regime, the consent of the other spouse is required in order for the repudiation to be considered valid, under Article 1683, no 2 of the PCC. The consent of the spouse is not needed to reject the inheritance or legacy if a separation matrimonial property regime applies.

96 If the successor is a minor, the authorisation of the Public Prosecutor's magistrate is needed to validly reject the inheritance and legacy, pursuant to Article 1889, no 1 j), Article 1890, no 1 and Article 1938, no 1 a) of the PCC. Authorisation may also be needed to reject the inheritance and legacy if the successor who is called is an accompanied adult, in the event of that need is determined in the judicial decision that applies the accompaniment measures in the particular case (Articles 138, 139 and 145 of the PCC). The authorisation procedure is governed by Executive-Law no 272/2001, dated 13 October 2001 and falls within the jurisdiction of the Public Prosecutor's magistrate, in accordance with Article 2 of this Executive-Law.

97 Acceptance as well as repudiation are deemed to be irrevocable, according to Articles 2061 and 2066 of the PCC, and indivisible (184), in light of Article 2054 no 2 and Article 2064, no 2 of the PCC.

---

(180) Under the terms of Article 2067 of the PCC, the creditors of the successor who repudiates may replace them (*subrogação*) in the acceptance, within six months following the moment they have knowledge of the repudiation.

(181) Effects of rejecting the inheritance or legacy are retroactive to the moment of the opening of the succession (Article 62 of the PCC).

(182) Capelo de Sousa, *Lições de Direito das Sucessões*, vol 2 (3rd edn, Coimbra Editora 2002) 24, Rita Lobo Xavier, *Manual de Direito das Sucessões* (Almedina 2022) 137 and Jorge Duarte Pinheiro, *O Direito das Sucessões Contemporâneo* (5th edn, Geslegal 2022) 385.

(183) These rules regard the rejection of inheritance but they apply *mutatis mutandis* to the rejection of legacies, as a consequence of the provisions of Article 2249 of the PCC.

(184) The indivisibility of those acts applies as a rule. There are exceptions that result from the provisions of Article 2055 of the PCC, regarding heirs, and of Article 2250 of the PCC, concerning legatees.

98 According to Article 2059 of the PCC, the right to accept the inheritance must be exercised within ten years starting from the date when the successor becomes aware of having been called to the succession. Otherwise, it will extinguish by the lapse of time (*caducidade*).

99 Proceedings for accepting or repudiating the inheritance are provided by law, under the terms of Article 2049 of the PCC and governed in Article 1039 of the PCPC, when a successor who has been called to the succession has neither accepted nor waived the inheritance in the following fifteen days. If the successor does not accept or repudiate within a period of fifteen days from the moment the successor was called to the succession, the court may notify the successor, at the request of the Public Prosecutor's magistrate or any interested party. The successor is notified to, within a specific period set for it, declare whether the successor accepts or repudiates. This notification includes information about the consequences of not acting (as a consequence, it is qualified as a comminatory – *cominatório* – proceeding). In fact, in the absence of a declaration of acceptance, and if a legal document of repudiation is not presented within the defined period, it will be considered that the successor has accepted.

100 If two or more heirs are called to succession and have accepted the inheritance and they do not intend to keep the estate undivided, it is necessary to determine which assets will belong to each of the heirs, filling the quota they were called to, through the sharing operation (*partilha*) (185). The need to share also exists when the deceased was married under a community matrimonial property regime (186), and their surviving spouse is not the sole heir of the deceased. Any heir or the surviving spouse in the circumstance just mentioned are entitled to the right to demand the sharing operation (*partilha*). This right may be exercised at any time after the opening of the succession and the succession acceptance. This is an imprescriptible right under the terms of Article 2101, no 1 of the PCC. The right to demand the sharing operation cannot be renounced, but it can be agreed that the assets remain undivided for a certain period of time not exceeding five years. It is permitted to renew this period, once or more times, by a new agreement,

(185) Capelo de Sousa, *Lições de Direito das Sucessões*, vol 2 (3rd edn, Coimbra Editora 2002) 89, Rita Lobo Xavier, *Manual de Direito das Sucessões* (Almedina 2022) 317 and Jorge Duarte Pinheiro, *O Direito das Sucessões Contemporâneo* (5th edn, Geslegal 2022) 432.

(186) Death also means the cessation of economic relations between the spouses and, if a community property regime applies, that determines the need to share of the couple's assets (Articles 1688 and 1689 of the PCC). As a consequence, there will be two successive sharing procedures: the marital one and afterwords the succession one.

in accordance with Article 2101, no 1 of the PCC. Legatees (187) are not entitled to demand sharing, except for the usufructuary (188) of a quota of the inheritance: this usufructuary is entitled to demand the sharing operation for the purpose of determining the assets upon which the right of usufruct falls (189).

101 The sharing operation may take place with an inventory (*inventário*) or without an inventory, in accordance with Article 2102 of the PCC. An inventory is not needed if all interested parties reach an agreement. However, there will be a need to undertake an inventory process, not only when there is no agreement from all those interested in the sharing, but also when the Public Prosecutor's magistrate is of the opinion that the interests of an incapacitated heir to whom the inheritance is granted requires acceptance with the benefit of inventory (*aceitação a benefício de inventário*); and in cases where one of the heirs – due to being in an uncertain location or due to a permanent *de facto* incapacity – cannot participate in an asset division carried out by agreement.

102 The sharing operation without inventory may be conducted at Notary offices or at civil registry offices. The notarial sharing in this case may be substantiated in a public deed in accordance with Article 80, j) of the PNC or through a private document authenticated under the provision of Article 22, f) of Executive-Law no 116/2008, dated 4 July 2008.

103 The sharing operation without inventory at civil registry offices follows the simplified hereditary succession procedures regulated in Article 210-A to 210-R of the PCRC. In light of Article 210-A, no 3 of the PCRC, sharing may be completed through a simplified hereditary succession procedure only if there is an immovable or movable property or corporate assets subject to registration in the estate. These procedures take place at a so-called 'Heritage Counter' (*Balcão das Heranças*) (190) that provides the possibility of all acts, procedures and formalities related to the hereditary succession – the sharing operation of the estate, titling, registration and guaranteeing compliance with

---

(187) Co-legatees in the same property, as co-owners of an asset, may demand the division of common property under the general terms of civil law provided in Articles 1404 and 1412 of the PCC inserted in the third book of the Civil Code dedicated to Property Rights.

(188) Any usufructuary qualify as legatee, in accordance with Article 2030, no 4 of the PCC.

(189) In this sense, Jorge Duarte Pinheiro, *Direito das Sucessões contemporâneo* (5th edn, Gestlegal 2022) 434.

(190) The 'Heritage Counters' (*Balcões das Heranças*), as well as the 'Divorce with Sharing Counters' (*Balcões Divórcio com partilha*) that were mentioned in n 156, were created and are governed by Ordinance (Portaria) no 1594/2007, dated 17 December 2007.

tax obligations regarding the estate and its assets – to be carried out in a single service to avoid unnecessary trips to several entities (namely notary, various registries and tax entities). 'Heritage Counters' operate in connection with civil registry offices (191). According to Article 210-B of the PCRC, only the administrator of an estate (*cabeça-de-casal*), their legal representative or their agent are granted the legitimacy to initiate simplified hereditary succession procedures. According to Article 210-R of A of the PCRC, the sharing carried out through the simplified hereditary succession procedures has the same legal effects provided for by law as for other forms of sharing.

104 The sharing operation made in inventory, as a rule, may be done judicially or extra-judicially. The inventory process, in principle, can be initiated in the judicial courts or in Notary offices, at the choice of the interested party who initiates the inventory (192) or when an agreement of all interested parties to that option was reached (Article 1083, no 2 of the PCPC). The possibility to choose and impose the inventory in Notary offices in the cases indicated in Article 1083, no 1 of the same Code is excluded. The situations in which the courts have exclusive jurisdiction for the inventory process are the following: i) the circumstances referred to in Article 2102, no 2, b) and c) of the Civil Code (193); ii) whenever the inventory depends on another judicial process; iii) when the inventory is requested by the Public Prosecutor's magistrate.

105 The judicial inventory process is governed by Articles 1082 and following of the Civil Procedure Code. The notarial inventory process is governed by the rules in the regime approved by Law no 117/2019, dated 13 September 2019 (194), that entered into force on 1 January 2020. As far as inventory processes that are initiated after this date are concerned, the regime approved by Law no 117/2019, dated 13 September 2019 applies (195).

---

(191) Civil Registrars are competent to act, but they are allowed to delegate acts to a registry officer, under the terms of Article 210-A, no 6 of the PCRC.

(192) According to Article 1083, no 3 of the PCC, if the inventory process is initiated at the Notary's office without the agreement of all interested parties, the process is referred to the judicial court if this is requested, in a defined period of time, by a directly interested party or parties, if, individually or jointly, the case concerns more than half of the inheritance.

(193) Those circumstances are the following: when the Public Prosecutor's magistrate considers that the interest of an incapacitated heir to whom the inheritance is granted requires acceptance with the benefit of inventory (*aceitação a benefício de inventário*) and in cases where one of the heirs – due to absence at an uncertain location or due to a permanent *de facto* incapacity – cannot participate in an asset division carried out by agreement.

(194) This Law not only amended the Civil Procedure Code regarding the provisions that govern the inventory process, but also approved the notarial inventory regime, revoking the previous regime approved by Law no 23/2013, dated 5 March 2013.

(195) Under the terms of Article 11, no 1 of Law no 117/2019, dated 13 September 2019.

Regarding inventory processes that, on the same date, were pending in Notary offices, the law distinguishes between different situations: on the one hand, if the process continues to be processed there, the legal regime applicable to the inventory is the legal regime approved as annex to Law no 23/2013, dated 5 March 2013 as amended by Law no 117/2019, dated 13 September 2019 (196) (Article 11, no 2 and no 3 of Law no 117/2019, dated 13 of September 2019); on the other hand, if the process is sent to the court, the regime in the Civil Procedure Code as amended by Law no 117/2019, dated 13 September 2019 will apply.

106 Notary inventories pending in Notary offices on 1 January 2020 are sent to the court in the cases provided for in Article 12. There is an unofficial transfer of inventories in which the following persons are directly interested: minors, accompanied adults or absent persons. Additionally, a referral may be made to the competent court at the request of any of those directly interested in the sharing: a) if the inventory has been suspended under provision 16 of the legal regime governing the inventory process for more than one year; b) if the inventory has been stopped, without carrying out useful acts, for more than six months. The process may also be sent to the court upon the request of directly interested parties who represent, alone or jointly, more than half of the inheritance, under any circumstances.

107 Regarding notary inventories, in accordance with Article 1 of Law no 117/2019, dated 13 September, a list of Notaries who deal with inventory processes in their respective offices is prepared by the Notaries Association (197). Interested parties may choose, in accordance with the provisions of Article 1083, no 2 of the PCPC, the Notary's office in which they wish to initiate the inventory, provided that there is a relevant connection with the sharing operation, and that will be assessed considering, namely, the place where the succession is opened, the location of most of the immovable assets or commercial establishments that are part of the inheritance or the residence of the majority of those directly interested in the division.

In light of Article 1, no 3 of Law no 117/2019, dated 13 September, the judge's impediment and suspicion regime provided for in Articles 1082 and following of the Civil Procedure Code (for further developments on the impediment and suspicion regime provided for in Articles 1082 and follow-

(196) Law no 117/2019, dated 13 September 2019, simultaneously revoked and amended the previous regime approved by Law no 23/2013, dated 5 March 2013.

(197) The updated version of the list is published on the Association website, considering territorial circumscriptions (<https://www.inventarios.pt/notarios>).

ing of the Civil Procedure Code see above section II 2 [no 35] and section II 4 [no 66]) is applicable to the Notary (198).

108 As far as the procedures that have to be followed, Article 2 of Law no 117/2019, dated 13 September states that the legal regime established in Articles 1082ff of the Portuguese Code of Civil Procedure is applicable to the inventory process that takes place in a Notary's office, with the necessary adaptations.

109 Article 3 of Law no 117/2019, dated 13 September provides for situations in which interested parties must be referred to the courts (199).

110 The possibility of submitting an appeal to the court to challenge a Notary's decision is stated in Article 4 of Law no 117/2019, dated 13 September.

111 The sharing operations are submitted to the judge for approval purposes, as is determined by Article 5 of Law no 117/2019, dated 13 September.

112 In general, international jurisdiction or competence of courts is assessed in light of Articles 62 and 63 of the PCPC. If there is a European regulation or international convention, its rules will be applicable as is the case in matters of succession: Articles 4 and following of Regulation (EU) 650/2012, dated 4 July.

B. *Certificates of Succession*

113 In Portugal, the status of successor (heir or legatee) may be demonstrated through different means (200). In addition to the possibility of proposing a

---

(198) In the event of impediment or unavailability of the Notary's office, interested parties may choose to initiate the process at a Notary's office based in neighbouring or nearby districts, according to Article 1, no 4 of Law no 117/2019, dated 13 September.

(199) Under Article 3 of Law no 117/2019, dated 13 September, the Notary must determine, even *ex officio*, through a reasoned order, the suspension of the process: i) if a case is pending in which an issue relevant to the admissibility of the process or to the definition of rights of those directly interested in the sharing is being considered; ii) if questions are raised, while the inventory is pending, that affect the admissibility of the process or the definition of the rights of those directly interested in the sharing, referring those interested to judicial means, as soon as the assets are shown to be related. Additionally, if, while the inventory is pending, an issue arises which, without respecting the admissibility of the process or the definition of the hereditary shares of the interested parties, involves the resolution of a dispute between the interested parties relating, in particular, to the definition of the assets or debts that comprise the assets to be shared, the Notary must, after hearing the parties and in a reasoned order: i) refrain from deciding, referring interested parties to judicial means, when the nature of the disputed matter or its complexity, whether *de facto* or *de iure*, makes its assessment by a non-judicial body inconvenient; ii) decide, in other cases, the matter in dispute, the decision being immediately challengeable before the competent court.

(200) This demonstration is necessary to carry out certain acts, namely to move certain assets, such as bank deposits or financial investments, to register some assets.

declaratory judicial action to declare that fact (Article 10, no 3 a) of the PCPC ([201])), there are special means of proving the status of successor that can be globally designated as 'qualification' (*habilitação*). Currently, there are four types of 'qualification' ([202]): i) notarial qualification; ii) qualification through a simplified hereditary succession procedure; iii) qualification in the inventory process; iv) judicial qualification outside the inventory process; iv) a European Succession Certificate.

114 Notarial qualification is governed by Articles 82 to 88 of the PNC. In accordance with Article 83, no 1 of this Law: 'Notarial qualification consists of the declaration, in a public deed, by three persons, who the Notary considers worthy of credibility, that the applicants are heirs of the deceased and there is no one who has priority in the succession and there is no one who is also called in concurrence with them in the same succession'. As is clearly stated in no 2 of the same Article, the declaration may be made, as an alternative to the above-mentioned three persons, by the person who performs the role of administrator of the estate (*cabeça-de-casal*). In this latter situation, the administrator of the estate must be warned that they will incur the penalties applicable to the crime of false statements before a public official if, intentionally and to the detriment of others, the administrator makes or confirms false statements, and this warning must be included in the deed (Article 97 of the PNC). In any case, the declaration must contain a mention of the full name, State, place of birth and last habitual residence of the deceased and those entitled to the inheritance and, if any of them is a minor, an indication of this circumstance.

115 In accordance with the provisions of Article 86 of the PNC, notarial qualification produces the same effects as judicial qualification and it is a proper ground for several acts to be carried out, in favour of all the heirs and the surviving spouse ([203]). In the event of the omission of any heir, the omitted heir who intends to challenge the notarial qualification, in addition

---

([201]) Declaratory actions of simple assessment are intended to obtain solely the judicial declaration of the existence or non-existence of a right or a fact.

([202]) Additionally, there is also a qualification set out in a regime contained in separate legislation: there is a special administrative authorisation to allow the exercise of certain rights in relation to the State or other public entity. This is the case of a procedure intended to carry out the transfer of ownership upon death of postal savings certificates, which carried a State guarantee (*títulos de aforro*). Jorge Duarte Pinheiro, *O Direito das Sucessões Contemporâneo* (5th edn, Geslegal 2022) 394 and Rita Lobo Xavier, *Manual de Direito das Sucessões* (Almedina 2022) 94.

([203]) Namely, acts of registration in the land registry offices; acts of registration in the commercial and automobile property registry offices; endorsements of credit titles; endorsements of the transfer of literary, scientific, artistic or industrial property rights and withdrawals of money or other assets.

to proposing the action under the terms of the civil procedure law, must ask the court to immediately communicate the pendency (*pendência*) of the case to the respective Notary office, in accordance with Article 86 of the PNC.

116 Legatees – when these are undetermined or instituted generically or when the inheritance is totally distributed in legacies – may resort to notarial qualification to prove their status as legatees, applying, in this case, the regime just mentioned, with the necessary adaptations.

117 Alternatively, qualification can be achieved through one of the simplified hereditary succession procedures provided for in Article 210-A of the PCRC. These procedures are conducted at 'Heritage Counters'. For the purposes of qualification, the procedures set out in Article 210-A, no 2 a) and b) are relevant, ie, i) procedure for the qualification of heirs, sharing and registrations; and ii) procedures for the qualification of heirs with or without registrations. According to Article 210-B of the PCRC, only the administrator of the estate (*cabeça-de-casal*), the administrator's legal representative or agent are granted the legitimacy to promote simplified hereditary succession procedures (204).

118 According to Article 210-O of the PCRC, the qualification of heirs carried out within the scope of simplified hereditary succession procedures is conducted to obtain: 'the declaration, made by the administrator of the estate or by three people who the Civil Registrar or the official of records consider worthy of credibility, that the applicants are heirs of the deceased and there is no one who has priority in succession and there is no one who is also called in concurrence with them in the same succession' (no 1).

119 The aforementioned procedures apply, with the necessary adaptations, to the qualification of legatees, when they are undetermined or instituted generically or when the inheritance is distributed in legacies (Article 210-P of the PCRC).

120 Qualification according to these simplified procedures produce the effects stated by law for other forms of qualification of heirs, in accordance with Article 210-O, no 3 of the PCRC.

121 Qualification can also be achieved during the inventory process. In this situation, the heirs indicated in the initial application submitted by the administrator of the estate or by another interested party will be deemed qualified (Articles 1097 and 1099 of the PCPC). In the latter case, the administrator of estate is summoned in order to perform the confirmation, correction or completion. Furthermore, the status of successor may be recognised, at any time in the process, following the occurrence of main

(204) This, in addition to the competent entity for this form of qualification, is the main difference compared to notarial qualification.

spontaneous or provoked intervention in the judicial inventory action of another person (Article 1087), who is the successor of any direct interested party involved in the inventory, before it has been completed.

122 Judicial qualification outside the inventory process is governed by Articles 351 to 357 of the PCPC ([205]) and occurs when, while an action is pending, one of the parties dies. In this case, the qualification of the successors of the deceased party is intended for the judicial proceedings. The judicial qualification can be promoted either by any of the surviving parties or by any of the successors of the deceased.

123 The European Succession Certificate also serves to prove the status of successor and the rights of each heir and legatee. Even if the Certificate is issued in one Member State for use in another Member State, it takes effect in the Member State in which it was issued (Article 62, para 3 of EU Regulation 650/2012 of the European Parliament and of the Council of 4 July 2012). In Portugal, a request for a European Succession Certificate is submitted to the 'Heritage Counters' that operate within the scope of the Civil Registry Offices.

C. *Administration of the estate*

124 The estate, as an autonomous patrimony that is, between the moment of opening of the succession and the moment of its liquidation and sharing, is administered, in principle, by the administrator of the estate (*cabeça-de-casal*), in accordance with Article 2079 of the PCC ([206]). The identification of the person who will perform the role can be concluded by agreement of all interested parties and the Public Prosecutor's magistrate when this magistrate has to intervene. The person indicated may not fulfil the legal criteria or may not be the one who would be the priority designated for this purpose (Article 2084 of the Portuguese Civil Code). When there is no agreement, the position will be filled by whoever is determined by application of the rules of Articles 2080 to 2082 of the Portuguese Civil Code. If the persons designated to be the administrator of an estate excuse themselves (Article 2085 of the PCC) or are removed from the position, the court appoints another (Article 2083 of the PCC).

125 Outside the competence outlined by the legislator regarding the administrator of an estate, the exercise of an estate's rights or the exercise of rights

---

([205]) Miguel Teixeira de Sousa, 'Commentary on Articles 351 to 357 of the Civil Procedure Code' in *CPC online* (<https://blogippc.blogspot.com/2024/02/cpc-online-19.html> accessed 26 January 2025).

([206]) Capelo de Sousa, *Lições de Direito das Sucessões*, vol 2 (3rd edn, Coimbra Editora 2002) 37 and Jorge Duarte Pinheiro, *O Direito das Sucessões Contemporâneo* (5th edn, Geslegal 2022) 404.

against the estate may only be jointly carried out by all heirs or against all of them (Article 2091 of the PCC).

126 In this context, there is yet another administrative body, which exists occasionally and sometimes plays a role in the case of testamentary succession: the executor (*testamenteiro*). Pursuant to Article 2320 of the PCC, the testator may appoint one or more people who are responsible for monitoring the compliance with the dispositions in the will or are responsible for executing the will's content as a whole or in part.

IV. Status of natural Persons

A. *Name changes*

127 One's name is chosen, as a rule, by parents (Article 1875, no 1 of the PCC) (207). The full name may be composed of a maximum of six simple or compound grammatical words: one or two correspond to the first name(s) (208) and up to four correspond to the surnames (209), in accordance with Article 103, no 2 of the PCRC (210).

---

(207) In the absence of an agreement between the parents, the judge will decide, in accordance with the child's best interests (Article 1789, no 2 of the PCC).

(208) The choice of the first name(s) must respect the conditions stated in Article 103, no 2, a) to d) of the PCRC. Joaquim Seabra Lopes, *Direito dos Registos e do Notariado* (Almedina 2023) 55.

(209) According to Article 1875, no 1 of the PCC, surnames must be chosen from parents' surnames, from both of them or only from one of them.

(210) In the light of these provisions, the following rules must be respected. Firstly, first names 'must be Portuguese, and must be among those contained in national onomastics or adapted, graphically and phonetically, to the Portuguese language, and must not raise doubts about the sex of the registrant'. Deputies of several left-wing parties, in the Parliament, presented legislative proposals to delete the last part of the quoted sentence, corresponding to the end of the provision stated in Article 103, no 2, a) of the PCRC ('and must not raise doubts about the sex of the registrant'). On 5 January 2024, the Portuguese Parliament approved the Decree of the Assembly of the Republic no 132/XV, which aimed to modify the regime for the definition of a person's first name and the certificate of birth and marriage, amending the Civil Registration Code, enshrining the right to opt for a neutral name and eliminating the requirement for third-party consent to make amendments to birth and marriage certificates following another person's gender change. On 29 January 2024, the President of the Portuguese Republic decided not to promulgate the Decree, having returned it to the Assembly of the Republic, as he considered that 'the decree does not guarantee a balance in respect for the essential principle of people's freedom, on the one hand, due to the emphasis given to the so-called "neutral name", a name that is legitimate as the choice of the parents, but should not prevent the option of a non-neutral name if that is the will of the person who made that decision'. The President added that the decree had not secured the needed balance

128 The name stated on the birth certificate is, in principle, immutable. It may be modified only with the authorisation of the Registrar of the Central Register.

129 Nonetheless, the law allows some changes in a few demarcated situations that are listed in Article 104, no 2 of the PCRC. For instance, changes that are a consequence of the decree of adoption of a child. Under the terms of Article 1988 of the PCC, the adopted person loses their original surnames, which are replaced by the surnames of the adoptive family, with their new name being established in accordance with the terms provided for natural filiation (Article 1875 of the PCC). Exceptionally, the adopter may request the court change the child's first name, by court decision. (respecting the legal requirements of Article 1988, no 2 of the PCC: safeguarding the personal identity and interests of the minor, favouring their integration into the adoptive family).

130 Changes can also be made to names in the case of marriage, either as a consequence of the choice made upon marriage to add a spouse's surnames (Article 1677 of the PCC) or as a consequence of the loss of a former spouse's surnames adopted due to marriage (Article 1677-A, Article 1677-B and Article 1677-C of the PCC). According to Article 1677 of the PCC, each spouse, whilst keeping their surnames ([211]), has the right to adopt, upon the

---

as it 'allows a person, who decides to change the respective gender, to unilaterally determine that that change would be recorded on that person's marriage certificate or the birth certificate of children, particularly minors, without the person to whom they were or are married being consulted or even informed, as well as without the other parent or the adult child having the chance to comment or be informed' as read on the official page of the President of the Portuguese Republic (at <https://www.presidencia.pt/atualidade/toda-a-atualidade/2024/01/presidente-da-republica-apreciou-decretos-da-assembleia-da-republica/> accessed 26 January 2025). Secondly, foreign first names in their original form are admitted only if the registrant is a foreigner, if they were born abroad or they have a nationality other than Portuguese and if one of the registrant's parents is foreign or has a nationality other than Portuguese. Thirdly, siblings may not be given the same first name, unless one of them is deceased. Under Article 103, no 4 of the Civil Registration Code, doubts about the composition of names are clarified by order of the director-general of Registries and Notaries, through the Central Registry Office. In accordance with Article 8, no. 1, h) of the Religious Freedom Law (Law 16/2001, dated 22 June 2001), first names may be chosen according to the religious onomastics of the parents' professed religion.

([211]) In the Portuguese legal system, the original surnames of each spouse are kept, as stated in the text, but it is not the solution adopted in some foreign countries. As a consequence, the general-director of the Services of Registration and Notary issued the following: 'Changing the name of a Portuguese citizen, due to marriage, must comply with the provisions of Article 1677 of the Civil Code. However, if the marriage is concluded abroad, a change of name carried out in accordance with the law of habitual residence is recognised as being effective in the Portuguese legal system, as long as the law of habitual residence is considered competent for the purpose and the marriage takes place in that country, even if the

conclusion of the marriage surnames from the other spouse, up to a maximum of two (212). This option may be exercised by both spouses simultaneously, with surnames being inserted either at the end or between other surnames. Thus, for instance, if A marries B, A may adopt B's surnames, and B may adopt A's surnames, even if they both insert the added surnames at the end of the names and, in that case, the exercise of this right by both spouses does not create a common name that identifies the family unit (213). The change usually takes place on the occasion of the conclusion of the marriage, but can be exercised later. The change of surnames is registered in the spouses' birth certificates (Article 69, no 1, m) of the PCRC). The spouses' surnames added upon marriage, as was explained, may be retained even if the marriage is dissolved due to death or divorce or even if there is a modification of the marital relationship due to a decree of the legal separation concerning personal and economic effects. In the event of the dissolution of marriage due to death or the modification of a marital relationship due to the decree of the legal separation concerning personal and economic effects, the spouse keeps the other spouse's surnames. In the event of the dissolution of marriage due to divorce, the divorced spouse loses, in principle, the right to use the surname of their ex-spouse. The divorcé(e) will have the possibility to keep the former spouse's surname if the latter agrees or if there is authorisation from the Civil Registry Office, pursuant to Article 5, no 1 d) of Executive Decree 272/2001, dated 13

---

change is contrary to the name composition rules in force in the national legal system [...]. The change of name, due to a marriage occurring abroad, which results in the total elimination of family surnames, is not given internal legal effect, as it offends imperative norms and principles of the national legal system – Articles 22, no 1; 1875 and 1677, no 1 of the Civil Code. From the foregoing conclusions, it is clear that the name change is recognised as being effective, as a result of a marriage concluded abroad, in which the surnames of the other spouse are added with partial loss of family surnames. However, if the change involves the elimination of all the surnames, that is forbidden'. At <https://irn.justica.gov.pt/Portals/33/Doutrina/Boletins%20-%20BRN/1999/maio/I_Caderno_BRN_5_mai_1999.pdf?ver=mp7XbIJJgfMTnf4xdqR3lw%3d%3d> accessed 26 January 2025.

(212) It should be noted that the possibility provided by Article 1677 of the PCC is not granted to those who retain the surnames of a former spouse from a previous marriage (Article 1677, no 2 of the PCC).

(213) They may reciprocally add surnames and create a family name if the surnames are included in the same order, but this is not mandatory. The possibility was disputed by the Portuguese doctrine and by the Civil Registrar as the word used in Article 1677 of the PCC was 'add'. Consequently, it was concluded that the surname had to be inserted at the end of the name. Nowadays, the possibility of inserting the surnames in the middle of the original name is not disputed. The Supreme Court, in a decision dated 14 October 1997 (Process 97A570), decided that the 'addition' of surnames authorised by Article 1677, no 1 of the PCC encompasses both possibilities: adding and interspersing.

October 2001. Finally, it should be noted that the spouse who kept the other spouse's surnames may be deprived of the right to use them, when the use of these surnames 'seriously harms the moral interests of the other spouse or their family' (Article 1677-C of the PCC).

131 Another particular situation that was added to the list of Article 104, no 2 of the PCRC by Law no 7/2011, dated 15 March 2011 (214), is the change of the first name resulting from the change in the reference to gender, which will be dealt in the next subsection.

B. *Gender recognition*

132 Law no 38/2018, dated 7 August 2018 (215), approved the regime regarding the right to self-determination of gender identity and gender expression as well as the protection of the sexual characteristics of each person.

133 As stated in Article 3 of the same Law, the exercise of the right to self-determination of a person's gender identity and gender expression is ensured, in particular, through the free development of their personality in accordance with their gender identity and expression (216).

134 According to Article 8 of this Law, a transgender person has to submit an application in any civil registry office to change the record of gender in the civil registry, and the consequent modification of the name (Article 69 no 1 o) of the PCRC). The person who submits the request has to indicate the civil identification number and the first name by which the person wishes to be identified. A new birth certificate of the transgender person may be requested, in which no mention may be made of the change in registration.

135 The request may be brought by any person whose gender identity does not correspond to the sex assigned at birth if that person has Portuguese

---

(214) This Law created the procedure for changing one's gender and first name in the civil registry, which was revoked (but for the Article that introduced changes in the Civil Registrar Code) by Law no 38/2018, dated 7 August 2018 that is now in force and to which reference will be made below.

(215) Law no 38/2018, dated 7 August 2018 was amended by Law no 14/2024 dated 29 January 2024. Law no 38/2018, dated 7 August 2018 has repealed the previous regime on the same matter approved by Law no 7/2011, dated 15 March 2011.

(216) Thus, irrespective of the request that will be referred to subsequently in the text, it is legally determined that, if it becomes necessary to indicate data from an identification document that does not correspond to a person's gender identity, this person or their legal representatives may request that this indication will now be carried out by inscribing the initials of the first name appearing on the identification document, preceded by the first name adopted in view of the manifested gender identity, followed by the full surname and the number of the identification document.

nationality, is over 18 years old and is not incompetent ([217]) due to psychic anomaly (Article 7, no 1 of Law no 38/2018, dated 7 August 2018). The same request may be submitted by Portuguese citizens aged between 16 and 18 through their legal representatives. In this situation, the Registrar must carry out a face-to-face hearing of the applicant, in order to determine their express, free and informed consent. A report from any doctor registered with the Association of Doctors or any psychologist registered with the Association of Psychologists is needed, which exclusively confirms the decision-making capacity and informed will of the person whose request is being assessed, with no references to any gender identity diagnoses. The principles of progressive autonomy and the best interests of the child enshrined in the Convention on the Rights of the Child must be taken into account (Article 7, no 2 of Law no 38/2018, dated 7 August 2018). Additionally, an intersex person may request the procedure to change the reference to sex in the civil registry and the consequent change of their first name, from the moment their gender identity is manifested (Article 7, no 3 of Law no 38/2018, dated 7 August 2018).

136 It must be highlighted that in the Portuguese legal system, currently, it is only possible for the right to be exercised within the female/male categorisation, associated with the term sex, in the case of requesting a sex change procedure in the civil registry and consequent change of first name, whether made by a person whose gender identity does not correspond to that assigned at birth, or whether by an intersex person. Under the prevalent perspective, the law in its current state does not allow a change of the reference of sex to 'indefinite' (or 'X') ([218]).

137 As stated in Article 9, no 2 of the same Law, it is not permitted to require any applicant to provide evidence that they have undergone medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as well as psychological and/or psychiatric treatment.

138 According to Article 6 of Law 38/2018, dated 7 August 2018, the procedure is confidential. Exception is made for some situations. It is not confidential upon request of the person, of their heirs, of judicial or police authorities for the purposes of criminal investigation or instruction, or upon judicial decision.

([217]) This Law still refers to *interdição* ('interdiction') and *inabilitação* ('disablement'), even if those measures were repealed by Law 49/2018, dated 14 August 2018, and replaced by 'accompanying measures', as will be stated below.

([218]) This is the conclusion that is presented in the report (Process C.C. 27/2022 SJ-CC) of the Advisory Board of the Institute of Registries and Notaries (Instituto dos Registos e do Notariado) issued on 27 October 2022 (available at <https://irn.justica.gov.pt/Portals/33/C_C_%2027-2022%20SJ-CC.pdf> accessed 26 January 2025).

139 According to Article 9, no 1, of Law no 38/2018, dated 7 August 2018, the decision of the request, being confirmed that the applicant has a legal right to submit the application, has to be issued within a maximum period of eight working days from the date of submission of the application. The Civil Registrar registers the change in the birth certificate, in accordance with Article 69, no 1, o) of the PCRC and, if applicable, issues a new birth certificate, in accordance with Article 123, no 1 of the same Code. The person who has changed the reference to their sex in the civil registry and their first name must initiate the process to update their identification documents within a maximum period of 30 days from the registration in the civil registry (Article 10, no 2 and 3 of Law no 38/2018, dated 7 August 2018).

140 In spite of the changes (regarding the reference to sex in the civil registry and first name), the rights established and the legal obligations assumed before the legal recognition of gender identity are not affected or altered (Article 10, no 1 of Law no 38/2018, dated 7 August 2018).

141 If the Civil Registrar issues an unfavourable decision regarding the request to change the reference to sex in the civil registry and the consequent change of first name, the applicant may submit a hierarchical (*hierárquico*) appeal to the president of the Institute of Registries and Notaries (*Instituto dos Registos e do Notariado* I.P.) under the terms set out in the Civil Registration Code. The same possibility is available if the deadlines legally established for the decision (Article 9, no 3 of Law no 38/2018, dated 7 August 2018) were not complied with.

142 After a change regarding the reference to sex in the civil registry and the first name, another change requested by the same person may only be the subject of a new application with judicial authorisation (Article 6, no 3).

143 The final decision on a person's gender identity, issued by a foreign authority or court, in accordance with the legislation of that country, is recognised in accordance with the law, under Article 6, no 4.

144 When a person who has changed the reference to sex in the civil registry and the first name becomes the parent of a child after the sex change, their gender will be stated on that child's birth certificate, in line with the new record in the civil registry ([219]). In the case of a person who already had a

---

([219]) The legal issues we will refer to subsequently would be addressed by a new law that would result from the promulgation of the above-mentioned (see n 210) Decree of the Assembly of the Republic no 132/XV. The President of the Portuguese Republic decided not to promulgate the Decree and returned it to the Assembly of the Republic. According to the decree, a person who changed their gender would be able to unilaterally determine the change to the marriage certificate and the birth certificate of children (minors or not), without the

child who was born prior to the legal change of sex mention, there is a special provision in the PCRC that applies to this situation: Article 69, no 4. (220) In the light of this rule, a change to the sex mention and the name of the parent will be recorded on the birth certificates of the adult children (older than 18) of the person who has changed gender, upon the children's request. Likewise, a change will be made to the birth certificate of the other spouse with their consent, provided by means of a declaration to the civil registry official or by the submission of an authentic or authenticated document. As far as the birth certificates of children under the age of 18 are concerned, there is no special rule applicable to them. Therefore, the current perspective on the issue is that a change of the parent's name may be registered in the birth certificate of the minor child, Article 69, no 1, r) of the PCRC (221), as the parent's name is an element of identification of the registered child. In practice, following technical guidance issued by the Institute of Registries and Notaries (*Instituto dos Registos e do Notariado*) (222), this annotation is optional and is carried out only upon the request of both parents of the child.

C. *Protection of adults*

The legal framework applicable to the guardianship of incompetent adults **145**
was significantly amended by Law 49/2018, dated 14 August 2018 (223), which established the legal regime of the accompanied adult (*estatuto jurídico do maior acompanhado*). The new regime aims to provide a supportive intervention based on the promotion of the autonomy of the vulnerable person and individually tailored to said person in keeping with the principle of proportionality.

---

other persons (spouse, former spouse, representatives of minor children, adult children) being informed or consulted in the matter.

(220) This provision was introduced in the Civil Registration Code by Law 7/2011, dated 15 March 2011.

(221) Article 69, no 1 r) of the PCRC is a general rule that concerns the change regarding all legal facts that modify the identification elements or the marital status of the registered person.

(222) Technical guidance no 1/CD/2020, dated 15 January 2020.

(223) These amendments were needed in order to comply with international commitments on the protection of human rights, to which the Portuguese State is a signatory, as well as with the Portuguese constitutional framework. For further observations in English regarding the legislative process that led to the enactment of Law 49/2018, dated 14 August and the solutions that were adopted, see Rute Teixeira Pedro, 'Chronicle of a legal reform foretold – the shape of the law to come regarding incompetent adults in Portugal' in Margaret Brinig (ed), *The International Survey of Family Law: 2018* (Jordan Publishing 2018) 441.

146 In the Portuguese legal system, whenever a person turns 18 ([224]), that person is automatically recognised as being legally competent, and, in principle, will be considered as such until the moment of death, even if a lack of some intellectual or volitional ability arises that may affect their decision-making capabilities. However, if an adult needs protection as a consequence of their vulnerabilities, the law provides the possibility of 'accompanying measures' being decreed by a court as a legal response to that situation ([225]). In accordance with Article 138 of the PCC, any person who is unable, for health or behavioural reasons, to 'fully, personally and consciously' exercise their rights fully or fulfil their duties, shall benefit from accompanying measures that aim to allow, as far as possible, the accompanied individual to continue making their own decisions and to ensure their well-being, recovery, the full exercise of their rights and the fulfilment of their duties ([226]) (Article 140 of the PCC).

147 According to Article 141 no 1 of the Civil Code, it is the adult in need (who is the beneficiary of the measures) that requests the application of accompanying measures. Legitimacy to trigger the process that will lead to the application of such measures is also recognised to other persons (the spouse, the *de facto* union companion, by any relative who is entitled to succession rights), but they require the authorisation of the vulnerable adult ([227]) to act. Additionally, the Public Prosecutor's magistrate may also demand the implementation of accompanying measures, with no need for the vulnerable adult's authorisation.

148 The implementation of accompanying measures follows the principle of proportionality, regarding not only their existence, but also their nature and extent. As far as the first aspect is concerned, the referred measures are

---

([224]) Before the entry into force of Law 39/2025, dated 1 April (see n 98) persons under 18 could marry if they were over 16 years old, according to the previous version of Article 1601, a)). In that case, they would be recognised as being legally capable by emancipation (previous version of Article 132 of the PCC). After the enactment of Law 39/2025, dated 1 April, only persons over 18 years old are allowed to marry).

([225]) Previously, there were two types of formal or *de iure* incapacity: *interdição* ('interdiction') and *inabilitação* ('disablement), that entailed the deprivation or limitation of the legal capacity of the vulnerable person. They were repealed by Law 49/2018, dated 14 August 2018.

([226]) An exception is made for any legal exceptions applicable to the situation or any limitations determined in a judicial decision.

([227]) If the vulnerable adult cannot freely and conscientiously authorise, or when there is a reasonable basis to apply accompanying measures, the court may grant the authorisation of the beneficiary and allow any of those individuals mentioned in the text to act (Article 141, no 2 of the PCC). The request to supply the beneficiary's authorisation may be joined to the request to apply accompanying measures.

subsidiary in nature, as the law prefers other solutions: accompanying measures are only judicially imposed if the support of the vulnerable adult cannot be 'guaranteed through the general duties of cooperation and assistance' (Article 140, no 2 of the PCC (228). If the accompanying measures are implemented, a person or persons – referred to as 'companion(s)' (*acompanhante*) – will be appointed by the court to 'accompany' the vulnerable adult, according to Article 143 of the PCC (229).

149 As far as the second aspect is concerned, the extent of the measure will correspond to what is strictly necessary on the basis of a case-to-case assessment. The measures that are determined by a court in each situation aim to promote the capacities that the accompanied person still has in order to ensure the full exercise of their rights and the fulfilment of their duties. As a consequence, currently, the rule is the legal capacity to act of the accompanied person and the exception is restrictions to it, even for vulnerable individuals to which accompanying measures are judicially decreed. Being necessary, the court will tailor the measures, after personally hearing the beneficiary (Article 139 of the PCC) and based upon the evidence gathered. The vulnerable person subject to accompanying measures is allowed to exercise personal rights (230) and to conclude contracts within their current life, unless otherwise provided by the law or judicial decision (Article 147, no 1 of the PCC).

150 In the light of the principle of proportionality and the aim of promoting personal autonomy, a specific and individualised response, appropriate to the concrete situation of the protected person, will be judicially designed, impacting only in those areas where the individual really needs support (Article 145, no 1 of the PCC). The law also considers the possibility that vulnerable adults conclude a contract of 'mandate for accompaniment' (*mandato com vista acompanhamento*), in a similar way to an agency contract (231). This contract is taken into account by the court when deciding the case (Article 156, no 3 of the PCC).

---

(228) Under Article 1874 of the PCC, parents and children are reciprocally bound to provide each other with help and assistance and to show respect.

(229) As a rule, the companion(s) will be chosen by the 'accompanied person' (*acompanhado*) or by their legal representative. In the absence of choice, the provisions stated in Article 143, no 2 of the PCC apply.

(230) In accordance with Article 147, no 2 of the PCC, among other personal rights, these qualify as such: the right to marry, the right to constitute a *de facto* union, the right to procreate, to declare parenthood, the right to adopt, the right to take care of and to educate one's children or adoptees, the right to choose a profession, the right to travel in the country or abroad, the right to establish domicile and residence, the right to create and maintain relationships with whoever one wants to and the right to make a will.

(231) The adult, as principal, may appoint someone, who will act as agent, to manage their interests, and they may grant powers of representation. This contract is freely revocable

151 The type of accompanying measures vary. According to Article 145, no 2 of the PCC, these include: the exercise of the parental responsibilities of the accompanied person; the general representation or special representation, with an explicit indication of the categories of acts for whose practice representation will be needed; the total or partial administration of assets; the simple requirement of prior authorisation for the performance of certain acts or categories of acts (Article 145, no 2 of the PCC). Acts of disposition of immovable property will always require prior and specific judicial authorisation (no 3 of the same Article).

152 The acts performed by the accompanied adult that do not respect these accompanying measures that were decreed will be qualified as voidable (Article 154, no 1 of the PCC). This consequence applies not only to acts carried out following the registration of the accompaniment, but also to acts carried out after the start of the process has been announced and only after the issue of the final judicial decision whenever they prove to be harmful to the accompanied person. Regarding acts performed before the announcement of the process, the regime of 'accidental incapacity' set out in Article 257 of the Portuguese Civil Code is applicable ([232]).

153 The court periodically reviews the accompanying measures in force, and at least every five years (Article 155 of the PCC).

V. Conclusions

154 As explained in this report, in the Portuguese legal system, it is clearly evident that, in the last three decades, a trend of de-judicialisation of decisions traditionally issued by courts has been taking place. This phenomenon is especially evident regarding some family law and succession law matters. Within these fields of law, Civil Registrars (*Conservadores do Registo Civil*) and Notaries (*Notários*) have increasingly been entrusted with the extra-judicial administration of justice competences. This legal change aimed to reduce the number of cases pending in the judicial courts, exempting them from the resolution of issues considered non-contentious, and simultaneously promoting the attainment of agreements between the parties involved.

---

by the principal and will follow the legal regime of the mandate (Articles 1157 and following of the PCC).

([232]) Article 257 of the PCC states that the declaration made by a person who, for any reason, became accidentally incapacitated to understand the meaning of it or did not have the free exercise of their will is be considered voidable, provided that the fact was actually known by the declarant or that, with the normal diligence, the fact could (and consequently should) be known by them, as it was well known.

ROMANIA

by *Ioan-Luca Vlad*

I. Introduction

Romanian law is a civil law system, which until recently adhered strongly to the concept of the court's exclusive competence in family law. However, in the past decade, several reforms have liberalised the family law field, giving more powers in non-contentious matters to public notaries, who are non-judicial authorities. This is especially true for proceedings concerning matrimonial matters, including parental responsibility for minor children. In the field of succession law, there has always been a two-track system, with a non-judicial competence for notaries, who are primarily entrusted with dealing with all non-contentious procedures relating to an estate. **1**

Both substantive family and succession law are part of private law and are therefore regulated by the first (Book I, Title II – Natural Persons), second (Book II – On the Family), and fourth (Book IV – On Inheritance and Gifts) of the Civil Code that was adopted in 2009 and entered into force on 1 October 2011 (hereinafter: CC). Family and succession law is mostly independent from the law of obligations, property law, or contract law. **2**

In terms of sources of law, Romanian court judgments do not, as a rule, have any precedent authority. There are, however, three exceptions. The Constitutional Court (*Curtea Constituţională*, hereinafter: CCR) sits outside of the normal court system and deals primarily with the conformity of laws with the Constitution. Its decisions are binding *erga omnes*, with any law found unconstitutional being abrogated automatically. The Civil Code itself – with respect to the provisions on the protection of adults – as well as other procedural family law provisions, have been found unconstitutional, resulting in recent significant changes to their contents. The High Court of Cassation and Justice (*Înalta Curte de Casaţie şi Justiţie*, hereinafter: ICCJ) sits at the top of the judicial hierarchy. It has the competence to issue two kinds of universally applicable judgments. The reply to preliminary questions is a new procedure, which has, up until now, been used sparingly. In such replies, the ICCJ issues binding interpretations on questions submitted to it by lower courts, when they can prove differing interpretations by courts of appeal. It also binds the questioning court in a case brought before it. The more established recourse in the interest of law is a *post-factum* procedure, which does not affect any individual case, but is initiated *ex officio* when lower courts find that there is a significant material divergence between the solutions of the courts of appeal. **3**

4 Although theoretically Romanian law provides for specialised family courts, such a system has not yet been set up, and ordinary courts are generally competent for family as well as succession matters. The four tiers of the civil court system are the lowest court (*Judecătorie*), the tribunal, which corresponds to the county level (*Tribunal*), the courts of appeal (*Curtea de Apel*), of which there are 15, and the ICCJ. In practice, family and succession matters rarely reach the ICCJ, because the competence in the first instance lies with the lowest courts and ends in the courts of appeal. Exceptionally, they reach the ICCJ through the recourse in the 'interest of law' procedure, or through preliminary questions. Procedure is governed primarily by the Romanian Code of Civil Procedure (*Codul de Procedură Civilă*, hereinafter: CPC), while non-contentious matters are supplemented by Law 36/1995 of Public Notaries and Notarial Activity (hereinafter: LNP).

5 An essential authority in the administration of family and succession law is the public notary. In Romania, public notaries exercise State authority but are also independent legal professionals. They are organised in individual and common offices, with a *numerus clausus* pertaining to the number of inhabitants of each county. They have exclusive territorial competence in some matters (such as, according to the last domicile of the deceased in inheritance matters), and issue authentic documents, including matrimonial conventions, certificates of inheritance, European Certificates of Succession, and certificates of divorce. Notaries have been the beneficiaries of most de-judicialisation measures, and they have developed a well-functioning infrastructure of public registers, which serve the need for legal publicity:

- National Notarial Register of Successions and European Certificates of Succession (RNNES – CEM): includes all succession cases regarding persons last domiciled abroad or with unknown domicile, who left assets within Romania; and any successions where European Certificates of Succession have been issued.
- National Notarial Register of Succession Options (RNNEOS): includes all notarial acts regarding the acceptance or disclaiming of a succession, and revocations of disclaimers; accepting or renouncing the function of testamentary executor; and non-acceptance declarations. Non-acceptance declarations are confirmations that the heir has not accepted the estate within one year of death and is therefore considered to have been renounced.
- National Notarial Register of Gifts (RNNEL): includes gifts, whether donations, wills or codicils, declarations revoking wills and codicils, testamentary dispositions regarding money and titles of value made before credit institutions and their revocation, donation contracts, acceptance of donation offers, when these are authenticated by Romanian notaries or consuls.
- National Notarial Register of Powers of Attorney and their Revocation

(RNNEPR): includes powers of attorney, mandates, and their revocation, when made in an authentic form; administration contracts and their revocation; acts designating a guardian; renunciations issued by representative; judgments annulling powers of attorney.
- National Notarial Register of Matrimonial Regimes (RNNRM): maintains the complete list of couples and their matrimonial regimes, as well as matrimonial agreements.
- National Notarial Register of Natural Persons' Creditors and Oppositions to Succession Divisions (RNNEC): includes voluntary submissions from creditors of natural persons of their claims (for the purpose of legal publicity) as well as anyone's submission against a succession taking place without their knowledge (the register ensures that such interested parties are notified, so as to present their claims, whether against the succession or against an heir).
- National Notarial Register of Divorce Requests (RNNECD): includes all divorce requests submitted to public notaries, to prevent double registrations, together with their outcomes.
- National Register of Death Acts (RNEAD): includes all death acts, as communicated by civil status offices (including those transcribed in Romanian registers), and is interconnected with the other registers, to trigger automatic notifications, cancellations of powers of attorney and other lifetime documents.
- National Notarial Register of Acts of Giving in Payment (RNNEADP): includes all notarial acts (this being the compulsory form) of Giving in Payment – a procedure that became very relevant with the introduction of new legislation forcing credit institutions to receive in payment assets put up as collateral in lieu of repayment of the credit.
- National Notarial Register of Patrimonial Groups Dedicated to Professions (RNPMP): a voluntary register whereby any natural person acting as a professional can register the composition of patrimonial groups (parts of their patrimony) dedicated to the exercise of their profession, for protecting the other parts of their patrimony from creditors' claims.
- National Notarial Register of Support and Protection Measures (RNEMSO): includes all the new support and protection measures taken by notaries as well as courts, regarding natural persons, under the reform of the protection system described in this report. This register is the newest, being activated on 25 August 2023, at 08:00.

All these registers are maintained in a secure manner by an entity called CNARNN-Infonot, [1] and are interconnected with the population evidence database and courts. They are public, with some limits (for example, only the **6**

[1] Available exclusively online at <https://cnarnn.infonotsystems.ro/ersan/> accessed 6 January 2024.

author may make requests regarding any existing wills and codicils, while they are alive), and provide a wide-ranging picture of a person's patrimonial life and interests, as well as their family and civil status.

7 Because public notaries cannot deal with any issue when the parties are not in agreement, they cannot be considered 'courts' in the sense of the European Regulations, and their documents are authentic acts, not decisions. Any document or minutes of a notary may be challenged before the competent lowest court, including minutes rejecting the request for a notarial service.

8 Mediators are a relatively new regulated profession in Romania, and they occupy a small niche in the administration of law. Governed by Law 192/2006 on Mediation and the Organisation of the Mediator's Profession, they do not have to be legally trained, and their role is strictly to facilitate an understanding between the parties to a dispute (facilitative mediation). Inasmuch as an agreement is reached, minutes are signed, which can have a direct effect only with regard to movable assets. When non-patrimonial matters (such as visiting rights or parental responsibility), immovable assets, or estates are concerned, the minutes of mediation must be submitted to the court or notary for them to become effective. This means that the appeal of mediation is rather small. Mediation agreements can be challenged if a) the formalities are not respected (when non-patrimonial matters, immovable assets, or estates are concerned); or b) only for annulment, not on the merits (in all other cases).

9 Finally, town halls (*primărie*) play a specialised role in family and succession law, through two offices. The civil status office has become competent to pronounce divorces, when the parties agree, are both fully competent, there is no issue regarding assets, and there are no minor children. The procedure in this case is purely administrative. The tutelary authority (which is an office in each town hall) is competent to ensure that the interests of children and adults placed under protection measures are respected. The Constitutional Court has decided (2) that any decisions (authorisations) for legal acts of minors or adults under protection measures must be taken by the (family) courts, rather than administrative authorities, and therefore, the role of the tutelary authority has been diminished. The reason is related to the powers of the administrative authority. They can no longer take decisions: this

(2) CCR, Decision 795/2020 regarding the unconstitutionality exception of Art 229(3) of Law 71/2011 for the implementation of Law 287/2009 on the Civil Code, in *Monitorul Oficial*, Part I, no 1299/28.12.2020. CCR, Decision 18/2022 regarding the admission of unconstitutionality of the Law regarding the change and completion of Art 229 of Law 71/2011 for the implementation of Law 287/2009 on the Civil Code, in *Monitorul Oficial*, Part I, no 282/23.03.2022.

competence lies exclusively with the courts. The administrative authorities essentially only help.

Specific procedures which have been de-judicialised include: **10**

a. Divorce: Parties to an uncontested divorce now have the option between going to court, going to a notary (who can conclude the divorce comprehensively, including agreements on minor children, parental rights, and assets), and, if the parties do not have minor children and do not wish to divide assets immediately, going to the civil status office. In all cases where one party is not fully competent, or there is a dispute, the courts remain exclusively competent.
b. Parental responsibility: The parental plan of access, interaction, and involvement of the parents regarding the child can be signed by the parents (including unmarried ones) before the notary. In case of disagreement, the court remains exclusively competent.
c. Succession procedures: Romanian law gives primary competence for successions to the public notary, with court access being available only after a registry search by the notary, showing all the relevant entries in the national notarial registers. Parties are always free to agree before a notary on any aspects of a succession, and their agreement can be total or only partial, in which case courts only remain competent to decide on contentious matters between the parties. Succession procedures can include minors or persons under protection, who are assisted by their legal representatives, subject to the agreement of the (family) court to the proposed inheritance and division documents.

Following Decision 601/2020 of the Constitutional Court ([3]) that found as unconstitutional all provisions regarding persons under interdiction (a measure adopted in case of a party's complete loss of mental capacity), there has been a major reform, introduced by Law 140/2022. The main principles established by the CCR are that protection measures must be proportional to the degree of capacity of the protected person, adapted to their circumstances and individual needs, as well as limited in time and periodically re-examined. Accordingly, the new reform has introduced three types of protection for persons, as follows: **11**

a. Assistance for concluding legal acts: This is available to adults with full capacity, who nevertheless need assistance in the form of an aide when concluding legal acts and representation in tasks of minor importance. Assistance is a liberal (free) task. The assistant is appointed through a notarial act, the entire procedure being non-judicial.

([3]) CCR, Decision 601/2020 regarding the unconstitutionality exception of Art 164(1) Civil Code, in *Monitorul Oficial*, Part I, no 88/27.01.2021.

b. Judicial counselling: This is available to adults with partial capacity to act, who are now assimilated to minors between 14 and 17 years of age. Placing a person under judicial counselling, as well as most procedures regarding the functioning of this regime, are judicial, although a person can designate their desired guardian by notarial act, and there is an advisory role for a family council when constituted.

c. Special guardianship: This is available to adults without the capacity of exercise, as well as to minors over 14 of age who also lack the capacity to exercise. Placing a person under special guardianship as well as the procedures regarding the functioning of this regime are judicial, the person being thereby assimilated to a minor under 14 years of age. A person may again designate their desired guardian by notarial act.

12 The main considerations which have supported a tendency towards de-judicialisation in Romania relate to the availability and timeliness of judicial procedures, which recently, due to various political and social factors (early pension of many judges, unavailability of positions at the National Magistrate Institute, work conflicts resulting in judicial strikes) have become an issue. Essentially, court procedures, except those most urgent, are both complex and very slow, with many cases continuing for two or more years, including family ones. By comparison, most notarial procedures can be concluded positively in one or two hearings, in a private and accessible setting (there are notaries in most communes), with specialised assistance included in the cost (explaining the contents of the legal document, collecting various administrative certificates required for every step, the appointment of a special curator, etc).

13 The main considerations which nevertheless militate towards maintaining the role of courts are, on the one hand, the cost of notarial services, which can be high in some cases, particularly when it comes to inheritances, and, on the other hand, the need to ensure that persons with reduced or no capacity to act are sufficiently protected. The solution to this problem has been found by allowing such persons to participate in notarial procedures, with the agreement of the court on the proposed act if it is of greater significance. Finally, there is also the principle of agreement, whereby notaries cannot overcome the disagreement of any party on any matter. In such cases, either the other parties reach a compromise with the one disagreeing (which is the usual course of action, incentivised by the speed and flexibility of notarial negotiations), or the notary must suspend the case and refer the parties to the court competent for taking a decision. Once the decision is taken, the parties return to the notary to continue the case, whereby what the court has decided is taken as *res judicata* as against the initially non-agreeing party.

14 The latest population statistics are available for the year 2021. In 2021, there were 180,735 live births, the lowest number of births since 1930. Of these,

68.1% were within marriage, and 31.9% were outside marriage. In 2021, there were 334,910 deaths, the highest rate of death since 1938. Most deaths occur in the over 75 years of age bracket. These two trends have been maintained over the years, and have led, together with emigration, to a significant reduction in Romania's population. Important discussions are taking place regarding the possible merging of local authorities (many of which are insolvent, serve a few hundred persons, and cannot ensure proper public services). In 2021, there were 114,207 marriages, which is a rising trend. There is a general trend towards marriage between older individuals. At the same time, the number of divorces was 27,024, constantly rising. Of these, almost 63.3% of divorces were by agreement, before notaries or the civil status office, reflecting the need to avoid long court procedures.

On the side of courts, the latest available statistics are for the year 2022. During this year, courts registered 2,129,827 new cases (a large increase) and the year began with 842,927 ongoing cases (a constant number). Of these, the vast majority pertain to the lowest courts, which deal primarily with family and succession matters, whereas tribunals are in theory the courts with primary general competence. There were 115,201 new cases in 2022, submitted to the lowest courts, in the matter of 'family and minors', corresponding to 7.4% of total cases in the lowest courts. As for estates, there were 9,027 estates procedures opened in total or less than 1% of the total. Within the 'minors and family' category, the statistics are [4]:

15

a. Divorce: 23.3%, represented mostly by contested divorces, with 26,819 cases.
b. Protection orders: 16.9%, with 19,437 cases.
c. Involuntary medical internments: 8.2%, with 9,458 cases.
d. Curatorships: 7.7%, with 8,845 cases (however, this was before the full effect of the new reform of adult protection, there being signs that in this year the number grew significantly). Because of the changes that occurred during the year, it has to be added here that 3% or 3;431 cases concerned the placement of persons under interdiction, and that the 1.9% or 2,216 cases concerned guardianship, all of which were automatically converted to the new provisions of adult protection upon the entry into force of the respective law.
e. Maintenance requests: 6.4% or 7,393 cases.
f. Presidential ordinance requests (meaning immediate provisional measures): 5.9% or 6,744 cases. These are particularly diverse, including requests such as: entering a place which is in co-ownership; allowing the

[4] The data were included in an unpublished report of the National Chamber of Notaries.

use of drinking water or the use of water for animals; undertaking urgent repairs to the common home; suspending demolition; cleaning up the common home to prevent disease; opening a safe; allowing urgent personal contacts with a sick parent; stopping factual violations of one's home. (5)

g. Exercise of parental authority: 5.1% or 5,878 cases.
h. Division of common assets or liquidation of the matrimonial regime: 3.7% or 4,260 cases.
i. Establishing the domicile of the minor child: 2.8% or 3,244 cases.
j. Denial of paternity: 1.7% or 2,015 cases.

16 Overall, the picture painted by these statistics confirms the general trends: there are fewer births, but more marriages, and more divorces, most of which are resolved before a public notary. The lowest courts, which are primarily competent for family and succession matters, generally deal with the remaining contested divorces, and the administration of the adult protection system. The remaining issues of family and succession law are divided between courts and notaries.

II. Family law

17 Romanian family law was governed, traditionally, by the 1864 Civil Code. In 1953, the communist regime introduced the Family Code, which significantly changed family law provisions by making them stricter, imposing a single, universal, matrimonial regime (that of legal community of property), and simple, straightforward rules regarding family life, corresponding to a society where most persons married for life and had few personal assets. Divorce was possible only for good reasons (either fault or as a remedy for objective situations such as incurable diseases) and in court. This situation was maintained for many years even after the dissolution of communism, and its effects are evident even today, as the vast majority of married couples live under the legal default regime of community of property and understand marriage as a sharing of assets in common.

18 The new Civil Code nevertheless took account of the changes in society and re-introduced several alternative matrimonial property regimes, with the 'conventional community' one being the most customisable by the parties. It also established the character of divorce as a primarily non-contentious and non-judicial matter, left at the disposal of the parties, with specific safeguards for minor children. The same can be said for the division of marital assets, which can occur during marriage, at the time of divorce, or thereafter. Courts and notaries are now equally entrusted with the application of family law.

---

(5) Roxana Stanciu, *Ordonanţa preşedinţială în materie civilă: Practică judiciară potrivit noului Cod de procedură civilă* (Hamangiu 2016) cases 70, 85, 86, 95, 101, 108.

Very recently, the decision of the European Court of Human Rights in the *Buhuceanu* case (Request 20081/19 and other 20), issued on 23 May 2023, and definitive on 25 September 2023, has established that Romania violated Article 8 of the European Convention on Human Rights, with regard to the lack of any legal recognition of same-sex couples. The Court noted that there have been bills concerning the recognition of same-sex partnerships, but these have not been adopted, and that there are no means whereby same-sex relationships can be adequately recognised and protected by law (para 83). At the time of writing this report, no legislative development has been announced or is expected because of this decision. However, it remains to be seen how the courts will apply it, since concluded cases may be reviewed by the affected parties who have won before the European Court of Human Rights, with a view to revising the judgments to conform with the Court's decisions. It is therefore possible that some form of legal effect could be given to the ECtHR decision, strictly regarding the complainants, within proceedings that were brought, and lost before Romanian courts. **19**

A. *Divorce (and legal separation)*

Romanian law does not recognise the concept of legal separation, with divorce being the only way to end a marriage. Otherwise, the marriage remains fully valid. Divorce is governed by the Civil Code, the Civil Procedure Code, and the Notaries Law. Romania does not recognise civil partnerships, accepting at present only heterosexual marriages. **20**

Article 277 CC states: **21**

> (1) 'Marriages between persons of the same sex are prohibited.
> (2) Marriages between persons of the same sex solemnised or contracted abroad either by Romanian citizens or by foreign citizens are not recognised in Romania.
> (3) Civil unions between persons of the opposite sex or of the same sex solemnised or contracted abroad either by Romanian citizens or by foreign citizens are not recognised in Romania.
> (4) The legal provisions regarding the free movement on the Romanian territory of the citizens of Member States of the European Union and of the European Economic Area remain applicable.

Constitutional Court Decision no 543/2018, published in the Official Journal of Romania no 842 of 3 October 2018, admitted the plea of unconstitutionality and established that the provisions of Article 277, paragraphs (2) and (4) of the Civil Code are constitutional to the extent that they allow the granting of the right to stay on the territory of the Romanian State, under the conditions stipulated in European Union law, to the spouses – citizens of the

Member States of the European Union and/or citizens of third States – resulting from marriages between persons of the same sex, concluded or contracted in a Member State of the European Union.' (6)

1. *Procedures available for divorce:*

22 Spouses that wish to end their marriage must decide whether to do it contentiously or by agreement. If they decide to invoke any other reason for divorce than agreement, the courts remain exclusively competent for their case. As part of the divorce proceedings, they can also decide on the future surnames of the spouses, the division of their assets, any maintenance payments, parental authority, and any ancillary matters.

23 Should the spouses agree, they have two or three choices, depending on the presence of minor children. They can go to the court, to obtain a decision on the divorce, as well as any ancillary matter. In this case, the court reviews any agreements made with respect to children (best interests). They can also go to a notary, who issues a certificate of divorce, including any agreement made with regard to children (the existence of which is compulsory if there are minor children), surnames and assets. Finally, if they do not have minor children, and do not wish to deal with their assets either, they can go to a civil status office, which declares only their divorce and takes account of their decision regarding their future surnames.

2. *Annulment of a defective marriage*

24 If the marriage was not validly concluded, Romanian law provides for two possible effects: absolute nullity and relative nullity. Absolute nullity arises when the marriage was entered into against the dispositions concerning consent, bigamy, filiation, personal presence, and agreement of the spouses at the ceremony, and the presence of witnesses and the civil status officer. Absolute nullity also arises in marriages when one spouse was not 16 years of age or older. However, in this case, nullity is remedied (without retroactive effects) if, by the time the judgment becomes definitive, both spouses turned 18, or the wife gave birth or was pregnant. Further absolute nullity appears in the case of fictitious marriages (concluded for purposes other than establishing a family), nevertheless, it is also remedied (without retroactive effects) if, by the time of a definitive judgment, the spouses started cohabiting, the wife gave birth or was pregnant, or two years or more have passed since the marriage was celebrated.

---

(6) Translation and footnote verbatim in Romanian Civil Code, Article 277, 82 (translated by Oana Gheorghiu, Monitorul Oficial, 2022). (Comment: this book has no claimed author).

Relative nullity appears when the marriage was concluded against the dispositions concerning required consents, when consent was vitiated by error as to the physical identity of the future spouse, influence, or violence, when one spouse was temporarily lacking discernment at the time of marriage, and the marriage was between a guardian and the person under their guardianship. **25**

Any interested person may invoke the absolute nullity of marriage, while relative nullity can only be invoked by the protected party, and only within a six-month limitation period (starting differently depending on circumstances). In all cases, nullity proceedings are judicial. **26**

3. *Jurisdiction of notaries and civil status officers for divorce*

According to Article 15 LNP, divorce lies in the competence of the notary located in the circumscription (area of competence) of the lowest court in whose county the marriage took place or the last common habitual residence of the spouses. According to Article 137(2) LNP, a cumulative condition of competence is that the law applicable to the divorce is Romanian law. It follows that divorces subjected to foreign law cannot be dealt with by the notary. Nevertheless, the parties may be invited to conclude an agreement on the law applicable to the divorce, under Article 5 of Regulation 1259/2010, to overcome the situation foreseen by Article 8 of the same, when the applicable law may be foreign law due to the subsequent move of one or both spouses to another State. (7) **27**

According to Article 375 CC, divorce by agreement without minor children also lies in the competence of the civil status officer at the place of marriage or that of the last habitual residence of the spouses. In the case of civil status officers, there is no provision regarding the application of Romanian law. **28**

No notification of judicial authorities is required in either case, and no provisions for *lis pendens* are made. The reason for this is that, in Romania, there must be the full agreement of both parties for either of the two out-of-court procedures. The law assumes that the party who initiated judicial proceedings would inform the authority of their disagreement. There are further no notification or service rules, because in both cases, parties must be present personally at least once. Regarding the outcomes, divorces (annotations) are entered in the civil status register, by *ex officio* notification, while both the divorce, as well as any agreements on the dissolution of the matrimonial regime are entered in the National Notarial Register of Matri- **29**

(7) Ana-Luisa Chelaru, *Repere actuale în dreptul international privat: Persoanele, succesiunile, familia* (Universul Juridic 2018) 355ff.

monial Regimes, also *ex officio*. The results of such agreements are further entered into the land registry and other property and tax registers as appropriate.

4. *Formal and substantive requirements*

30 To apply for a divorce before a notary, spouses must be adults, personally present, fully competent, request the divorce by agreement, have Romanian law applicable to their divorce, and address the territorially competent notary. There is no requirement for the parties to be represented or assisted by counsel. The parties may have minor children, as the notary is competent in matters of maintenance and parental responsibility.

31 To apply for a divorce before a civil status officer, spouses must be adults, personally present, fully competent, request the divorce by agreement, address the territorially competent civil status office, not have minor children, and not have any agreement on their matrimonial assets. There is no requirement for assistance or representation. Civil status officers are not competent to deal with maintenance issues.

5. *Procedural steps*

32 For a notarial divorce, parties must address the competent notary public, which verifies its own competence and rejects the case otherwise. Proof of the last common habitual residence of the spouses is made by means of the spouses' identity cards, or by their authentic statements. The spouses may be represented in the beginning by a representative with an authentic power of attorney, however, they must be personally present at the second compulsory hearing. The spouses declare the existence of any minor children, present their draft agreement (or verbal understanding) on parental responsibility, as well as their proposed agreement on their own and their children's surnames. If there is no agreement on either point, the request is rejected. The notary then gives the parties 30 days' reflection time.

33 When there are minor children, the notary notifies the competent tutelary authority with a copy of the parents' draft agreement, including the exercise of parental authority, the children's designated place of residence, plan of contact with the non-resident parent, and the parents' respective contributions to the raising, education, and professional preparation of the children. The competent authority then undertakes a social inquiry report, visiting the child, their parents, school, neighbours, etc, with a professional psychologist, and hearing the child's opinions. It is the social inquiry report that contains the only opinion on the conformity of the parents' draft agreement with the child's best interests.

The notary must, according to the law, hear a child aged ten or older. **34** Nevertheless, there is an issue regarding the fact that hearing the child does not have any legal effect on the parents' agreement, particularly when the social inquiry report assesses it to be compliant with the child's best interests. If it is not considered so, then the notary may reject the divorce request.

Once all these procedures have been undertaken, the parental responsibility **35** agreement is authenticated first, and then the minutes of admitting the divorce request. The notary issues the divorce certificate, in six originals, and communicates it to the relevant authorities and registers. At the same time, any agreement on the matrimonial property can be authenticated.

Impartiality (and the compliance of agreements with mandatory rules) is **36** guaranteed by the fact that the notary cannot be related, in the pay of, or otherwise in a conflict of interests with either party, but more importantly, by the provision that either party may withdraw from the procedure freely, at any point in time up to the authentication of the divorce minutes.

Any interested person can raise objections to the notary's acts through an **37** action for annulment in court (on essentially procedural grounds, such as the forging of public documents, incapacity of one of the parties, public order nullity). Further, a complaint can be brought against any decision to reject the request, before the lowest court, within ten days from receiving it. The court may order the notary to go ahead with the request of the parties.

For a divorce before the civil status officer, the spouses must appear **38** personally or be represented by someone with an authentic power of attorney. After submitting their request, they receive a reflection period of 30 days, at the end of which, they return to the civil status officer (strictly personally), and once they confirm their desire to divorce, the civil status officer issues the divorce certificate. The spouses must also agree on their future surnames and must declare that they have no minor children. The civil status officer registers the divorce directly in their marriage record and issues a certificate of divorce. The divorce is also communicated to the National Electronic Register of Matrimonial Regimes, even though the matrimonial assets themselves are not divided. Either party may complain at the lowest local court about the acts of the civil status officer.

6. *Effects of divorce*

Marriage is dissolved on the date the court judgment pronouncing the **39** divorce becomes definitive, or on the day the divorce certificate is issued (the decision is constitutive). Spouses may agree to keep the surnames they had during their marriage, or to revert to their original surnames, which is the default option. The matrimonial regime ends on the date the divorce was

requested, although the parties may ask the court (and only the court) to declare that it had ended before that date, for reasons of separation in fact.

40 Only the court may award damages due to the spouse who, while blameless regarding the divorce, suffers from the dissolution of the marriage. Upon divorce, the maintenance obligation between the spouses ends. The divorced spouse is entitled to maintenance if in need, due to an incapacity which was present while still married, or within one year from divorce if related to the marriage. The spouse at fault has such a right only for one year after divorce. In any case, the maintenance obligation ends with the re-marriage of its beneficiary.

41 The innocent party may also receive a 'compensation payment' the aim of which is to allow them to maintain their lifestyle despite the effects of divorce. Two cumulative conditions have to be fulfilled for such payment: the marriage lasted for at least 20 years, and no maintenance was requested. The compensation payment can be set in money, or in the right to use properties belonging to the other party. The payment ends with the re-marriage of the beneficiary, or when they gain other resources enabling them to maintain their lifestyle as during the marriage. Succession rights also end upon divorce.

42 As can easily be observed, none of the potential payments that may derive from a divorce can come into effect when it was sought at the civil status office. Only maintenance payments can be agreed on through a notary divorce. The other two types of payment are conditioned on one spouse being at fault, and thus on a judicial divorce. Maintenance payments can be included in the spouses' agreement as part of the divorce proceedings. The maintenance agreement authenticated by a notary is directly enforceable, as is the case with an uncontested monetary claim. The authentic agreement also benefits from special procedures in cross-border cases, through administrative authorities, to facilitate its recovery. (8)

7. *Rules on consent and effect*

43 General rules on consent, intent, and effect apply as a matter of principle to divorce and its legal effects. The acts which form part of the divorce process (including decisions as to surnames, matrimonial property liquidation, and parental responsibility) are binding between the parties and as to third parties as well once they have been properly entered in the relevant registers. Regarding representation, it cannot constitute a vitiating factor because, in

(8) Flavius George Păncescu, *Drept procesual civil international* (Hamangiu 2017) 253ff, 264.

either out-of-court procedure, the parties must be present personally at least once and confirm their intentions. Regarding vitiating factors as to the parties' consent, if, despite their right to withdraw at any time, the divorce goes ahead against their will, they can raise objections to the certificate of divorce (or any of the acts authenticated by the notary) before the local lowest court for annulment. However, the burden of proof is on the claimant and such claims do not generally succeed, as the notaries ensure that both parties are representing their wishes with free will.

44 The acts issued by the notary are binding *erga omnes* in all their parts. The parties can shape them almost fully, particularly if they do not have minor children. They take effect immediately upon authentication, and without a review by any other authority. Their publicity is ensured by an entry in the relevant registers (civil status register, register of matrimonial regimes, land register, etc). However, because the notary only has jurisdiction for non-contentious proceedings, authentic documents do not become *res judicata*. Any aspect contained therein can be challenged in court and, in a future trial, they have only evidentiary, and not prejudicial effects.

8. *Cross-border cases*

45 Romania is not bound by any EU law instrument as regards the jurisdiction of notaries or civil status officers. Therefore, the rules on jurisdiction are strictly national, foreseen in the CC and LNP. Regarding applicable law, Romania applies Article 5 of Regulation 1259/2010. (9)

46 If the notary finds that Romanian law is applicable to the divorce, they can proceed. Otherwise, they must reject the divorce request. In either case, the lowest local court may hear the complaint against the notary's acts. Romanian notaries issue certificates based on Articles 36(1)(a) and 66(1)(a) of the Brussels IIb Regulation (2019/1111).

47 Regarding a foreign non-judicial decision, the basic rules on recognition are contained in the CPC, Book VII. According to this, Romanian courts are exclusively competent for proceedings regarding personal status referring to civil status acts concluded in Romania, regarding persons domiciled in Romania and who are Romanian citizens; as well as for the dissolution, nullity or annulment of marriage, and any other spousal disputes (except those relating to immovable property located abroad) if, at the time of the request, both spouses are domiciled in Romania and at least one of them is a Romanian citizen. If either of these conditions is not met, the exclusive

(9) Dan Andrei Popescu, Elena Alina Oprea, *Drept international privat* (Hamangiu 2023) 88–93, 387–389.

jurisdiction does not arise (Article 1079). Thus, if the exclusive jurisdiction of Romanian courts was violated, then the recognition of the foreign court judgment which did so will not occur.

48 Romanian courts are (not exclusively) competent for cases concerning maintenance (when the claimant is domiciled in Romania), the protection of the minor or adult who is a Romanian citizen domiciled abroad, divorces (where the claimant has been domiciled in Romania for at least one year), and proceedings between persons domiciled abroad, regarding civil status acts registered in Romania if at least one party is a Romanian citizen (Article 1081). In the sense of the CPC, the term 'courts' includes other authorities as well unless the law explicitly states otherwise (Article 1094).

49 Article 1094 CPC defines a 'foreign judgment' as including non-contentious jurisdictional acts of courts as well as of notaries or any other competent authority. Therefore, the same rules apply to the recognition of judgments as well as to non-judicial decisions.

50 Article 1095 CPC provides that foreign judgments are recognised *de jure* if they refer to the personal status of citizens of the State where they were issued; as well as if, being pronounced in some other State, have been recognised first in the State of each party's citizenship, or – when they have not been recognised – have been pronounced according to the law determined by Romanian (including EU) private international law, are not contrary to public order, [10] and the right to defend oneself has been respected.

51 In any other case, foreign judgments (which includes non-judicial decisions) will be recognised only by courts, through the exequatur procedure, providing they are definitive, the authority had competence, and there is reciprocity (which is presumed) (Article 1096). The exequatur procedure always lies in the competence of the tribunal. [11]

52 However, one should also bear in mind that, according to Law 119/1996 regarding civil status, foreign civil status acts concerning Romanian citizens are not recognised in Romania, except for the strict purpose of their transcription or inscription in Romanian civil status registers. As such, a Romanian citizen divorced abroad (whether in court or in out-of-court proceedings) must take one of two paths:

a. If they were also a citizen of the State pronouncing the divorce, and the other party is not a Romanian citizen, the divorce will have to be

---

[10] Dan Petrache, *Ordinea publică de drept international privat* (Universul Juridic 2019).

[11] Şerban-Alexandru Stănescu, *Procesul civil international* (Hamangiu 2017).

registered administratively directly, and only then will it be recognised by other authorities.

b. If they were not a citizen of the pronouncing State, or their spouse was, exclusively, a Romanian citizen, then the divorce will first have to follow the exequatur procedure. This will then be registered administratively based on the resulting Romanian decision to recognise it, and only then will it be recognised by other authorities.

Maintenance or property-related documents from abroad that are drawn up in the course of the divorce and are independent (as instrumentum) from it can be independently recognised by means of an exequatur in Romania. If they are issued by EU authorities, they are recognised *de jure*, but their effects must be enforced through a bailiff, through registration in the land register, etc. **53**

B. *Parenthood*

Romanian law follows the traditional approach to parenthood by only recognising motherhood and fatherhood. In principle, legal parenthood follows genetic descent. Therefore, co-motherhood or co-fatherhood cannot be established in Romania, even by adoption. Among assisted reproduction techniques, in-vitro fertilisation and sperm donation are legal (in the latter case, the sperm donor is never considered to be the father). Egg donation, surrogacy and post-mortem fertilisations are illegal. **54**

1. *Motherhood*

Article 408 CC states that motherhood is established by the fact of birth. This corresponds to both biological and genetic maternity. Therefore, Article 408 CC enables a quick, uncomplicated, and accurate establishment of motherhood, without the involvement of the courts. At the time of birth, the medical doctor witnessing the birth issues a medical proof (document) of birth, mentioning the mother. This forms the basis for the registration in the civil status register of births. The civil status register can be rectified indefinitely, based on the medical proof of birth, if this was not entered correctly, or through contrary proof, in the case of babies being switched in a clinic. The mother's will or a declaration of intent is not relevant for the establishment of maternity, nor is the reason for conception. Motherhood can only pertain to a person who is a woman under civil status law. Motherhood so established cannot be dissolved. It can only be 'overwritten' through adoption with the new mother-child-relationship to the adoptive mother. **55**

When the birth was not witnessed, and therefore there was no medical witness to attest the fact that the mother did indeed give birth, motherhood **56**

can also be established by acknowledgement or by court judgment, in the same ways as for fatherhood. Motherhood so established can be dissolved in court when it is proven not to correspond to the truth (eg, a DNA test). Contractual remedies are not applicable (such as error or incapacity).

2. *Fatherhood*

57 Romanian law (Article 408 CC) provides for three possibilities to establish legal fatherhood: first, the man who is married to the mother at the date of the birth is *ipso jure* presumed to be the father. Second, a man can acknowledge paternity. And third, paternity can be judicially established. However, there only can be one legal father at a time, ie, for another man to become the legal father, any existing fatherhood must first be contested. Fatherhood can pertain only to a person who is male under civil status law.

58 If the mother of the child is married at the date of the birth, her husband is the legal father of the child (Article 408(2) CC). In case the husband dies before the birth of the child, Article 412 CC states that the same rule applies if the child was born between the 180th and 300th day from the dissolution of marriage. However, this period can be extended through scientific means of proof. If the mother has re-married in the meantime, the law resolves the conflict of potential paternity in favour of the new husband. Any interested party may, at any time, contest the paternity of the husband, by proving it was impossible for the child to be conceived by him or that the conditions for the presumption of paternity to apply are not met (Articles 414(2) and 434 CC). Except for the previously mentioned cases, no judicial involvement is required to establish these *ipso jure* fatherhoods.

3. *Acknowledgement*

59 Parenthood can be established by acknowledgement by either parent. Acknowledgement is a unilateral declaration not requiring acceptance by, or even being served to, the other parent or the child, but it becomes valid only if the child does not have an existing corresponding parent (mother or father). The child must have been born and be alive at the time of acknowledgement. A post-mortem acknowledgement is possible only if the deceased has natural-born (biological, not adopted, heirs.) heirs (Article 415 CC).

60 Acknowledgement can be executed through a verbal declaration at the civil status office, through an authentic document, or by a will. Once made, it is irrevocable (Article 416 CC). An unmarried minor child may recognise a child alone if they possess discernment at the time of recognition (Article 417 CC). This corresponds with the unfortunate reality of a significant number of minor parents in Romania.

Acknowledgement suffers from relative nullity when it was executed in error, under undue influence, or violence. An acknowledgement that is untruthful can be challenged in court by any interested person. When the acknowledgement is challenged by the other parent, by the recognised child or its descendants, the burden of proof is on the person who acknowledged parenthood or their descendants. However, wrongful acknowledgement that is uncontested is considered valid, even if there is no genetic link between the acknowledging parent and the child. It is also not a criminal offence. Therefore, parenthood is, to a certain extent, placed in the hands of the parents, mostly of the father but in the case of foundlings, also of the intended mother, with 'stepchild adoptions' being both possible and desired by the system, the overarching goal being for each child to have parents. **61**

4. *Judicial establishment*

Finally, there is the possibility of having parenthood judicially established, provided that the child does not already have a parent of the same gender. Otherwise, the existing parent would have to be successfully contested first. Therefore, motherhood can be judicially established only when there is no medical proof of birth, or when the medical certificate itself is contested as false (Article 422 CC). The claim to establish motherhood pertains to the child or their heirs, and is unlimited in time (Article 423), except if the child has died, in which case the heirs have only one year from the child's death. **62**

Paternity of a child who was born out of wedlock, or whose legally established fatherhood has been successfully contested, can be requested by the child, or mother on their behalf, even if she is a minor herself, as well as by the child's heirs. Within such proceedings, paternity is presumed (ie, without a genetic test) if it is proven that the intended father cohabited with the child's mother during the legal time of conception, unless he proves that it is impossible for him to have conceived the child. The claim is unlimited in time during the child's lifetime and can be initiated by their heirs within a year from their death (Article 427). **63**

Children are normally not heard in such cases, as this is a matter of finding out the truth. If they are ten years old or over, they can be brought in as witnesses, provided they know relevant information. The effect of these decisions is declaratory. **64**

5. *Contestation*

Parenthood can sometimes be contested. The contestation is a private right and may be exercised in the following cases: **65**

a. The legal father proves it is impossible for him to have conceived the child. This does not mean genetic paternity, but a higher burden of

proof, usually meaning that there was no occasion during which conception could have taken place. Proof can only be produced in court, whereby the existing legal fatherhood is terminated by the court after a successful contestation. This termination has a *res judicata* effect. This request is not limited in time during the child's life.

b. Parenthood by acknowledgement was untruthful. This claim can be brought at any time during the child's life and is proven with any means of evidence. The termination has a *res judicata* effect.

c. Parenthood was judicially established by the application of indirect proof (ie, not by genetic testing) or by presumptions. This claim can be brought at any time during the child's life and is proven with any means of evidence. The termination has a *res judicata* effect.

6. *No out-of-court changes in parenthood*

66 There is no possibility for changes in established parenthood to take place out of court. In fact, Article 435 CC states that if a link of parenthood has been legally established and has not been contested in court, it is not admissible to establish, by any means, another parenthood. Further, Article 437 CC forbids either party to a parenthood proceeding from renouncing the right that they are claiming or defending in court, nor can a person who acts on behalf of a minor do so. In other words, parenthood proceedings must always progress to judicial findings and cannot be left at the disposal of the parties, such as by renunciation or out-of-court transaction.

67 By contrast, acknowledgement can, and usually is, executed in out-of-court proceedings, and as long as it is uncontested, it remains valid. In other words, the law prioritises that each child has parents, and once established, that parenthood remains stable.

C. *Adoption*

68 Adoption is the legal act whereby the link of parenthood is created between the adoptee and the adopting parent, together with family ties between the adoptee and the adopting parent's relatives. (12) Correspondingly, any family links with the previous parent and their relatives cease to exist. Since 1996, adoption with partial effects has no longer been possible. This type of adoption only created parenthood with the adopting parent, while leaving the parenthood and family links with the biological parents intact. Thus, a

(12) Lazăr-Ciprian Ureche, Bogdan Dumitru Moloman, *Ghid privind procedura adopţiei* (Universul Juridic 2017).

child adopted with partial effects (*înfiere*) could have up to two pairs of parents.

The State exercises a watchdog function in adoption matters. A court decision by the (family) court is necessary for the establishment and termination of the adoption. The adoption is initiated upon application by the adoptive parent (also single parent) and ends with the constitutive pronouncement of the court. Adoption is regulated in the same way for minors as for adult children, but the latter can only be adopted if they were raised by the intended adoptive parent. **69**

Adoption is forbidden between siblings and spouses or former spouses; it is also forbidden for spouses or former spouses to be adopted by the same person or family. Persons without full capacity, as well as those with psychiatric diseases may not adopt. The adopting parent must be at least 18 (16 for good reasons) years older than the adoptee. **70**

Two persons may not adopt the same child together, either at the same time, or successively, unless they are married. Exceptions are: **71**

a. When the adopting parent or both adopting spouses have died. In this case, the previous adoption is considered to be dissolved on the date the judgment allowing the new adoption becomes final.
b. The previous adoption has ended for any other reason.

Two same-sex persons may not adopt together (Article 462(3) CC). **72**

1. *Consent to adoption*

The consent of the biological parent(s) or of the child's guardian (when the biological parents are deceased, unknown, declared dead, have disappeared, or under judicial counsel or special guardianship) is required. When only one parent is in such a situation, the other's consent is sufficient. The intended adoptee's consent is required when they are over the age of ten. The adopting parent's consent is required, together with that of their spouse, if that spouse is not also adopting at the same time. Consent must be unconditional and without consideration. Parents who have lost the exercise of their parental rights, or were punished with the interdiction of parental rights, maintain the right to consent to their child's adoption, alongside the person who exercises parental rights. **73**

The law specifically protects the natural parents' and the guardian's consent. It can only be given at least 60 days after the child's birth, and it can be revoked within 30 days from being given. Exceptionally, the court may supplant the parents' or guardian's consent if it is proven that they are being abusive, and the adoption is in the best interests of the child (Article 467). **74**

2. *Effects of adoption*

75 Adoption has a variety of effects on the law of names (see below). The most important effect is that the relationship of the child to their previous relatives is extinguished, and the child attains the legal position of a child of the adoptive parent(s). The biological family ties remain relevant only for provisions which have as a prerequisite a blood relationship (or lack thereof), such as the prohibition of marriage. The adoption and its effects become final on the date the judgment allowing it becomes definitive.

3. *Cancellation of adoption*

76 Adoption ends by dissolution or by its annulment (Article 475 CC). Adoption is dissolved *ipso jure* when the adopting parent(s) dies(die), and a new adoption is pronounced. Further, adoption can be judicially dissolved if a protection measure needs to be taken towards the adopted child, and it would be in their best interests for the adoption to end. The adoption is dissolved on the date the judgment instituting the protection measure becomes definitive.

77 An adoption can also be judicially dissolved at the request of the adopting parent(s), when the adoptee is guilty of attempted murder, or other criminal acts punishable with a prison sentence of over two years, when the victim of their acts is the parent. When the parent dies, the heirs (or any person who would have inherited had the adopted child not existed) may request the dissolution. Dissolution on request of the parent or their heirs may only occur once the adoptee has turned 18, even if the criminal acts took place before that time. The same criminal acts directed against the adoptee allow them to request dissolution at any time.

78 The annulment of an adoption can be pronounced judicially at the request of any person called to consent and whose consent was vitiated by error regarding the identity of the adoptee, by undue influence or violence. The claim can be introduced within six months from the discovery of the error or influence, or from the cessation of the violent incidents, but no later than two years after adoption was declared.

79 A judicial finding of nullity of an adoption can take place when the adoption was fictitious (for any purpose other than protecting the child's best interests) or concluded by disrespecting formal or material rules not otherwise sanctioned. Any interested person may submit the claim; however, the court may continue the adoption if it considers this to be in the adoptee's best interests.

80 Upon the adoption's ending, by any means, the natural parents of the child are re-instituted in their rights and duties, unless the court finds that it is in

the adoptee's best interests to implement an alternative protection measure, or guardianship. The adoptee regains the name and surname they had before adoption, but only if this would be in their best interests.

D. *Parental responsibility*

81 Under Romanian law, parental responsibility is designated more traditionally as 'parental authority', defined as the collection of rights and duties regarding the person and the assets of the child (Article 483 CC). It belongs principally and equally to both parents. Parents exercise parental authority in the child's best interests and are responsible for the raising of their minor children. Parental authority ends upon the child's attainment of full capacity to act.

82 A minor parent who is 14 or older only has parental authority with regards to the child's person, and not their assets. Parental authority regarding the child's assets then rests on the adult parent, if any, or to a guardian.

1. *Establishment of parental authority*

83 Parental authority is established automatically upon the birth of a child to married parents, or to the unmarried mother. It is also established as a consequence of establishing parenthood as described above. A subsequent marriage of a man to the child's mother does not in itself establish parental authority of the man, even if the child has no recognised father.

2. *Amendment of parental authority*

84 Normally, parental authority is exercised together by married parents (Article 503(1) CC), or by unmarried parents when they live together (Article 505(1) CC). When a parent is under judicial counsel (a protective measure for vulnerable adults), the court may decide on the issue of parental authority as to the child's assets to be exercised alone by the other parent. When such a parent is the only parent, the court may institute guardianship proceedings for the child.

85 In the case of divorced parents, or unmarried parents who live separately, the means of exercising parental authority are determined by the court. Further, any court seized of an action to establish parenthood must also determine the means of exercising parental authority.

86 Parents may at any time agree as to the means of exercising parental authority, as well as regarding the taking of protection measures regarding the child. The court, or the notary authenticating such an agreement, must hear a child who is ten years old or older. Notarial agreements can be challenged with actions for annulment, for reasons of public order, forgery, etc.

87 One parent may exercise parental authority alone when the other has died, is declared dead, benefits from special guardianship, is barred from the exercise of parental rights or, for any reason, is unable to express their will. A parent under special guardianship maintains the right to oversee the raising and education of the child, as well as to consent to adoption, unless they cannot express their will due to a lack of discernment.

3. *Dissolution and resumption of parental authority*

88 The court may, at the request of public authorities, declare the dissolution of parental authority when the parent threatens the life, health, or development of the child through bad treatment, by consumption of alcohol or drugs, by abusive treatment, by grave negligence or by grave damage to the child's best interests. The submission of a psycho-social report is compulsory, and hearing the prosecutor's opinion on the matter is also required.

89 The dissolution of parental authority is total and extends to all children of that parent on the date the judgment is declared. However, the court may tailor the effects to the individual case, by limiting dissolution to only some parental rights, or some children, according to their best interests. When a child remains without any parental authority as an effect of such a decision, a guardian is appointed.

90 A parent regains parental authority by court order if the circumstances leading to its dissolution have ceased to exist. During the hearing of any such claim, the court may allow personal contact with the child if this is considered to be in the child's best interests.

4. *Out-of-court procedures and third parties in parental authority*

91 Essentially, the management of parental authority falls squarely within the court's competence. The room for party autonomy is very limited. However, two special provisions exist: first, either parent may, by a will or a separate authentic act, designate a person who should be the guardian of their minor child should both parents be dead, declared dead, or otherwise unable to exercise parental authority. This designation is to be considered by the court when appointing the guardian but does not oblige the designated person to accept. By contrast, parents may also designate such a guardian by agreement with the intended guardian, concluded in authentic form, in which case the agreement is binding on the designated guardian (but not on the parents, who can always change their decision).

92 Second, parents may conclude agreements as to the effective exercise of parental authority. They may not, by these agreements, fully relinquish such authority, or give the other parent the right to act on their behalf. However,

one parent may be entrusted with as many rights to decide independently that the other's parental authority remains nominal. Such an agreement is referred to as a 'parental plan' in Romanian practice and can be concluded before a public notary (as an authentic act) or before the court (included in a judgment). In either case, it does not have the authority of a *res judicata*, as its change can be requested if circumstances change. The hearing of a child over the age of ten is compulsory, as is a social inquiry by the local child protection office, who must assess whether the proposed agreement is in the best interests of the child. The authentic act or judgment is immediately enforceable.

93 The parental plan may include many aspects of the child's life, but essentially the following are most commonly included:

a. The right to visit or have the child at the parent's home, and a 'schedule' of contact.
b. Decisions as to schooling and supervision of education.
c. Supporting any expenses incurred for the child.
d. How the child is transported between residences.
e. The right to take the child abroad on holiday or for other purposes.
f. Access and contact with either parent's relatives or third persons.

94 Third persons may be involved in the exercise of parental authority when the child does not have any parent capable of such, including when both (or single) parents are under judicial counselling or special guardianship. In this case, parental authority is transferred to the guardian, or to the institution which exercises protective measures towards the child (and is then exercised by its director).

95 Under Romanian law, it is not possible to delegate parental authority to third parties, nor does a stepparent acquire any parental authority with regard to their stepchild.

5. *Guardianship (tutorship)*

96 The family court appoints a guardian (called tutor, according to the Romanian designation) if the minor is not subject to parental authority, or if neither parent can exercise it. Any person who is aware of such a situation with a child is obliged to notify the court (Article 111 CC). Any adult and capable and competent person, or a married couple, can be appointed as a guardian. A parent may, by authentic act or will, specify that one or more designated persons may not act as guardians for their child. As described above, parents may also designate the desired guardian, by authentic act, will, or agreement with this person. When no person, or more persons, have been designated, the court is to decide.

97 The court appoints first and foremost the designated person as guardian, unless this would not be considered to be in the child's best interests, or the person refuses. Otherwise, the appointment is made from among relatives or family friends who would be willing and capable of being a guardian. Hearing a minor who is over the age of ten is compulsory as is the hearing of the family council (see below), when no guardian was designated but such a council has been established. The rights and duties of the guardian begin at the time when the decision to appoint them has been communicated, when parental authority is transferred to them.

98 Guardianship is maintained until the child attains full capacity to act and is a free and personal burden. Guardianship may be concluded earlier than this time if:

a. The child or the guardian dies.
b. The guardian becomes incapable of exercising their role or damages the child's best interests.
c. When the guardian turns 60 and requests so.
d. When a female guardian becomes pregnant and requests so.
e. When the guardian becomes a parent of two or more children.

99 The court must appoint a new tutor without delay.

100 Exceptionally, the court, with the advice of the family council, may decide:

a. To appoint a specialist natural or legal person to administer some or all of the child's assets.

b. To compensate the guardian, considering the work undertaken in administering the child's assets, with up to 10% of the revenue of the child's assets.

6. *The family council*

101 The family council is a peculiar institution of the new Civil Code (Articles 124-132 CC), whose role is to supervise the way in which the guardian exercises parental authority over a minor or over a person under judicial counsel or special guardianship. Its appointment is at the will of the court, which selects three members, and two alternatives from among the family and friends of the protected person. The family council is convened by the guardian or court *ex officio* or at the request of a member, or of the ward who is over the age of 14. Members can be represented by third parties. The family council issues consultative opinions, and takes reasoned decisions, by majority, which are recorded in a register.

102 In particular, the guardian is obliged to request the consultative advice of the family council for any significant acts of disposition concluded by the guardian, which can otherwise be annulled. Acts concluded against the advice of the council are valid but the responsibility for such acts lies with the

guardian. Whenever the court is called to allow a certain act, the advice of the family council must be considered, and if given, it usually prevails. In this way, to some extent, the administration of guardianship is delegated to private persons, who are better placed to assess the realities of each case.

7. *Cross-border cases*

103 According to Regulation 2019/1111, the term 'court' means any authority in any Member State with jurisdiction in the matters falling within the scope of the Regulation (Article 2(2)(1)). Thus, Romanian notaries are included when seized with a request for an international divorce with minor children. Therefore, Romanian notaries may authenticate a parental plan in such cases, even if the child's habitual residence is in another Member State. This is further clarified by Article 10 of the same Regulation, allowing a choice of forum. When a request to authenticate a parental plan is submitted outside of a divorce proceeding, the notary has competence within their general authentication powers, as they are then not assimilated to a court according to this Regulation. [13] When the child has their habitual residence abroad, the notary will request the psycho-social inquiry to be drawn up by foreign authorities.

104 Romania recognises and enforces authentic instruments and agreements falling within the scope of Regulation 2019/1111, Section 4, and issues the appropriate certificates. Authentic instruments and agreements issued by countries other than Member States can only be recognised through the exequatur procedure.

E. *Matrimonial property regimes*

105 Romanian law, since the new Civil Code, gives married couples considerable autonomy regarding matrimonial property regimes. While there is a default statutory property regime (that of the legal community of property), spouses can also choose between two contractual property regimes, and add clauses to further personalise their individual regimes. Non-married cohabitants do not have access to a specific property regime. Property-related claims in cohabitation relationships must be settled within the general principles of contract and property law, non-marital partnerships being unrecognised.

1. *Statutory property regime*

106 As the default model, Article 339ff CC establish the legal community regime, according to which, each spouse remains the owner of the assets they had at

---

[13] Dan Andrei Popescu, Elena Alina Oprea, *Drept international privat* (Hamangiu 2023) 216–218, 444–445.

the beginning of the marriage and manages them independently. Each spouse is also the sole owner of any assets received as inheritance, individual gifts (the individual character is presumed), personal assets, assets dedicated to their individual profession, intellectual and industrial property, prizes or rewards, manuscripts, sketches and art they create, inventions and similar creations, the indemnity for damage to their person or individual assets, anything that replaces an individual asset, as well as the fruits of such assets. By contrast, revenues from work, assimilated revenues (including from intellectual property), as well as any asset purchased during the statutory property regime are common assets.

107 In this author's opinion, the legal community regime is a most unduly complex system, and its character of being a default regime is only justified by tradition, as it was the only available regime between 1953 and 2011. The main disadvantage with this regime is that common assets are common in unknown shares (*în devălmăşie*), meaning that the quota of each spouse in each asset is only determined retrospectively, either when they decide to take one or more specific assets out of the community, by dividing them as they wish, or at the dissolution of the matrimonial regime.

108 During the regime, each spouse may administer common assets alone, without changing their destination, but may not dispose of them without the other's agreement if the assets are registrable. Spouses may not abuse this right, particularly by disposing of a rental agreement signed by one of them over the house they reside in, or by disposing of its furniture and contents to impose hardships on the other spouse. In cases of threat for any reason (the threat may be wilful ([ie coming from the wilful actions of the other spouse], or due to the illness of a spouse [ie the other spouse cannot control themselves, but creates nevertheless a threat to the marriage assets, eg by being addicted to gambling]), the other spouse may request the court grant them those powers of administration necessary for the maintenance of an orderly life.

2. *Contractual property regimes*

109 There are two contractual property regimes: the separation of assets, and the conventional community. The separation of assets regime is the simplest, whereby each spouse is the owner of any asset they had at the time of marriage, and of any asset they acquire thereafter. Assets acquired together are owned in common, in the shares foreseen by the spouses or established by their contribution to the acquisition of that particular asset. Spouses may conclude inventories of their existing assets, which, for transparency, are annexed to the matrimonial agreement.

During the regime, a spouse may freely use the other spouse's assets if they are not opposed to such. At the end of the regime, each spouse has a right to hold the other's assets until reciprocal debts have been fully covered. Accrued gains are not divided or equalised. **110**

The regime of conventional community is the most customisable regime. It allows the spouses, by matrimonial agreement, to: **111**

a. Include, fully or partly, assets that they already have within the community of property regime.
b. Exclude from the community of property some assets or types of assets acquired during marriage.
c. Provide for the necessity of the other spouse's agreement when undertaking certain acts of administration.
d. Agree on a 'hotchpot' clause (*preciput*), meaning that 'the surviving spouse shall take over without payment, before the partition of the inheritance, one or more goods deemed community of property, held under joint undivided ownership or co-ownership' (14). (15)
e. Provide for specific means to liquidate the regime.

3. *Procedures when choosing, changing, and liquidating the regimes, and objections from third parties*

The default statutory regime of legal community is adopted by the act of marriage, in the absence of a contrary matrimonial agreement. The choice of a contractual matrimonial regime can only be made through a matrimonial agreement that is concluded before a notary public in authentic form, and validly publicised. The agreement may be concluded before marriage, but only takes effect at the time of marriage. (16) **112**

A change to the matrimonial regime can only be made through a matrimonial agreement, and only at least one year after marriage, or after the last change. Agreements can be challenged under contractual remedies. Spouses may also partially or fully liquidate the matrimonial regime they chose, at any point, by dividing their common assets as they wish. However, creditors who are damaged by such a change or liquidation may ask the court to revoke it within one year of the formalities of publicity being undertaken. **113**

It is also possible for either spouse to request judicial separation of property, when the other spouse concludes acts in a manner that endangers the family's **114**

---

(14) Romanian Civil Code, Article 333, 94.

(15) Diana-Geanina Ionaș, *Clauza de preciput: Legat cuprins în convenția matrimonială?* (Universul Juridic 2016).

(16) Nadia Cerasela Aniței, *Convenția matrimonială potrivit noului Cod Civil* (Hamangiu 2012).

interests. Further, judicial separation can be requested by the guardian of the spouse who benefits from judicial counsel or special guardianship, or by the family council.

115 Matrimonial regimes are publicised in several ways: First, they are recorded on the margin of the act of marriage. Second, they are always entered in the National Notarial Register of Matrimonial Regimes, which is publicly available to any person. Third, they are publicised through the inscription of their existence or effects in the land registry, tax registers, commercial register, etc.

4. *Cross-border cases*

116 Romania is not subject to the provisions of Regulation 2016/1103 or its sister Regulation 2016/1104. As such, the law applicable to matrimonial regimes is determined according to Articles 2590-2596 CC. Spouses may choose the law applicable to their matrimonial regime, between:·

The law of the State in whose territory one of them is habitually resident at the time the law is chosen.

- The law of the State of which either of them is a citizen at the time the law is chosen.
- The law of the State where they establish their first common habitual residence after the marriage.

117 If no such choice is made, the general effects of marriage law shall apply, determined under Article 2589 CC, in the following order:

1. The law of the spouses' common habitual residence.
2. Failing that, the law of the spouses' common citizenship.
3. Failing that, the law of the State in whose territory the marriage was celebrated.

118 One can see these connection points are mutable in time and space. The agreement on the choice of applicable law is submitted to the formal requirements set either by the law chosen to govern the matrimonial property regime, or by the place where the agreement is concluded. In all cases, the choice must be explicit and evidenced in a document signed and dated by the spouses or be unambiguously apparent from the terms of a marriage contract. Where Romanian law is applicable, the formal requirements laid down by it for the matrimonial agreement must be observed.

119 Therefore, it can be said that foreign matrimonial agreements, including provisions on the applicable law, are recognised in Romania also when they are concluded abroad if they are authentic and notarial, if Romanian law is chosen. Publicity measures and effects of the matrimonial property regime on third parties are subject to the applicable law. However, third parties are protected by Article 2595(2) Civil Code, which includes obligations of

publicity according to both the law applicable to the matrimonial property regime, as well as to the law of the State where immovable property is located. Further, while the spouses may give retroactive effect to choices of law, they may in no case prejudice the rights of third parties.

F. *Arbitration and mediation in family law matters*

Essentially, any matters regarding family law can be subjected to mediation, which can be freely chosen. According to Article 64 of Law 192/1996, mediation can solve issues regarding, inter alia, a) the continuation of the marriage; b) the division of common assets; c) the exercise of parental authority; d) deciding a child's domicile; and e) the parents' contributions to child maintenance. However, as described before, the effects of mediation minutes are limited, in that they must then be presented to a public notary for authentication, or to the court for approval. Independently, mediation minutes are valid only when they refer to movable patrimonial assets (as they have the same legal effects as a contract with a private signature). **120**

Arbitration is also marginally possible, namely in patrimonial matters disputed between competent adults. For example, the liquidation of a matrimonial regime between two competent spouses would be arbitrable. **121**

In any other case, family and status matters are the monopoly of State courts and notaries as described above. **122**

G. *Conclusion to family law*

Romanian family law encompasses various approaches to legal relationships within family matters. While some relationships can be established and managed through consent or declarations, others must always involve the courts. The main non-judicial body involved in the administration of family law is the public notary, and secondarily, the civil status office. A simplified summary can be found in the following table: **123**

Legal relationship	**Establishment**	**Dissolution**
Marriage	Contractual	a. By application and judicial act (annulment or divorce by agreement or for fault); b. By notarial agreement (with or without minor children); c. By agreement before the civil status office (without minor children).
Motherhood	a. *Ipso jure*: woman who gave birth; b. By acknowledgement (court, notary, a will, civil status office); c. By application and judicial act.	a. By application and judicial act (except when it was established *ipso jure*); b. By adoption.

Fatherhood	a. *Ipso jure*: marriage to the mother; b. By acknowledgement (court, notary, a will, civil status office); c. By application and judicial act.	a. By contestation and judicial act; b. By adoption.
Adoption of minors	By application, parental consent, and judicial act.	a. By application and judicial act; a. *Ipso jure*, when the adoptive parent(s) dies and a new adoption is ordered.
Adoption of adults	Same as above, only if the adult has been raised, while a minor, by the adoptive parent.	Same as above.
Parental authority	Same as parenthood.	a. *Ipso jure*: child becomes of full age; b. By application and judicial act.
Guardianship (tutorship)	By judicial act, at anyone's request.	By application and judicial act.
Marital property rights	a. Default upon marriage: legal community of property; b. By matrimonial agreement.	a. *Ipso jure*: by divorce or death of one spouse; b. By matrimonial agreement; c. By application and judicial separation.

III. Succession law

124 The law of succession regulates the transfer of private property rights and obligations (the patrimony) upon the death of a person. Materially, it is regulated in Book IV of the Civil Code, alongside gifts. It is not the task of this report to present the entire contents of the fourth book, the focus being on procedural law.

125 In terms of procedure, the law assigns primary competence to public notaries, whose proceedings are regulated by the LNP. However, notaries may only proceed when there is an agreement between all parties to the procedure. Any issues in disagreement must be decided by the courts, with Article 94 j[1]) CPC granting competence to the lowest courts in inheritance matters, regardless of the proceedings' value. It is relevant to mention the special procedure for the division of assets which, while not exclusively applicable to inheritance cases, nevertheless generally finds its most common application when heirs wish to exit the co-ownership resulting from a succession: it is regulated by Article 980ff CPC under the title 'judicial division'.

126 It must be underlined that notaries are the only competent authority for the issuance of certificates regarding successions (concerning the inheritance, quality of heir, testamentary executor, or the vacant estate) and European Certificates of Succession. Courts may issue judgments in succession matters,

but these should afterwards be transposed in the corresponding certificate, issued by a notary (who is bound by the contents of the court's decision).

A. *Devolution of the estate*

127 In Romanian succession law, all pecuniary private rights – both assets and liabilities – devolve *ipso jure* upon the heir or heirs jointly upon the death of a person. This does not require knowledge of the inheritance. However, the status of heir is only consolidated upon the explicit or tacit acceptance of the estate within the time limit prescribed by law. Acceptance under the benefit of inventory is not possible or necessary because, by law, liabilities only devolve within the limit of the assets' actual worth (with any liabilities above that amount being *ipso jure* extinguished). The interests of the deceased's creditors are therefore secondary to those of the heirs. This solution, which is opposite to that existing before 2011, reflects the unfortunate reality that after 2000, most of Romania's population burdened itself with loans, most of which are beyond any realistic possibility of repayment. Therefore, the heirs should at most collect nothing, or collect only any net benefit of the estate, and not be burdened by their author's excessive loan-taking.

1. *Acceptance and disclaimer (renunciation) of the inheritance*

128 Despite the principle of automatic succession, the heir has the option to accept, or to disclaim the inheritance, with *ex tunc* effects (declaratory). In case the heir disclaims the inheritance, the succession devolves as follows: if there are other heirs within the same class, then the estate is divided between the accepting heirs; if there are no other accepting heirs within the same class, the estate is transmitted to the next class of heirs, as if the disclaiming person did not exist.

129 An acceptance transforms the provisional heir-status into a final and binding one, if occurring before the expiry of the period for expressing the succession option. Acceptance can take place in two ways: first, the heir can make an explicit declaration to the public notary, which is an authentic act and second, the heir can accept the inheritance tacitly by implicit conduct, such as the application for a certificate of inheritance or the disposition of assets of the estate. The renunciation, with or without payment, to the estate in favour of another person or persons is also considered to be a tacit acceptance (Article 1110 CC). In other words, renunciation must be pure and simple, with no condition or consideration, and regardless of who may benefit from it thereafter. Otherwise, it is a tacit acceptance (followed by a sale or donation, as the case may be).

130 Exceptionally, the heir that steals or hides assets of the deceased from the inventory is presumed to have accepted and inherits the deceased's liabilities

beyond the value of the assets inherited, but within their share of the estate, as a form of sanction (Article 1119 CC).

131 Nobody may be obliged to accept an estate (Article 1106 CC). Nevertheless, the heir's creditors may accept the inheritance, indirectly, within the limit that fulfills their rights (Article 1107 CC). An heir that wishes to undertake an action which might be seen as a tacit acceptance may give, before undertaking such action, an authentic notarial statement that they are thereby not accepting the estate (Article 1111 CC).

132 The time period within which an heir can decided to choose an option is one year from the opening of the estate. However, the following circumstances mark an alternative starting time:

a. From the birth of the heir if the heir was born after the death.
b. From the date the death was registered in the civil status registry if this is done according to a court order of declaring death, unless the heir knew of the fact of death beforehand.
c. From when the beneficiary of a gift knew, or should have known, about the gift if the will containing this gift is found after the opening of the estate.
d. From the date when the heir knew, or should have known, the link of kinship on which their inheritance right is based if this date is after the opening of the estate.

133 The deadline may be brought forward, at the request of any interested person, by court order, under penalty of being considered to have renounced the estate. Any heir may ask for an inventory to be made, before exercising this option. The deadline then does not end less than two months after the inventory is finalised and communicated to the heir, even when interested persons request its reduction.

134 An heir who, although in knowledge of the opening of the estate, and their quality of heir, did not exercise the right to opt in or out, by accepting or expressly renouncing the estate, is presumed, until the contrary is proven, to have renounced the estate (Article 1112 CC). However, this presumption takes effect only if the heir, duly notified, does not prove that they exercised their right to opt in or out. The notification must include, under penalty of nullity, the statement that not exercising one's right to opt in or out gives rise to a presumption of renunciation.

135 By contrast to the provisions in force before 2011, the legislator now gives priority to the clarification of the status of assets and estates, which should, in principle, be dealt with within one year of the death. This is intended, on the one hand, to motivate potential heirs to act rather than remain passive, and on the other hand, to bring revenues in the form of taxes on transactions, and local taxes on property. There is no inheritance tax for the estate, or for a portion of estate assets, which are dealt with, by a certificate of inheritance or definitive judgment, within two years of the death.

A disclaimer of the inheritance can take place only by an authentic notarial act. It cannot be presumed during the period in which a decision has to be made regarding the options available. The disclaimer retroactively makes the heir a 'stranger' to the estate. Creditors of the heir may request the revocation of the disclaimer within three months of finding about it, but only within the limit of their own claims against their debtor. The heir may also willingly and freely revoke a disclaimer, within the period in which a decision has to be made regarding the options available, if the inheritance has not, in the meantime, been accepted by other competing heirs. The revocation of a disclaimer equals acceptance of the estate. **136**

It is possible to challenge any acceptance or renunciation in court, within six months from the date when the interested person knows of the cause of relative nullity (such as vitiated consent), or from the end of the violence which determined it (Article 1124 CC). **137**

2. *Co-ownership of heirs and division of the estate*

If several persons become heirs, they become co-owners of individual objects of the estate, and they can dispose of their share in each object, individually. It is also possible to sell one's share of the entire estate. The corresponding contract is to be recorded by a notary if the estate includes registrable assets. There is no right to pre-emption when selling a share of the entire estate, while in selling one's share of specific objects, rights of pre-emption exist only sporadically, such as for forest or arable land. **138**

No person may be forced to remain in co-ownership. It is possible to renounce the right to request partition for a maximum of three years, indefinitely renewable. Besides this, any person may at any time request division of all or some of the co-owned assets. **139**

Division takes place by agreement, which can be recorded privately (if no registrable assets are involved) or at a public notary (particularly for immovable assets). When done by agreement, parties are free to decide and to compensate one another fully or partially. They may or may not follow exactly what the testator has requested. **140**

If there is no agreement, the interested heir(s) may apply to the court, according to the special partitioning procedure, as any co-owner. In such cases, the options available to the court, considering the requests made, are: **141**

a. To materially divide the asset according to the shares held.
b. To grant the asset(s) fully to one co-owner, with corresponding payments or other benefits (including other assets) to other co-owners.
c. To order the public sale of the asset(s) and divide the proceeds by shares, appointing a bailiff for this purpose.

142 The court order has direct effect, with the special procedure in case c) ending only after the appointed bailiff presents results of the sales and division of the proceeds to the court (called 'liquidation of accounts').

3. *Liability of the heirs and its liquidation*

143 In principle, the deceased's liabilities devolve upon the heirs only within the amount of the value of the assets. Only exceptionally is an heir who hides or steals assets responsible, according to their share, for liabilities above the value of the inherited assets.

144 Heirs are free to request an inventory of the estate before deciding whether to accept or disclaim it. In this way, they may discover whether they stand to gain anything or not. The inventory may include debts. Heirs may also decide to undertake the procedure of liquidating the debts of the estate. This procedure is in the exclusive competence of the public notary (Article 121ff LNP).

145 The procedure for liquidating debts consists of:

a. Recovering all debts owed to the deceased.
b. Paying all debts of the estate, whether of the deceased or corresponding to debts incurred during the inheritance procedure.
c. Executing individual gifts.
d. Disposing of any assets of the estate for the purpose of meeting liabilities if liquidities are not sufficient.

146 To establish the liabilities, the notary undertakes an inventory and solicits declarations by the heirs regarding any debts they know of. They further verify the RNNEC and notify the inscribed creditors. They may also receive requests from creditors on their own motion. The notary then finalises the table of creditors, with priority given to fiscal liabilities.

147 The notary then issues a certificate of estate liquidation, comprising the assets and liabilities, the heirs, and their shares, as well as their agreement as to the means of liquidating liabilities, the appointment of the liquidator, and timeline for the procedure. The liquidator can be designated by the deceased by will, by the heirs from amongst them, or a third party, or by the court. The liquidator undertakes the recovery of rights, the payment of debts and disposal of assets. The disposal of assets has to be agreed separately through an authentic act, which has the power of a mandate. Liquidation may not extend over one year, without the parties' agreement.

148 The procedure ends when the liquidator presents the accounts to the public notary, after which the notary issues the inheritance certificate, which will include only the net benefit of the estate. No creditors of the deceased or of the estate may present themselves thereafter.

B. *Certificates of succession*

In Romania, there are several kinds of certificates of succession that may be issued, all of them by the public notary (17): **149**

a. The certificate of inheritance is the basic and most common certificate, which includes the identity of the deceased, that of the heirs, their shares, as well as any gifts and their beneficiaries, and the composition of the estate, as declared by the heirs (individual assets and liabilities).
b. The supplementary certificate of inheritance may be issued at any time when new assets or liabilities are discovered and requested by the heirs for inclusion.
c. The certificate on the quality of heir proves only the identity and shares of the heirs, without stipulating the composition of the estate. It is generally issued at the beginning of a complex estate procedure to enable the heirs to exercise their non-patrimonial or procedural rights, or to prove their general link of heirship to the deceased.
d. The certificate of estate liquidation is issued as part of the liquidation of liabilities' procedure described above.
e. The certificate of testamentary executor is issued to prove specifically the executor's identity and powers.
f. The certificate of vacant estate.
g. The European Certificates of Succession.

In relation to the land registry and other asset registers, proof of the heirs' right of ownership must be provided by presenting a certificate of inheritance, a supplementary certificate of inheritance, or a European Certificate of Succession, expressly stipulating the identity and shares of ownership in each asset. Certificates of quality of heirs or corresponding European certificates that do not mention the identity and share of ownership in each asset are not accepted as proof of ownership. **150**

1. *Procedure*

The certificates stated above are issued by the public notary, who must assess whether the alleged right exists both in fact and in law. The international jurisdiction of notaries is not regulated by the Succession Regulation, but only by Romanian notary law, (18) according to which, Romanian notaries are competent in any case where there is agreement of the parties. Territorially, **151**

(17) Doina Dunca, Daniela Negrilă, *Procedură succesorală notarială: Note de curs* (Notarom 2014).

(18) Ioan-Luca Vlad, *Succesiuni internaţionale: Regulamentul nr. 650/2012. Tratate internaţionale în domeniu* (2nd edn, Universul Juridic 2020).

the competent notary is situated where the deceased's last domicile was located; if absent, where at least one immovable asset is located; if none, where at least one movable asset is located; and if none, the first notary seized of the matter. However, notaries will only issue European Certificates if Romania is the competent country according to the Succession Regulation (Art. I-6-3 of Emergency Ordinance (OUG) 119/2006).

152 The notary only acts on being seized of the matter. The request to open the estate procedure can be made by any interested person (which includes heirs, executors, creditors of the estate or of the heirs, or the local public authority). In particular, the local public authority (town hall) must, in some cases, request the opening of the estate *ex officio*, when aware of immovable assets existing on its territory. The purpose of this fiscal procedure rule is to attain a legal and known owner for each asset that gives rise to local taxes. However, once seized, the notary may not continue without the summoning and appearance (personally or by authentic power of attorney) of all heirs, who should also agree. Otherwise, the notary suspends the procedure.

153 Once the parties are present and in agreement, the notary undertakes the required preliminary steps (liquidation of the matrimonial regime, if applicable; liquidation of liabilities, if requested; inventory of the assets), verifies the rights of the deceased over the assets being presented as theirs, takes note of the liabilities presented and the heirs' agreement as to them, implements the heirs' agreement as to the reduction of gifts and the recognition of reserved shares ignored by the testator, (19) and then issues the requested certificates. If no heir is found, the notary issues a certificate of vacant estate, which enables the local authority (town hall) to receive the property of the deceased (the town hall is always liable for the deceased's debts only to the value of the estate's assets).

154 A complaint before the lowest court may be lodged against the decision not to undertake a notarial service. The court reviews the complaint and may instruct the notary to proceed further. Within the procedure, any disagreement results in its suspension, and the parties are free to petition the court, either to decide on the entire estate, or specifically for the point in contention. For example, if someone prevents the inventory from being drawn up, the court is petitioned to oblige such persons to allow the inventory, which enables the notary to call upon public force for its completion. Once the matter has been decided in court, the parties may revert to the notary, all aspects that have been decided having the value of *res judicata* and being entered as such in the certificate.

---

(19) Ioana Olaru, *Rezerva succesorală în dreptul intern şi în dreptul international privat* (Solomon 2019).

An issued certificate is an authentic act which can be challenged only within strict limits set by law. First, any material findings of facts observed directly by the notary public are considered true until a forgery is proved (a high evidentiary burden). Any other findings are considered true until the contrary is proven. In general, challenges to certificates are brought by heirs who have been omitted during the procedure. This corresponds to the unfortunate reality that Romanian State registers generally cannot identify the children of a person, only the parents of a person (not to mention siblings or other relatives), and therefore the finding of heirs is still dependent on declarations and witnesses, without the possibility of an absolute determination. The certificate is not a *res judicata* (except for the parts that were decided in court) and therefore can be challenged in court at any time, and fully or partially changed by the court. **155**

2. *Contents and effects of a certificate of inheritance*

All certificates described above contain information on the deceased, whether a will exists and the law applicable to the estate. Executor certificates only contain the identity and powers of an executor. Quality certificates only contain the identity and shares of the heirs. Essentially, no partial quality certificates may be issued, in other words, all heirs and their shares (adding up to 100% or designating the remainder as vacant estate) must be entered. **156**

Only the (supplementary) certificate of inheritance has the special evidentiary and material effects provided by law as to the transfer of property rights. Specifically, Article 1133 CC provides that the certificate of inheritance proves the quality of heir (legal or testamentary) as well as the heirs' ownership over each asset in the estate, in the share pertaining to each. This is a different approach to that before 2011, as now the certificate of inheritance is considered the title of ownership of the heirs, without the need for third parties to further inquire into the history of the deceased's title. Movable assets (which are generally not registrable) can be included individually in the certificate, giving a provable title to the heirs. **157**

Third parties acting based on the certificate of inheritance and the land register (if registration is applicable) are presumed to be acting in good faith, unless they knew otherwise of its invalidity. Any transfers of immovable property are automatically entered in the land register, at the request of the notary, made *ex officio*, based on the certificate. Further, the parties are obliged to register transfers of immovables and any other registrable property, with any of them being entitled to request this independently, in any relevant registers (local taxes, cemetery, register of personal debts, vehicle registration, etc). **158**

159 Regarding the European Certificate of Succession, this is issued by public notaries, with the procedure and contents provided directly by the Succession Regulation, only after the relevant Romanian certificate has been issued. By definition, if Romania is not the competent State according to the Regulation, then it does not issue the European Certificate of Succession. If it is the competent State, then the national procedure must be completed first.

160 The Romanian certificate (alongside other documents, such as the agreement liquidating the matrimonial regime) is the evidentiary basis for the corresponding contents of the European Certificate of Succession. As has been seen, the Romanian notarial inheritance procedure requires all the data needed to be entered in the corresponding European Certificates, and therefore their creation is almost 'automatic' as they simply transfer the collected data and findings. Of course, any complaints and appeals provided for by the Succession Regulation can be entered independently of those against the underlying Romanian authentic documents.

C. *Administration of estates*

1. *Ground rule: management of the estate by the heir(s) having* saisine

161 Upon death, the heirs with *saisine ipso jure* take the place of the deceased, ie, they acquire the right to manage the estate. The *saisine* is the right to administer the estate and exercise the rights and claims of the deceased. The heirs with *saisine* are the surviving spouse, descendants, and privileged ascendants (parents) of the deceased. Other heirs do not have the *saisine* and receive it only when the inheritance certificate is issued.

162 Therefore, as long as at least one heir with *saisine* exists, that heir may manage the estate without any special procedure being required. They may dispose of non-registrable assets of the estate, may receive and make payments of estate debts, and may execute individual gifts. In most cases, their activity will be considered a tacit acceptance of the estate. In this way, the law allows the immediate family of the deceased to continue possessing and using the deceased's estate without any special procedure. In fact, if the parties agree, they can divide the deceased's non-registrable assets, and close the matter of the estate, without any certificate.

163 Because of the risk that their activities may be considered a tacit acceptance, the law provides for a specific notarial declaration that any heir can make before they undertake acts of administration, to explicitly state that such acts do not represent the intent of acceptance and reserve their right of option for a period of one year.

However, in the case of registrable assets (primarily, land and buildings), the heirs with *saisine* are only entitled to use, and not to dispose of (or constitute liens), properties, for which they would require a certificate of inheritance. **164**

2. *Executors and heirs without saisine*

Should no heir with *saisine* exist or accept the estate, then the other heirs take possession of the estate only through the issuance of the inheritance certificate. In the meantime, the public notary seized of an estate procedure may appoint a special curator of the estate, as well as individual administrators for specific assets of the estate, who have the rights and duties of simple administrators. The special curator may exercise all rights and duties to protect the potential heirs. When a claimant has a right against the estate, the court may also instruct the notary to appoint a special curator to serve as the defendant on behalf of the unknown heirs. **165**

The role of testamentary executor does not have a long tradition in Romania. Before 2011, the position was regulated almost as an afterthought in the old Civil Code, and the improvements added by the new Civil Code are marginal. The executor is appointed by a will, or by a third party indicated in the will. The executor takes office only upon explicit, authentic notarial acceptance. The executor may act for at most two years, renewable by one year with the court's agreement. By a will, it can be shortened or limited to a specific part of the estate. **166**

The executor's powers are as follows: **167**

a. To request the sealing of the estate if there are minors or protected persons, or disappeared persons among the heirs.
b. To request an inventory of the estate.
c. To request the court to agree to the sale of assets if there are not sufficient liquidities for the payment of debts.
d. To try and execute the will and to defend its validity.
e. To pay the debts of the estate, if they were so entitled by the will, or otherwise with the agreement of the court.
f. To receive payment of the rights of the estate.
g. To proceed to the partition of the estate, only if the partition is approved by all heirs.

The executor position is strictly personal, and they must give accounts of their activity. **168**

3. *International cases*

Romania fully applies the European Succession Regulation. It issues European Certificates of Succession, as well as the certificates corresponding to **169**

national judgments, transactions, and certificates. It recognises Member States' documents as provided for in the Regulation.

170 One situation which has already arisen in practice is that of European Certificates of Succession which do not mention the heirs' individual rights over individual assets in the estate or identify assets incompletely. These are not accepted by the land register. The 'roundabout' solution found in practice is to undertake a local notarial procedure, for the purpose of issuing a Romanian certificate of inheritance, limited to the assets in question. However, this author considers that all Member States' authorities are obliged, when presented with the relevant proof, to fill in all parts of the European Certificates of Succession, as requested by the petitioners, to make it useful in cross-border situations. Following Case C-354/21 of the European Court of Justice, this author would welcome the corresponding preliminary question regarding the practice of not including the assets in the European Certificates of Succession.

171 With regard to non-Member State documents, these are not automatically recognised, but instead must follow the exequatur procedure, regardless of whether they are judgments or authentic acts.

4. *Conclusion to succession law*

172 Romanian succession law allows a high degree of private autonomy. This starts with testamentary freedom, extends to the administration of the estate by the heirs with *saisine*, and ends with the division of the estate (and each asset within it) by contract. Therefore, the notary's role is to take account of the wishes and agreements of the parties, acting as a service provider for the transmission, liquidation, and division of the estate. For this purpose, notaries have various competences such as the appointment of curators of the estate, responsibility for the inventory procedure, or the sale at auction of estate assets, and most importantly, issuing certificates and registering the transfers of property based on these certificates.

173 The court's role exists only in the case of disputes, either between the heirs, or with third parties, before or after the certificate has been issued. Contentious procedures result in decisions which become *res judicata*. They also oversee the notarial activity at any step if a party requests so, as well as entertaining complaints against the activity of the testamentary executor.

174 Another area where courts are involved is when minors, or persons with reduced or no capacity to act are involved in estate procedures. Such procedures can still be undertaken before a public notary, but the proposed agreement on each aspect (ie, the liquidation of the matrimonial regime, the proposed inheritance certificate, and the proposed division of assets) must be

confirmed by the court as being in the best interests of the child or ward, as a condition of validity of their consent.

IV. Status of natural persons

A. *Name changes*

Romanian law starts from the principle that names are both a personal, private right, as well as a matter of public interest. (20) On the one hand, civil law provides for a name change because of a change in personal status, while, on the other hand, it is possible to have one's name changed for compelling reasons in an administrative procedure. Apart from adoption, courts are rarely involved in either of these procedures. **175**

1. *Name change due to a change in the personal status*

a) *Marriage*

The spouses are to determine, by declaration to the registry office at the conclusion of marriage, a family name. The options available to each spouse, independently of the other, are: **176**

1. To keep their original surname.
2. To take the surname of the other spouse.
3. To use the united surnames of both.

The agreement on surnames cannot be withdrawn or changed. Any change in surnames after the moment of marriage is dealt with like an administrative name change. The dissolution of marriage by death has no *ipso jure* effect on the family name. Dissolution of marriage by divorce results, by default, in the resumption of the pre-marital surname by both spouses, unless they agree otherwise, or, exceptionally, if the court finds that maintaining the married name is justified by compelling reasons (such as for authors and public figures). **177**

b) *Child*

The child must receive a first name and a surname at birth. The first name is established based on the declaration of birth and may not have more than three parts (as of 2022). The surname of the child is, as a rule, the common surname of its parents. Should the parents not have a common surname, the **178**

(20) Paraschiv Pețu, Elena Velicu, Viorel Mardare, *Starea civilă: mijloc de identificare a persoanei fizice* (4th edn, Detectiv 2007).

parents may choose the surname of the child. Should the parents not agree on a surname, the court is called to decide. The record of birth is completed only after the court's decision. When both parents are unknown, a mayor freely decides on a first name and surname.

179 A parent may not give the surname of the other parent to the child without the other parent's consent. It is not required for all children of a couple to have the same surname. No further changes are possible once the surname of a child has been determined, except through the administrative change procedure.

c) *Adoption*

180 Only if the name changes due to adoption are courts involved. As a rule, the child receives as its birth surname the surname of the adoptive parent, or parents (if they do not share a surname, they must agree on one for the child). This change of surname is effected *ipso jure* through the adoption judgment. Upon application of the adopting parent or parents, the first name of the child can also be changed if it is in the child's best interests. Upon the ending of adoption for any reason, the adopted child regains the surname and, if applicable, the first name which they had before the adoption. However, for good reason, the court may allow them to keep their name gained by adoption (Article 482 CC).

2. *Administrative name change procedure for compelling reasons*

181 Besides the presented name changes by civil law, an administrative name change procedure, which applies likewise to first names and surnames, exists for compelling reasons. It is governed by chapter II[1] of Law 119/1996 on civil status. The law provides a very long list of compelling reasons, including but not limited to: indecent or ridiculous names; usage of a nom de plume; errors by the civil status officers which then perpetuated themselves through other documents; names that are too long; adaptation of the name to one's ethnicity; when parents of adults change their surname administratively and their children wish to take the new surname; when siblings have different surnames and wish to take a common one; when spouses wish to change their choice upon marriage; when the person changed their name abroad but does not have a foreign administrative document to prove this; when the person has been granted a sex change by judgment and wishes to adopt a first name that corresponds to their new gender. The procedure of administrative name change is quite liberal, as there is a provision for 'any other compelling reason' and is widely in use, including to resolve otherwise intractable administrative issues.

The procedure is initiated by the interested person, personally or through a special power of attorney, before the town hall of their domicile, with proof of the reasons for the change. The request for change must be published in the Official Gazette, Part III, within one year before the request. A minor should request the change through their parent or guardian and sign the request if over 14. When both parents request their surnames be changed, then the change of surname of their minor child, if under 14, is compulsory and takes place *ex officio*. The surname change of one spouse does not have an effect on the surname of the other spouse. **182**

The request to change a first or surname is inadmissible if the petitioner is under a measure that limits their right to travel abroad, throughout the time it is in force, or if, within the previous five years, the petitioner was condemned for any crime committed with intention, or expelled or returned from countries with which Romania has extradition agreements. Further, any interested person may oppose the name change request, within 30 days from its publication in the Official Gazette. The request is made at the town hall, in writing. The county population evidence office then verifies if the conditions for the name change are met, and makes a reasoned proposal to the mayor, who issues the order admitting or rejecting the name change within 30 days of receipt of the request. **183**

The order admitting the name change takes effect on the day it is received by the petitioner. If this does not happen within 90 days from its issuance, the decision retroactively loses any effect. The order rejecting the name change may be contested in court. A new name change may be requested for new reasons, or after the reasons which determined rejection have ended. **184**

3. *Orthography of the name*

Romanian law provides for a simpler procedure in the specific case where a person's first or surname has been registered in the Romanian civil status record translated into a language other than the native language of the petitioner, or with the orthography of another language. Such a person may request the inscription, by mention on these records, of their first or last name, translated or with the orthography of their native language. **185**

The request is simplified in that it is not subject to publication or opposition and is decided on by a mayor. The effects of the new spelling extend to the minor children of the petitioner, with the agreement of the other parent, and when the spouses have a common surname, of the other spouse, if they agree. In the case of disagreement regarding the effects on their minor children, the court is called to decide. **186**

This procedure corresponds to the reality that Romania has several historical ethnic groups and also many still active civil status records, which were **187**

introduced by foreign administrations during times of war or occupation. In many cases, the local administration forced the spelling of names with the orthography of one language, to the exclusion of others, which results in persons having very different names than the ones they grew up with (for example, a German ethnic may be Ianos in their civil status record from the time of the Hungarian administration, Ioan for Romanian authorities, and be called Johann in their church and family).

B. *Gender recognition*

188 Romanian law only recognises two genders: male and female. Gender is established medically at birth or, in the case of foundlings or children born without medical supervision, through medical-legal expertise. Once established, the gender may only be changed through a definitive court judgment.

189 There are, in fact, no provisions in Romanian law regarding the conditions and procedure for a change of gender judgment. The procedure of requesting a gender change, assessing the evidence and issuing a judgment is done entirely at the level of the lowest courts, which are primarily competent, and follow their own reasoning without benefitting from legal guidance. Under the most recent published jurisprudence, (21) a change of gender can be justified by the consistent, long-term self-identification with the other gender, confirmed by a psychological examination establishing gender dysphoria. No surgical gender change is required, as it would be a violation of the person's right to dispose of one's body.

190 Upon admission of a gender change, the Personal Numerical Code of the person also changes (as the first figure is gender-specific, odd for males, and even for females) automatically, and the person may (!) request the administrative change of their first name, to correspond with their new gender.

191 A judgment of gender change is not a *res judicata* inasmuch as the petitioner wishes to revert to their original gender, which can always be decided through a new judgment. A gender change is never admissible if the petitioner is married, or has adopted children together with another person, as that would result in same-gender marriages, or same-gender adoptions, which are forbidden by law.

C. *Protection of adults*

192 The law on the protection of adults has been significantly amended following the finding of unconstitutionality of the previous system, through Law

(21) Court of Sector 6 Bucharest, civil sentence no 3388/2021, reported at <https://www.juridice.ro/687700/schimbarea-de-sex-pe-cale-judiciara-lipsa-unor-interventii-chirurgicale-de-schimbare-de-sex.html>.

140/2022. It can be said that Romania currently has one of the most modern, customisable, and rights-oriented adult protection systems in the world.

193 There are four types of adult protection measures:

a. Assistance with concluding legal acts.
b. Judicial counsel.
c. Special guardianship.
d. Curatorship.

194 Every appointment, institution of a measure, change, and termination of a protection measure is *ex officio* inscribed in the RNEMSO, which is public and available for consultation. Notaries are obliged to consult it before concluding legal acts.

1. *Assistance with concluding legal acts*

195 Assistance with concluding legal acts (hereinafter: assistance) is available to any adult person with full capacity to act who, to take care of themselves, to administer their assets, or generally exercise their rights, wishes to have a legally competent aide for the conclusion of legal acts. The aide is appointed by the beneficiary through an authentic act, drawn up by a notary, for up to two years, which can be renewed once. The essential roles of the aide are:

1. To act as an intermediary between the beneficiary and third parties; it is presumed that the intermediary has the consent of the beneficiary.
2. To transmit and receive information on behalf of the beneficiary, and to communicate the beneficiary's decisions to third parties.
3. To help the beneficiary when conducting legal business.

196 The aide does not, independently, conclude legal acts on behalf of the beneficiary, and the appointment does not diminish the beneficiary's capacity to act. The role of the aide is open to any person who could also be a guardian and is not remunerated. The aide must present annual, and final, reports on their activites to the adult protection authority. Any person may complain about the activities of the aide before the courts if their activity is damaging to the beneficiary.

197 Assistance ends at the expiration of its specified duration; at the request of the beneficiary (who does not have to present reasons), addressed to the notary public; when the beneficiary or the aide is placed under judicial counsel or special guardianship; as an effect of a complaint being admitted by the court; when the beneficiary dies; or when the aide explicitly resigns.

2. *Judicial counsel*

198 Judicial counsel is the protection afforded to a person whose mental capacities have partially deteriorated, and who requires permanent counselling in

exercising their rights and liberties, and assistance is not sufficient for their protection.

199 Judicial counsel can be instituted for a maximum of three years, after which it can be renewed if the reasons remain. Essentially, the effect of judicial counsel is to assimilate the person with a minor between 14 and 18 years, placed under guardianship. The acts of disposition made by the person under judicial counsel must in any case be authorised by the court.

200 A special (and unprecedented) provision concerns the will made by a person under judicial counsel, after the institution of this measure, which is valid only if it is authorised or confirmed by the court, considering its nature and the circumstances in which it was made.

3. *Special guardianship*

201 Special guardianship is the protection afforded to a person whose mental capacities have completely and, as the case may be, permanently, deteriorated, and who requires permanent representation in exercising their rights and liberties, and judicial counsel is not sufficient for their protection. Special guardianship can benefit adults as well as minors over 14 years of age.

202 Special guardianship is instituted for at a maximum of five years. However, if the deterioration of the person's mental capacity is permanent, the court can institute guardianship for up to 15 years. Essentially, the effect of special guardianship is to assimilate the person to a child under 14, lacking capacity to act, and being represented by the tutor in all their affairs, with the approval of the court.

4. *Common provisions for judicial counsel and special guardianship*

203 Any person may petition the court, which has exclusive competence, to place someone under a protection measure. The court appoints the tutor. However, any person with full capacity to act, or even under judicial counsel, may, through a unilateral authentic act, a will, or by authentic agreement, designate the person who should be their tutor. In this case, the court will appoint that person. Courts do not necessarily check whether appointing that person corresponds to the vulnerable adult's best interests. As a provisional measure, the court may appoint a special curator, for the care and representation of the beneficiary, and to administer their assets.

204 Both protection measures are customisable. According to Article 168(4) CC, the court may, through its judgment, decide, depending on the degree of autonomy of the person and their specific needs, the types of acts for which the agreement of the tutor, or representation by the tutor, is required. The court may decide for the protection measure to concern only one category of

acts, only to the beneficiary's person, or only to their assets. In such cases, the capacity to act of the beneficiary is not affected for the remaining acts.

205 The protection measure takes effect when the judgment becomes definitive. Through the same judgment, the court appoints the tutor: first, a person so designated by the beneficiary, or otherwise a spouse, relative, friend, or cohabiting person, who is willing and capable. The tutor may request replacement after three years' service, or earlier, for good reason. The tutor is obliged to take care of the beneficiary in every way. If the court is so petitioned and agrees, a family council can also be constituted, exactly as for minor children under guardianship. The court is called to verify and give its agreement on any acts of disposition of higher value, and on other life decisions, such as changing the place of residence of the beneficiary.

206 Protection ends through the death of the beneficiary, on its expiration, when it is replaced, as well as when it is terminated by the court. The tutor is required to notify the court when circumstances arise that justify the change, replacement, or termination of protection. The request can also be brought by the beneficiary, their spouse, relatives, cohabitants, family council or responsible institutions.

5. *The requirement of a court agreement*

207 At the intersection between the liberty of disposition, through notarial acts, and the protection of minors' or protected persons' interests lies the need for the court's agreement when the authentification of certain notarial acts is sought. Specifically, the tutor may not, without the advice of the family council and the court's authorisation, conclude acts of disposition, division, mortgage, or lien regarding the protected person's assets; renounce their patrimonial rights; or conclude any other acts which go beyond simple administration. An exception is made for goods which are subject to disappearance, degradation, alteration, or deprecation, as well as those which have become useless to the protected person (Article 144 CC). The court's authorisation is granted only if the act meets a need or provides a clear benefit for the protected person, is individual for each act, and may stipulate its conditions. For sales, it can specify whether they will be concluded by agreement, by public auction or otherwise; and the court may indicate how the money thus obtained should be used (Article 145 CC).

208 The court's authorisation is not needed for acts of conservation, administration, for accepting an inheritance or accepting gifts without burdens, as well as 'small-value' acts of disposition which are of current character and are executed on the same day as their conclusion. This is in line with the fact that obligations are not inherited past the actual value of an estate, making this act at worst neutral, but never detrimental, to the protected person.

6. *Curatorship*

209 Curatorship is the protection measure afforded to a person with full capacity to act, but who, due to old age, illness, or physical infirmity, is unable to administer their affairs or protect their interests, and for good reason, is unable to appoint a representative or administrator. It can also be instituted when a person is obliged to be away for a long time from their domicile and has not left a representative or administrator, or in the case of missing persons who do not have a representative or administrator.

210 Curatorship is always instituted by the court, upon petition by any person. Any competent and willing adult may be appointed as a curator. A person may designate, by a will, authentic unilateral act, or authentic agreement, a person to be their curator, in which case such person will be appointed by the court. If the court finds it necessary, it can decide that instead of instituting curatorship, judicial counsel or special guardianship is instituted instead.

211 The institution of curatorship requires the consent of the beneficiary if it can be given. In any case, it does not affect the beneficiary's capacity to act. The effects of curatorship concern the beneficiary's affairs and assets, and not their person, thus a family council cannot be constituted. The rules of a simple mandate apply in general, except if the court considers that the curator should have the rights and obligations of a full administrator. In any case, the court may set the limits of the mandate, and may instruct the curator whenever the beneficiary is unable to do so.

212 The curator may request dismissal after three years, or earlier for good reason. Curatorship ends when its reasons end, at the request of any person, by court judgment.

7. *Cross-border situations*

213 According to Article 2572 CC, the civil status and capacity of a natural person are governed by their national law, unless otherwise provided by special provisions. Article 2578 CC provides that protection measures for a person with full capacity to act are subject to the law of the State where they have their habitual residence at the time when the guardianship is established, or another protection measure is taken. The same law governs the existence, extent, change and cessation of the power of representation, when the person with full capacity of exercise cannot take care of their interests. This person may, however, choose a) their law of citizenship; b) the law of one of their previous habitual residences; c) the law where their assets are located, regarding protection measures concerning these assets.

214 According to Article 1079 CPC, Romanian courts are exclusively competent to judge cases regarding guardianship and curatorship of a person domiciled

in Romania who is a Romanian citizen or stateless and the institution of judicial counsel or special guardianship regarding a person domiciled in Romania, regardless of citizenship. Romanian courts also have competence, although not exclusive (Article 1081 CPC), for cases regarding the protection of minors or persons under judicial counsel or special guardianship who are Romanian citizens domiciled abroad.

215 Therefore, foreign judgments, as well as authentic acts, regarding the capacity and protection of a natural person may be recognised in Romania only through the exequatur procedure if the above-mentioned exclusive competence of Romanian courts has not been violated. In practice, it is often easier to obtain the same or equivalent protection measures in Romania, through an *ex novo* procedure.

D. *Conclusion to status of natural persons*

216 The degree of judicial involvement in the status of natural persons varies. While courts play virtually no role in the determination and change of names (except in adoption cases), they are constitutively active in the context of legal gender recognition, as well as in the constitution, management, review, and termination of adult protection measures, except for assistance.

217 Slight liberalisation tendencies can be detected. In particular, a person may designate their aide, as well as their desired tutor and curator, should the need arise, and this can be done both unilaterally as well as by authentic agreement. Ordering a curatorship (but not of judicial counsel or special guardianship) can be avoided completely through well-considered authentic powers of attorney.

218 Further, the extension of the role of the family council, while still in its infancy as a legal institution, to the protection of adults, allows the management of protection regimes to function more smoothly, in the sense that measures agreed on by the tutor and family council are highly unlikely to be contested or struck out by courts.

V. Conclusions

219 Romanian procedural law in family and succession matters is, in many respects, highly modern, with the result that many competences lie with non-judicial authorities, primarily notaries. Essentially, one can say that the Romanian legislator has been guided by the following principles:

a. Giving adult, competent parties the highest degree of autonomy in determining their own personal and patrimonial affairs, by agreement, out of court, specifically before a public notary.

b. Ensuring the protection of children, in both court and in notary procedures, through the means of psycho-social inquiries by specialised local authorities, whose experts issue opinions on the compatibility of any proposed decisions with the superior interests of the child.
c. Keeping the protection of incapable or partly capable adults strictly within the remit of the courts, with some means of smoothing the management of protection regimes through the family council.
d. Giving courts the exclusive competence to exercise a control function, to prevent status changes that may adversely affect children (particularly through adoption) or the public order (gender changes), with a view to the avoidance of legalised same-sex relationships.

SLOVENIA

by *Nataša Erjavec*

I. Introduction

The Republic of Slovenia was established on 26 June 1991. It was previously part of the Socialist Federal Republic of Yugoslavia (hereafter referred to as SFRY). Following independence, a significant portion of the civil law legislation of the former State remained in force in accordance with the Constitution of the Republic of Slovenia. (1) Over time, however, new regulations have been adopted, particularly in the field of family law, but not in the field of inheritance law. **1**

Family and inheritance law in Slovenia are legal branches within civil law. The Slovenian legal system belongs to the continental legal group (civil law). The legislative branch of authority is held by the bicameral parliament, consisting of the National Assembly (*Državni zbor*) and the National Council (*Državni svet*). The National Assembly is the primary legislative body, comprising 88 representatives of the people and two representatives of the Italian and Hungarian national communities. However, Slovenia's legal system was significantly influenced by the decision to join the European Union (hereafter referred to as the EU), which occurred on 1 May 2004. **2**

The legal sources governing the field of family and inheritance law in Slovenia primarily include the Constitution of the Republic of Slovenia, (2) the Family Code (3) adopted in 2017, while the field of inheritance law is still regulated by the Inheritance Act, (4) enacted by the former Republic of Slovenia in 1976, within the framework of the former SFRY. Supplementary **3**

---

(1) Uradni list RS/I (Official Gazette of the Republic of Slovenia), št. 33/91, Uradni list RS, št. 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13, 47/13, 75/16 – UZ70a, 92/21 – UZ62a.

(2) The most important constitutional provisions are in Chapter II of the Constitution of the Republic of Slovenia, among human rights and fundamental freedoms. We refer to provisions regarding marriage and the family (Article 53 of the Constitution of the Republic of Slovenia), parenthood (Article 54 of the Constitution of the Republic of Slovenia), and the rights of the child (Article 55 of the Constitution of the Republic of Slovenia).

(3) Uradni list RS, št. 15/17, 21/18 – ZNOrg, 16/19 – ZNP-1, 22/19, 67/19, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US, 5/23.

(4) Uradni list SRS, št. 15/76, 23/78, Uradni list RS/I, št. 17/91 – ZUDE, Uradni list RS, št. 13/94 – ZN, 40/94 – odl.US, 82/94 – ZN-B, 117/00 – odl. US, 67/01, 83/01 – OZ, 73/04 – ZN-C, 31/13 – odl. US, 99/13, 63/16.

legal sources in this area also consist of the Notariat Act, (5) Personal Name Act, (6) Register of Deaths, Births and Marriages Act, (7) Cardinal Adoption Act, (8) Provision of Foster Care Act, (9) Courts Act, (10) Law on the Succession of Agricultural Holdings, (11) International Private Law and Procedure Act, (12) Land Register Act, (13) among others, not forgetting numerous subordinate regulations. Proceedings in family matters before the court are conducted through contentious or non-contentious procedures, wherein the provisions of contentious procedures, governed by the Civil Procedure Act (hereafter referred to as CPA), (14) are generally applied. (15) Only when explicitly specified in the legal norm does the court decide according to the rules of non-contentious procedures, governed by the Non-Contentious Civil Procedure Act (hereafter referred to as NCCPA). (16) The Inheritance Act stipulates (17) that the provisions of the civil procedure shall apply in all proceedings unless otherwise specified in the Inheritance Act.

4 Legal order in the Republic of Slovenia does not recognise case-law as a mandatory legal source, which means that rulings of higher courts do not formally bind lower courts. Case-law, therefore, represents a secondary

---

(5) Uradni list RS, št. 2/07 – uradno prečiščeno besedilo, 33/07 – ZSReg-B, 45/08, 91/13, 36/20 – ZZUSUDJZ, 175/20 – ZIUOPDVE, 189/20 – ZFRO, 130/22, 49/23, 102/23.

(6) Uradni list RS, št. 20/06, 43/19.

(7) Uradni list RS, št. 11/11 – uradno prečiščeno besedilo, 67/19.

(8) Uradni list FLRJ, št. 30/47, 24/52, Uradni list SFRJ, št. 10/65, 29/71, Uradni list SRS, št. 51/71, 15/76 – ZZZDR.

(9) Uradni list RS, št. 110/02, 11/03, 3/04, 142/04, 7/06, 56/06 – odl. US, 114/06 – ZUTPG, 5/07, 5/08, 73/08, 8/09, 53/09, 7/10, 56/10, 3/11, 57/11, 96/12 – ZPIZ-2, 109/12, 22/19, 46/19, 17/22, 25/23.

(10) Uradni list RS, št. 94/07 – uradno prečiščeno besedilo, 45/08, 96/09, 86/10 – ZJNepS, 33/11, 75/12, 63/13, 17/15, 23/17 – ZSSve, 22/18 – ZSICT, 16/19 – ZNP-1, 36/20 – ZZUSUDJZ, 61/20, 80/20 – ZIUOOPE, 104/20, 152/20 – ZZUOOP, 203/20 – ZIUPOPDVE, 18/23.

(11) Uradni list RS, št. 70/95, 54/99 – odl. US, 30/13, 44/22 – ZKZ-G.

(12) Uradni list RS, št. 56/99, 45/08 – ZArbit, 31/21 – odl. US.

(13) Uradni list RS, št. 58/03, 45/08, 37/08 – ZST-1, 28/09, 25/11, 14/15 – ZUUJFO, 23/17 – ZDOdv, 69/17, 11/18 – ZIZ-L, 16/19 – ZNP-1, 121/21.

(14) Uradni list RS, št. 73/07 – uradno prečiščeno besedilo, 45/08 – ZArbit, 45/08, 111/08 – odl. US, 121/08 – skl. US, 57/09 – odl. US, 12/10 – odl. US, 50/10 – odl. US, 107/10 – odl. US, 75/12 – odl. US, 76/12 – popr., 40/13 – odl. US, 92/13 – odl. US, 6/14, 10/14 – odl. US, 48/14, 48/15 – odl. US, 6/17 – odl. US, 10/17, 32/18, 16/19 – ZNP-1, 70/19 – odl. US, 1/22 – odl. US, 3/22 – ZDeb.

(15) Barbara Novak, *Družinsko pravo po Družinskem zakoniku in Zakonu o nepravdnem postopku* (Uradni list RS 2022) 66.

(16) Uradni list RS, št. 16/19, 28/21.

(17) Inheritance Act, art 163.

source of law, ensuring consistent application of formal (primary) legal sources. The absolutely binding sources of law are only the acts of the legislator (or constitutional legislator), whether Slovenian or European. However, the actual significance of judicial practice is very significant, as lower courts respect the judicial practice of higher courts and the Supreme Court. According to the established practice of the Constitutional Court, an unjustified and unexplained departure from the judicial practice of the Supreme Court constitutes a violation of the right to equal protection of rights under Article 22 of the Constitution of the Republic of Slovenia.

5 In proceedings related to family and inheritance law, courts typically make decisions. Also playing a significant role are the Centres for Social Work (hereafter: CSW), notaries, and administrative units. (18) The courts dealing with these matters are general courts, namely: local, district, higher, and the Supreme Court. At the initial level of family law, decisions are usually made by district courts, (19) which are not specialised family courts but have specialised family departments within district courts. Specialised family departments are also established within higher courts and the Supreme Court. (20) Local courts handle inheritance matters. (21) In Slovenia, there are 44 local courts, 11 district courts, 4 higher courts, and the Supreme Court. The Constitutional Court of the Republic of Slovenia holds the highest position as the authority safeguarding constitutionality, legality, human rights, and fundamental freedoms.

6 In the field of family law, the Family Code (hereafter referred to as FC) (22) came into force in Slovenia on 15 April 2019. The FC represents a reform of family legislation that originated over four decades earlier in the former State (SFRY) and was previously regulated by the Marriage and Family Relations Act (hereafter referred to as MFRA) (23) until the FC came into force. (24) With the implementation of the FC, the majority of decisions that were within the competence of administrative bodies (CSW) were transferred to

(18) Administrative units perform tasks of the Sate administration.

(19) Family Code, art 14(1).

(20) Barbara Novak, *Družinsko pravo po Družinskem zakoniku in Zakonu o nepravdnem postopku* (Uradni list RS 2022) 26.

(21) Courts Act, art 99.

(22) The FC was adopted on 21 March 2017, and the *vacatio legis* continued from March 2017 to April 2019.

(23) Uradni list RS, št. 69/04 – uradno prečiščeno besedilo, 101/07 – odl. US, 90/11 – odl. US, 84/12 – odl. US, 82/15 – odl. US, 15/17 – DZ, 94/22 – odl. US, 94/22 – odl. US.

(24) The Republic of Slovenia adopted the Marriage and Family Relations Act (MFRA) in 1976, and it came into effect on 1 January 1977.

the courts. ([25]) Some examples of this transfer include disregarding impediments of kinship and the personal status of being a minor in concluding a marriage, measures for the protection of children's interests (including foster care) and adoption. The previous non-contentious procedure for the deprivation of legal capacity was renamed as the procedure for appointing a guardian to an adult and the courts gained jurisdiction over the appointment of guardians (previously under the authority of the CSW). ([26])

7 Pivotal changes introduced by the FC include the transfer of jurisdiction exclusively in cases of consensual divorce for spouses without joint minor children from the courts to notaries. Another novelty is the option for spouses to conclude a marital property agreement (*Pogodba o ureditvi premoženjskopravnih razmerij*). ([27]) Through this contract, the spouses can agree on the content of their property regime, distinct from the statutory one. Additionally, they can regulate other property relationships and agree on mutual maintenance for the duration of the marriage, as well as in the event of divorce. The contract is executed in the form of a notarial deed. The notary who drafts the contract ensures its registration in the Register of Marital Property Agreements, maintained by the Chamber of Notaries of Slovenia.

8 Within the field of inheritance law, decision-making falls entirely under the jurisdiction of courts, and there have not been significant changes in this area, despite proposals to transfer some competences from courts to notaries. However, such legislative proposals have not garnered the necessary support. It is also worth mentioning the Central Register of Wills, introduced on 15 October 2007, functioning as an automated database at the Chamber of Notaries of Slovenia. Notaries, lawyers, or courts can propose entries into this register for wills they draft or receive for safekeeping.

9 Since the re-introduction of notaries in Slovenia, there have been aspirations within the Notary Chamber of Slovenia to take a more active role in the regulation of inheritance matters. The first attempt to change the law occurred in 2000 but ended with the fall of the government. Subsequent unsuccessful attempts followed in 2008, 2013, and 2019. There are numerous arguments in favour of transferring jurisdiction (faster procedures, relieving the courts, greater accessibility to notaries, etc), but it is a decision primarily

---

([25]) Vesna Rijavec, 'Postopki v družinskih zadevah po sprejemu Družinskega zakonika' (2017) 43 Podjetje in delo 1279, 1279–1301.

([26]) Before that, the court determined the need for a guardian, while the appointment of the guardian itself was done by the CSW.

([27]) Family Code, arts 85–94.

of a political nature. At the time of writing this contribution, (28) the legislative process is underway to amend the Inheritance Act, (29) aiming to expedite inheritance proceedings and set shorter deadlines in cases of unknown heirs, (30) proceedings with public notice, (31) and the transfer of estates into bankruptcy without heirs. (32) Simultaneously, it is proposed that notice be published only on the court's websites, no longer affixed to the court bulletin board, published in the Official Gazette of the Republic of Slovenia, and, if necessary, by other suitable means, as currently mandated by law.

10 The Courts Act defines the court as a State body responsible for exercising judicial authority and executing rulings, directly enforcing these rulings in matters and instances stipulated by the law. Courts also execute rulings made by other State bodies or public authorities, if so provided by law. (33) Courts issue judicial rulings, either in the form of judgments or decisions. (34) The relationship between a judgment and a decision under the Civil Procedure Act is regulated so that the court issues a decision when it does not decide by judgment. (35) This means that when the court does not rule on the plaintiff's claim and does not simultaneously decide on the substance, it makes a decision. (36) In principle, therefore, in civil proceedings, the court makes judgments on final or substantive issues, while decisions are primarily issued to resolve procedural/preparatory matters. However, this rule does not entirely hold true. (37) In non-contentious proceedings, courts issue their rulings in the form of decisions. There are several differences between a judgment and a decision. The first is their structure (the structure of a judgment and its parts are strictly prescribed, while a decision must only include an introduction and a decree, with an explanation provided only if required by law). The second difference lies in the binding nature of the court's judgment (the court is always bound by a judgment). The third difference is in their finality. Unlike judgments, which become final when

(28) December 2023.

(29) Ministrstvo za pravosodje, *Predlog Zakona o spremembah Zakona o dedovanju*, <https://skupnostobcin.acblnk.com/url/ver/537658634/2456317/27f83c2f7585f168d56cf80a95ccaa96> accessed 29 December 2023.

(30) Inheritance Act, art 130.

(31) Inheritance Act, art 206.

(32) Inheritance Act, arts 142(a) and 142(b).

(33) Courts Act, art 37.

(34) Civil Procedure Act, art 128.

(35) Civil Procedure Act, art 128(3).

(36) Matej Čujovič, 'Novela Zakona o nepravdnem postopku: sodna odločba, sodna poravnava in pravna sredstva po novi ureditvi' (2019) 1 PB 83, 85.

(37) Ibid 84.

they can no longer be challenged by appeal, not all decisions have legal finality. Only decisions that are equated with judgments, those marking the end of proceedings, and those imposing specific obligations on parties or others become legally final. (38)

11 Different authorities collect and process statistical data relevant to procedures in the field of family and inheritance law. The Ministry of Justice records data concerning case allocations in courts, (39) the Chamber of Notaries maintains the Register of Wills, (40) the Register of Marital Property Agreements, (41) and the Statistical Office of the Republic of Slovenia documents the number of divorces (42) and adoptions. (43)

II. Family law

12 Among the legal sources governing family law, the first to mention is the Constitution of the Republic of Slovenia (primarily encompassing provisions on marriages, parenthood, children's rights, and the freedom to decide on childbirth) alongside various international treaties and EU legislation. The primary law governing a significant portion of family relations is the Family Code (FC), designed to consolidate all family matters into a single statute post-accession. However, the legislative body deviated from this principle during the validity of the Marriage and Family Relations Act (MFRA). The intention was for the MFRA to comprehensively regulate family matters, but the legislature departed from such a regulatory approach in this area. Instead, the legislature enacted special legislation specifically addressing

---

(38) Matej Čujovič, 'Novela Zakona o nepravdnem postopku: sodna odločba, sodna poravnava in pravna sredstva po novi ureditvi' (2019) 1 PB 83, 85.

(39) In 2022, there were 23,918 received inheritance cases; Ministrstvo za pravosodje, *Sodna statistika 2022*, <https://podatki.gov.si/dataset/43606a24-b254-40ef-846d-2b7df3db22ed/resource/124b649f-d599-44a1-ab5c-69b71316492c/download/sodnastatistika2022.pdf> accessed 27 December 2023.

(40) From 2007 to 2019, 42,620 wills were registered; Notarska zbornica Slovenije, *Register oporok*, <https://www.notar-z.si/registri/register-oporok> accessed 27 December 2023.

(41) Between 2019 and 2022, 440 marital property agreements were registered; Notarska zbornica Slovenije, *Register pogodb o ureditvi premoženjskopravnih razmerij*, <https://www.notar-z.si/registri/register-pogodb-o-ureditvi-premozenjskopravnih-razmerij> accessed 27 December 2023.

(42) The statistics record 2,149 divorces for the year 2022; Statistični urad Republike Slovenije, *Aktualni podatki*, <https://www.stat.si/StatWeb/Field/Index/17/78> accessed 27 December 2023.

(43) The statistics record a final figure of 40 adoptions for 2021, with 23 adoptions from abroad; Statistični urad Republike Slovenije, *Priznanja in ugotovitve očetovstva, posvojitve otrok, 2021*, <https://www.stat.si/StatWeb/news/Index/10356> accessed 27 December 2023.

adoptions and foster care. After the adoption of the special legislation, the MFRA ceased to apply, and as a result, left only specialised laws governing adoptions and foster care. Consequently, the new FC does not effectively regulate family law matters but shares jurisdiction over family law issues with these specialised laws, which, however, have limited scope. Consequently, even after the FC's enactment in Slovenia, the Cardinal Adoption Act (regulating incomplete adoptions based on regulations predating the MFRA) and the Foster Care Act continue to apply.

13 The new FC, adopted on 21 March 2017, came into effect on 15 April 2019, (44) replacing the MFRA enacted on 4 June 1976. The two-year *vacatio legis* period was necessary to adjust to the changes introduced by the FC. These changes resulted from the transfer of responsibilities from Centres for Social Work (CSW) to courts, the redefinition of boundaries between contentious and non-contentious proceedings, and the expanded authorities of notaries. (45) According to the new FC, notaries became responsible for creating marital property agreements and executing consensual divorces for couples without joint children over whom parental care is exercised.

14 Slovenian family law regulates various aspects (46) of family life including various life partnerships, relationships between parents and children, forms of State assistance for challenges in partner and family life, measures to safeguard children's interests, maintenance, adoptions, granting parental care to relatives, foster care, guardianship for children, and guardianship for adults in need of special care. (47)

15 The procedural regulations governing the enforcement of substantive legal rights primarily consist of the Civil Procedure Act (CPA), regulating contentious proceedings, and the Non-Contentious Civil Procedure Act (NCCPA), governing non-contentious proceedings. To delineate jurisdiction between these proceedings, a rule applies: in family matters where a court is competent, the contentious procedure provisions are generally applied in decision-making. If the legislator intends to prescribe a non-contentious procedure in matters within the judicial jurisdiction, they must explicitly state so in their normative act. However, adherence to this rule in the FC has been inconsistent. (48) NCCPA intervened in the FC's provisions by explicitly specifying which family matters are handled in non-contentious proceed-

(44) Except for a few rare provisions that started to apply earlier; Family Code, art 305.

(45) Suzana Kraljić, *Družinski zakonik s komentarjem* (Poslovna založba MB 2019) 33.

(46) Family Code, art 1.

(47) Barbara Novak, *Družinsko pravo po Družinskem zakoniku in Zakonu o nepravdnem postopku* (Uradni list RS 2022) 15–17.

(48) Ibid 66.

ings. Non-contentious proceedings are envisaged, among other things, for recognising the existence of disputes over the divorce and annulment of marriages, disputes regarding the division of joint property, disputes over establishing and contesting paternity or maternity, disputes over the maintenance of adult children as long as the obligation exists under the FC, disputes over the exercise of parental care, decisions regarding adoption, granting parental care to relatives, fostering, placing a child or adult under guardianship. ([49]) In conclusion, the majority of family legal relations have been decided through non-contentious proceedings after the implementation of NCCPA.

16 Slovenian family law is distinct due to the institute of cohabitation (*zunajzakonska skupnost*). Slovenia regulated cohabitation, equating it with marriage, back in 1977 – a rarity elsewhere in Europe. Initially defined as a domestic community between a man and a woman, this was intended to protect the weaker (heterosexual) partner from exploitation by the other partner. ([50]) The Civil Union Act (hereafter referred to as CUA), ([51]) which has since ceased to be in force, legally acknowledged the status of a registered partnership even for same-sex couples, ([52]) and also for non-registered same-sex couples in cohabitation. Presently, cohabitation may involve individuals of the same or different gender, as defined in Article 4 of the FC as a long-term domestic community of two individuals who are not married but there are no reasons for marriage between them to be invalid. Such a union, according to the FC, holds the same legal consequences between the cohabitants as a marriage would; however, its legal implications in other legal domains are determined by other laws. ([53]) Slovenian law does not require any formalities for the existence of cohabitation, unlike marriage, which may require registration, for instance. Cohabitants have the same rights and obligations as spouses under the FC. However, in other legal domains, cohabitants enjoy equivalent legal consequences (meaning they have the same rights and obligations as spouses) only if the relevant sector-specific law explicitly stipulates so. As cohabitation cannot be equated with marriage, it

---

([49]) Ibid 67.

([50]) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 40.

([51]) Uradni list RS, št. 33/16, 94/22 – odl. US, 5/23.

([52]) Suzana Kraljić, *Družinski zakonik s komentarjem* (Poslovna založba MB 2019) 50.

([53]) The second paragraph of Article 4 of the FC further stipulates that if a decision regarding a right or obligation depends on the existence of a life partnership as mentioned in the first paragraph of Article 4 of the FC, this matter shall be determined in proceedings to ascertain such rights or obligations. The decision on this matter has legal effects solely within the issue addressed and resolved in the case at hand.

is not subject to the EU Regulation (54) that governs property rights between spouses. Similarly, the EU Regulation (55) that regulates property rights between registered partners cannot be applied to cohabitation under Slovenian law. This stems from the definition of 'registered partnership' in the EU Regulation, which refers to a form of life partnership between two individuals specified by the law, which requires registration and meets the legal formalities regarding its establishment. (56) Consequently, cohabitation, a prevalent practice in Slovenia, does not fall within the scope of either Regulation that regulates property rights between spouses or registered partners. This discrepancy represents unequal legal treatment between cohabitants and spouses or registered partners, particularly concerning property relations with international elements. (57)

I would like to emphasise that, following the decision of the Constitutional Court, (58) and the subsequent amendment to the FC, (59) the Republic of Slovenia now allows the marriages of same-sex partners. Additionally, same-sex spouses or cohabitants can now jointly adopt a child. Before the Constitutional Court ruling, Slovenian law recognised two forms of formalised partnerships: the FC defined marriage, while the CUA regulated partnership. Marriage was defined as a lifelong union between a man and a woman, while partnership was intended for two individuals of the same sex. The Constitutional Court of the Republic of Slovenia, in its judgment, (60) found a discrepancy in Article 3 of the FC in relation to the Constitution, prompting the legislator to modify the first paragraph of Article 3 of the FC, thereby defining marriage as a lifelong union between two individuals. Consequently, this led to the cessation of the CUA. (61) Furthermore, the

(54) Council Regulation (EU) 2016/1103[2016] OJ L183/1, art 3.

(55) Council Regulation (EU) 2016/1104[2016] OJ L183/30, art 3.

(56) Ibid art 3(1)(a).

(57) This discrepancy was also confirmed by the Ministry of Labour, Family, Social Affairs, and Equal Opportunities in their correspondence under reference number 1201-4/2019/3, dated 19 March 2019.

(58) *U-I-486/20, Up-572/18*, 94 Uradni list Republike Slovenije (USRS 16 June 2022) 7104, 7104–7112.

(59) Uradni list RS, *98. Zakon o spremembah Družinskega zakonika (DZ-B), stran 211.*, <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2023-01-0098/zakon-o-spremembah-druzinskega-zakonika-dz-b> accessed 29 December 2023.

(60) *U-I-486/20, Up-572/18*, 94 Uradni list Republike Slovenije (USRS 16 June 2022) 7104, 7104–7112.

(61) Uradni list RS, *98. Zakon o spremembah Družinskega zakonika (DZ-B), stran 211.*, <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2023-01-0098/zakon-o-spremembah-druzinskega-zakonika-dz-b> accessed 29 December 2023.

Constitutional Court, through its judgment, (62) found discrepancies in Articles 213 and 223 of the FC in relation to the Constitution, which had prohibited joint adoption by same-sex couples. The Court determined, through this judgment, that until the relevant amendment to the FC, the same rules applicable to joint adoption by spouses under the existing legal framework would apply to joint adoption by same-sex couples.

A. *Divorce and legal separation*

1. *Termination of marriage*

18 In the Slovenian legal framework, a marriage can end (63) through divorce, annulment, the death of one of the spouses, or by declaring a missing person deceased. (64) The termination of a marriage occurs solely through divorce; there is no provision for separation. It is essential to note that upon the termination of a domestic community between spouses, their joint property ceases, as does inheritance rights. All processes for ending a marriage are court proceedings, with the exception of consensual divorce for spouses without joint minor children over whom they exercise parental care, which is conducted before a notary.

a) *Consensual termination of marriage before the court*

19 Marriage between spouses with minor children can be consensually terminated in court. (65) A procedural prerequisite is that the spouses first reach an agreement regarding the custody, upbringing, (66) and maintenance of their joint children, as well as arrangements for their contact with both parents. Before submitting a consensual divorce petition, the spouses attend a counselling session at the CSW to help determine if their relationship is sufficiently strained for the marriage to be unsustainable for at least one of them or if there is a possibility of salvaging the marriage. (67) The counselling

(62) *U-I-91/21-19, Up-675/19-32*, 94 Uradni list Republike Slovenije (USRS 16 June 2022) 7112, 7112–7126.

(63) Family Code, art 95.

(64) Barbara Novak, *Družinsko pravo po Družinskem zakoniku in Zakonu o nepravdnem postopku* (Uradni list RS 2022) 142.

(65) Family Code, art 96(1).

(66) In this context, the parents can agree to continue having joint custody and joint responsibility for the upbringing of their children, or all the children can reside with one parent, or some children can live with one parent while others reside with the other parent (Family Code, art 138(1)).

(67) Family Code, art 200.

session must be attended by the spouses personally, without representatives. The CSW prepares a record of the counselling session, which must be attached to the spouses' petition for consensual divorce. (68) Additionally, spouses seeking a consensual divorce must reach prior agreements at a notary regarding the division of their joint property, determining who will become, or remain, the tenant of the residence post-divorce, and an agreement on maintenance for the spouse who lacks means of livelihood and is unemployed without fault. These agreements must be formalised in the form of an enforceable notarial deed signed by both spouses and the notary. (69) The only difference between spouses who have joint underage children is that the obligations must be agreed upon in these three agreements, according to the wording of the FC, with mandatory enforceability. In the case of married couples without joint underage children, enforceability is not obligatory. Such spouses can agree on enforceability, but it is not a legal requirement in this case. This agreement is concluded by the spouses themselves, and as such, a lawyer's legal assistance is not anticipated. However, they may seek assistance from the CSW, or they can opt for the mediation procedure, as stipulated by Article 202 of the FC. Before the court grants the divorce, it verifies whether a special (separate) agreement (70) between the spouses ensures the welfare, upbringing, and maintenance of their joint children and their access to both parents, all in line with the children's best interests. If this is not fulfilled, the court rejects the spouses' petition for consensual divorce. (71)

20 For consensual divorces, the district courts have substantive jurisdiction. (72) In addition to this, the court is required to have special territorial jurisdiction, which is determined by where the spouses had their last shared permanent residence. (73) In cases of marital disputes with an international element, if the Republic of Slovenia has jurisdiction because the spouses had their last shared permanent residence in Slovenia, the competent venue is the court within whose jurisdiction the spouses had their last shared permanent residence. (74)

21 Slovenian courts decide on divorce by issuing a decision. (75) The decision to divorce also incorporates the agreement between the spouses regarding the

(68) Family Code, art 82(2).
(69) Family Code, art 96(1).
(70) The spouses agree on this by themselves in the form of a private document.
(71) Family Code, art 96(2).
(72) Non-Contentious Civil Procedure Act, art 10(2)(3).
(73) Non-Contentious Civil Procedure Act, art 14(1).
(74) Non-Contentious Civil Procedure Act, art 14(2).
(75) Non-Contentious Civil Procedure Act, art 85(1):

custody, upbringing, and maintenance of their joint children, as well as the contact arrangements between the spouses and the children. (76) Appeals are permissible against any ruling, either against its entire decree or only against individual parts thereof. This applies universally, to all court rulings, not just in this particular case.

22 The decision to divorce based on the spouses' joint petition for divorce can only be contested due to substantial violations of procedural rules if a spouse consented to the petition due to error, force, or deceit, or if the legal conditions for divorce based on the agreement for consensual divorce were not fulfilled. (77)

23 The legally final decision on the divorce cannot be annulled or altered based on a request for the protection of legality, regardless of whether either of the participants have entered into a new marriage. (78) There is an option for review against the decision, which is permitted by NCCPA under the conditions specified by the CPA for all non-contentious proceedings where it is not explicitly excluded. Re-opening the procedure is possible only against a legally final decision by the court where the petition for divorce was rejected. (79)

b) *Consensual divorce before a notary*

24 Consensual divorce of spouses without joint children, over whom they would exercise parental care, takes place before a notary. This new regulation, effective from 15 April 2019, was introduced by the FC to facilitate a simpler and faster divorce, thus relieving the burden on the courts. (80) This new option has been well received in practice and among users. For a divorce before a notary, three cumulative conditions must be met:

(Content of a decision in matrimonial disputes)

(1) The court's decision by way of which the divorce is granted on the basis of a petition for uncontested divorce shall also contain an agreement of the spouses on the care, upbringing and maintenance of joint children and their contact with the parents.

(2) If the court agrees with the petition for divorce, annulment or non-existence of marriage, it shall also decide on the care, upbringing and maintenance of joint children and their contact with the parents.

(3) In the decision referred to in the preceding paragraph, the court shall also decide on the maintenance of the spouse and on the arrangement of accommodation protection if a relevant petition was submitted in the proceedings.

(76) Ibid.

(77) Non-Contentious Civil Procedure Act, art 86.

(78) Non-Contentious Civil Procedure Act, art 87.

(79) Non-Contentious Civil Procedure Act, art 87(1).

(80) Ministrstvo za delo, družino, socialne zadeve in enake možnosti, Predlog Družinskega zakonika, 13, <http://vrs-3.vlada.si/MANDAT14/VLADNAGRADIVA.NSF/1

— The spouses do not have joint children over whom they exercise parental care;
— The spouses must previously and in the form of a notarial deed agree on the property and legal consequences of their divorce. To achieve this, they make three agreements: one regarding the division of co-owned property, another about who will be the tenant of the residence after the divorce (if they live in rented accommodation), and a third about the maintenance of the financially disadvantaged spouse;
— Both spouses must consent to the divorce. The notary verifies the consent of both parties and prepares a specific notarial deed on this matter.

25 Consensual divorce before a notary is exclusively intended for spouses without joint children over whom they would exercise parental care. The notary will inquire about this aspect and record their statements in a notarial deed. The notary is obliged to clarify this fact but may rely on the parties' statements and accept them as accurate. ([81]) Parental responsibility over a child typically ends when the child turns 18 and becomes an adult. However, a child may attain full legal capacity even before reaching adulthood. This occurs if the child enters into a marriage or if the court recognises their full legal capacity, provided the child has become a parent and has achieved the physical and mental maturity necessary for independent living. ([82])

26 i) *Preliminary phase of termination of marriage before a notary*. Consensual divorce before a notary occurs in two phases. In the first phase, the spouses enter into three agreements: on the division of their co-owned property, on which of them becomes, or remains, the tenant of the residence after the divorce, and on maintenance for the financially disadvantaged spouse. ([83]) According to the FC, all three aforementioned agreements must be concluded in the form of a notarial deed, but it does not mandate mandatory direct enforceability (unlike agreements for the divorce of spouses with minor children). The reason for this difference lies in the legislature granting greater autonomy to spouses without minor children who wish to divorce consensually. In practice, all three mentioned agreements are usually contained within a single notarial instrument.

8a6b9887c33a0bdc12570e50034eb54/ac8b64126a6eae51c1258087004e704c/$FILE/DZak_VG__12_12_16_.pdf> accessed 22 December 2023.

([81]) Vesna Rijavec, 'Civilnopravna odgovornost notarjev' (1998) 11 PP I, I–IX.

([82]) Family Code, art 152.

([83]) In cases of consensual divorce before a notary, where the spouses do not have minor children and the notary issues a public document, the notary can be regarded as a court in accordance with the Brussels IIb Regulation.

27 ii) *Termination of marriage before a notary in a narrower sense*. The second, substantive phase, or the divorce in a narrower sense, follows the first phase and involves the spouses signing a notarial deed about the divorce. The FC explicitly states that the divorce becomes final on the day the notarial deed of the spouses' agreement on divorce is signed. (84) The legislator mandates the notary to send (85) the notarial deed about the divorce to the administrative unit responsible for entering the divorce into the civil registry. The registration of the divorce in the civil registry is declarative in nature. Spouses can choose any notary in the Republic of Slovenia for their divorce, as each notary is authorised to operate throughout the territory of the Republic of Slovenia. (86) In legal theory, a notary is exclusively competent (87) for the consensual divorce of spouses who do not have joint minor children over whom they exercise parental care. However, in practice, there are still cases where such divorces are executed by the court. Some courts believe that access to judicial protection is always a right of the parties. Despite the courts being aware that a consensual divorce can take place before a notary, introduced with the purpose of relieving the courts, notaries are exclusively designated as competent for them. Nevertheless, as was the case before the enactment of the FC, some courts still independently grant a divorce in the case of an agreement between spouses who do not have joint children over whom they share parental responsibility.

2. *Termination of marriage in court, initiated by one of the spouses due to unsustainability*

28 Divorce before a court can also be initiated by one of the spouses. The spouse suing for divorce claims the existence of a reason for divorce, namely the unsustainability of the marriage. It is not relevant whether the marriage is unsustainable for the other spouse, as the court can grant a divorce even if the other spouse opposes the divorce. (88) The spouse causing the unsustainability can also propose the divorce; their fault is not a barrier for divorce. The most common reasons in practice for unsustainability are the mismatch of characters between spouses, relationships with other people,

---

(84) Family Code, art 97(2).

(85) The deadline for sending is eight days after signing the notarial deed.

(86) Notariat Act, art 12(1).

(87) Barbara Novak, *Družinski zakonik: z uvodnimi pojasnili (2. spremenjena in dopolnjena izdaja)* (Uradni list RS, 2020) 105.

(88) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 318.

and estrangement between spouses. (89) When the court grants a divorce upon the request of one spouse, it simultaneously decides on the custody, upbringing, and maintenance of the joint children and their contact with the parents. In doing so, it determines in advance how the children's best interests will be ensured. (90) If neither spouse has requested a ruling on these matters, the court must decide on issues related to the joint children *ex officio*. (91) In a divorce initiated by one spouse due to unsustainability, the court also decides on the support and housing arrangements of accommodation protection for the spouse if such a request has been made during the process. (92) During a divorce initiated by one spouse due to unsustainability, the court does not decide on the extent of the co-owned property of the spouses or their shares in it, nor does it divide it. The territorial jurisdiction for the divorce lies with the district court, specifically the court in the area where the petitioner resides (93) or where the spouses last had a shared permanent residence. (94) In cases involving international elements, the competent court in Slovenia is determined by the last shared permanent residence of the spouses in Slovenia or the permanent residence of the petitioner in Slovenia. (95)

When it comes to divorce proceedings before a court, the principle of inquiry applies, but only when it concerns safeguarding the rights and legal interests of children and individuals who, due to disturbances in their mental development, mental health issues, or other circumstances, are incapable of independently caring for their rights or interests. In such cases, the court establishes facts that the participants have not mentioned and also provides evidence that the participants have not proposed. (96) Participants must have the right to make a statement in the procedure, meaning they have the opportunity to express themselves regarding the claims of other participants, the chance to participate in the presentation of evidence, and the opportunity to discuss the results of the entire process. In the case of a judicial divorce, it is considered divorced only when the divorce decision becomes final. An appeal against the court's decision is permitted within 30 days of receiving a copy of the decision.

(89) Ibid 319.
(90) Family Code, art 98.
(91) Non-Contentious Civil Procedure Act, art 102.
(92) Non-Contentious Civil Procedure Act, art 85(3).
(93) Non-Contentious Civil Procedure Act, art 10(1).
(94) Family Code, art 14(1).
(95) Family Code, art 14(2).
(96) Non-Contentious Civil Procedure Act, arts 7 and 6(2).

3. *Legal consequences of termination and annulment of marriage*

a) *Personal name of spouses*

30 A personal name is composed of a first name and a surname. (97) Upon annulment of a marriage or divorce, the divorced spouses typically retain the surname they chose at the time of marriage. The spouse who changed their surname at the time of marriage can, within one year of the finality of the court ruling on divorce or annulment of the marriage, or within one year of signing a notarial deed or another equivalent document for a consensual divorce, make a statement to the competent authority expressing their desire to revert to the surname they had before entering into the marriage. This statement can only be made if the individual changed their surname during the marriage. Thus, if a spouse decided to take the surname of the other spouse, upon divorce, it is possible to revert back to the surname that the spouse had before marriage. However, if a spouse decided that upon marriage, they do not want to change their surname, the option for changing the surname upon divorce is not possible as the surname of such a spouse has not been changed at all.

b) *Marital property of spouses*

31 For a consensual divorce before the court or before a notary, it is a requirement that the co-owned property of the spouses be previously mutually determined and divided. However, this requirement does not apply to divorces initiated by one of the spouses due to unsustainability before the court. In such cases, the divorce of the spouses can occur without the prior determination and division of their joint assets. The spouses can subsequently handle this matter either by mutual agreement or through the court proceedings. The same principle applies to the annulment of the marriage. If there is no agreement or initiative for a judicial resolution of the dispute, the property is not divided.

c) *Parental responsibility*

32 The spouses who share parental responsibility for their joint children can only divorce before a court, either consensually or upon the request of one of them due to unsustainability. In the case of divorce, the court also decides on the custody, upbringing, and maintenance of the joint children and their contact with the parents. Even in the case of the annulment of marriage, the

(97) Personal Name Act, art 3.

provisions regarding the relationship between the spouses from the invalidated marriage toward their joint children are applied as in the case of a divorce. (98)

d) *Spousal maintenance*

33 In the case of a consensual divorce, in the initial phase and in the form of a notarial deed, the spouses also agree on the maintenance of the spouse who is financially disadvantaged and is not employed without their fault. In the case of a consensual divorce before the court, such an agreement must be directly enforceable, (99) while in a consensual divorce before a notary, it can be directly enforceable if agreed upon by the spouses. In a divorce initiated by one of the spouses before the court due to unsustainability, the court, through the decision on divorce, also decides on the maintenance of the underprivileged spouse if such a request has been made during the process. (100) According to substantive law in this scenario, the financially disadvantaged spouse can demand maintenance from the other spouse through a specific lawsuit. This lawsuit must be filed within one year from the legally final divorce, (101) but only if the conditions for maintenance existed at the time of the divorce and continue to exist when the spouse demands maintenance. The same applies to the maintenance of spouses even in cases of annulment of marriage. Although this is not explicitly derived from the law, there has never been a dispute over this interpretation. (102)

e) *Child maintenance*

34 When a couple with minor children seeks divorce before the court, the resolution of matters concerning the children occurs in the course of the divorce proceedings. In the case of a consensual divorce before the court, the spouses must first reach an agreement on all essential matters concerning their children and submit a report from the CSW regarding the prior counselling conducted before proposing the consensual divorce. The court is not bound by the spouses' agreement concerning the children. In divorce

(98) Family Code, art 99.
(99) Family Code, art 96(1).
(100) Non-Contentious Civil Procedure Act, art 85(3).
(101) Family Code, art 100(1).
(102) Barbara Novak, *Družinsko pravo po Družinskem zakoniku in Zakonu o nepravdnem postopku* (Uradni list RS 2022) 155.

cases initiated by one of the spouses, (103) Article 85 of the NCCPA regulates simultaneous decisions regarding relevant child-related claims. (104) The court can make concurrent decisions about the custody, upbringing, and maintenance of joint children, as well as contacts with them by the parents, even without their request or differently from what they requested. Before making its ruling, the court assesses whether the child's best interests are safeguarded, gathers opinions from the CSW, and also considers the child's own opinion, expressed either directly or through a trusted representative if the child is capable of understanding its significance and consequences. (105)

f) *Inheritance rights*

35 In the Slovenian legal framework, there are only two primary bases for inheritance: by a will and by law. According to the Inheritance Act, both an inheritance contract and a contract regarding the content of a will are invalid, except for an agreement on the renunciation of an inheritance that has not been initiated, (106) which is limited to a narrow and strictly defined circle of individuals. Descendants from an ancestor or, since the Inheritance Act-C (107) amendment in October 2016, a spouse can renounce an inheritance.

36 The surviving spouse has no inheritance rights if they were divorced from the deceased, if their marriage had been annulled during the deceased's lifetime, or if the termination of the domestic community with the deceased was due to the fault of the surviving spouse or by consensual agreement with the deceased. The termination of the domestic community essentially means the end of a marriage and, consequently, has the same implications on inheritance rights as a formal legal divorce. A spouse loses their inheritance rights if the deceased had sued for divorce, and after their death, it was determined that the divorce was justified. In such a case, heirs can continue the procedure based on the divorce initiated by the deceased, primarily to exclude the spouse as an heir. A spouse also loses inheritance rights when

(103) The same applies in the case of a petition for annulment or the non-existence of a marriage.

(104) Vesna Rijavec, Aleš Galič et al, *Zakon o nepravdnem postopku (ZNP-1), Razširjena uvodna pojasnila* (GV založba 2020) 205.

(105) Family Code, art 143(1).

(106) Inheritance Act, 137(2).

(107) Uradni list RS, 2687. Zakon o spremembah in dopolnitvah Zakona o dedovanju (ZD-C), stran 8787, <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2016-01-2687?sop=2016-01-2687> accessed 27 December 2023.

their marriage with the deceased was annulled posthumously due to reasons known to the surviving spouse at the time of the union's conclusion. (108)

4. *International jurisdiction*

When it comes to a divorce without joint minor children, both courts and notaries (109) in Slovenia verify their international jurisdiction based on the provisions of the Brussels IIb Regulation (110) and the Private International Law and Procedure Act (hereafter referred to as PILPA). According to Regulation Rome III, a 'court' denotes any body within participating Member States which has judicial authority over matters falling under the scope of this Regulation (such as divorce and legal separation). (111) Undoubtedly, under Article 96 of the FC (consensual divorce before the court) and Article 98 of the FC (divorce before the court upon one spouse's petition due to unsustainability), it constitutes a divorce before the court. However, it is worth highlighting the newly-introduced divorce before a notary (112) and that the notary system in Slovenia is a public service. (113) Notaries practise as independent professionals and are persons of public trust. Notaries are appointed to vacant positions within the notarial profession by the Minister of Justice. (114) The agreement between spouses regarding divorce before a notary must be drawn up in the form of a notarial deed, (115) representing a public document. The content of the notarial deed is stipulated by the Notariat Act. Among other duties, the notary verifies the parties' identity, confirms whether the conditions for divorce before a notary are met, and particularly examines the mutual consent of both spouses to divorce while providing them with legal advice. The divorce is granted upon the signing of the notarial deed by both spouses and the notary, (116) indicating the reasons why a notary overseeing the consensual divorce of spouses without joint minor children might be categorised under the term 'court' (117) pursuant to

37

(108) Viktorija Žnidaršič Skubic, 'Dedovanje med zakoncema' (2015) Pravni letopis 81, 81–91.

(109) In cases of consensual divorce of marriage between spouses without joint minor children.

(110) Council Regulation (EU) 2019/1111 [2019] OJ L178/1, ch 2.

(111) Council Regulation (EU) 1259/2010 [2010] OJ L343/10, art 3(2).

(112) Family Code, art 97.

(113) Notariat Act, art 1(1).

(114) Notariat Act, art 10(1).

(115) The content rules of the notarial deed are determined by Article 43 of the Notarial Act.

(116) Family Code, art 97(2).

(117) Council Regulation (EU) 1259/2010[2010] OJ L343/10, art 3(2).

the Rome III Regulation. As per Regulation Brussels IIb, Slovenia has notified the Commission ([118]) that competent authorities for issuing a certificate for public documents under Article 66 of this Regulation include district courts and notaries (solely for cases of consensual divorce before a notary, when it concerns a public document regarding the consensual divorce of spouses without joint minor children).

38 Rules that would distinguish the procedure before a court from the rules for divorce before a notary are not contained in Slovenian law, as there is no need for them. If the divorce is consensual and the spouses have joint children over whom they exercise parental responsibility, the divorce procedure is conducted solely in court. However, if the spouses do not have joint minor children, their divorce is granted before a notary. When the divorce is initiated by one of the spouses due to unsustainability, the procedure is carried out in court.

39 The NCCPA does not contain provisions on the suspension of proceedings, but it does have a provision on the subsidiary and appropriate application of the CPA in its Article 42. The CPA also has a chapter on preparations for the main hearing, one of the steps being a preliminary examination of the lawsuit. Article 274 of the CPA stipulates that the president of the senate issues a decision after a preliminary examination of the lawsuit, whereby the lawsuit is dismissed if it is found that the decision on the lawsuit does not fall within the judicial jurisdiction, as is stated in Article 18 of the CPA. Article 18 of the CPA, in the first paragraph, specifies that the court must constantly, *ex officio*, ensure whether the decision on the dispute falls within its judicial jurisdiction. In the third paragraph of Article 18 of the CPA, a presumption of international jurisdiction is specified, namely that if the court finds during the proceedings that the court of the Republic of Slovenia is not competent to decide on the dispute, it must, *ex officio*, declare itself incompetent, annul the legal actions performed, and dismiss the lawsuit, except in cases where the jurisdiction of the court of the Republic of Slovenia depends on the consent of the defendant, and the defendant has consented to it. As such, the legal framework of the Republic of Slovenia ensures that the court consistently addresses the issue of *lis pendens*, even in cases with international elements. If the court comes to the conclusion that a lawsuit with an identical claim has been brought before a foreign court, the principle of *lis pendens* applies and the court must *ex officio* declare itself incompetent, annul the legal actions performed, and dismiss the lawsuit.

([118]) Council Regulation (EU) 2019/1111 [2019] OJ L178/1, art 103.

B. *Parenthood*

40 The Slovenian legal system still perceives parenthood quite traditionally, with a few exceptions regarding same-sex partners. The FC does not recognise co-motherhood, co-fatherhood, or multi-parenthood, except in cases of adoption. A same-sex partner has the right to adopt their partner's child, (119) but same-sex partners do not have the right to assisted reproduction procedures.

41 The techniques of assisted reproduction within the realm of assisted reproductive technology include intrauterine insemination (IUI) and in vitro fertilisation techniques such as IVF and ICSI. Generally, these procedures involve the use of the reproductive cells of a woman and a man who are married or in a cohabitation. (120) In cases where conception using the reproductive cells of the partners is not possible or when other assisted reproduction procedures have failed, the use of donor egg cells or donor sperm is allowed. However, the simultaneous (121) use of both donor egg and donor sperm cells is not permitted. (122) Surrogacy is prohibited in Slovenia. (123)

42 Parenthood falls under an individual's personal status, thus establishing or recognising parenthood has *erga omnes* effects. Challenging parenthood requires a ruling by a competent court, a ruling in an out-of-court procedure is not sufficient. Since the recognition or establishment of parentage creates mutual rights and obligations between parents and children, the acknowledgement or court ruling has constitutive effects.

1. *Motherhood*

43 The child's mother is considered to be the woman who gave birth to the child. (124) Therefore, a legal presumption has been established, which was introduced into legislation only with the FC. The predecessor of this Code

---

(119) This right was only granted to same-sex couples at the end of 2022, but the adoption process for same-sex partners is otherwise the same as in the case of opposite-sex couples.

(120) The procedure with assisted reproductive techniques is not allowed for single women.

(121) Law on the Treatment of Infertility and Procedures of Biomedical Assisted Fertilisation (Zakon o zdravljenju neplodnosti in postopkih oploditve z biomedicinsko pomočjo), Uradni list RS, št. 70/00, 15/17 – DZ.

(122) Law on the Treatment of Infertility and Procedures of Biomedical Assisted Fertilisation, art 8.

(123) Law on the Treatment of Infertility and Procedures of Biomedical Assisted Fertilisation, art 7.

(124) Family Code, art 112.

(MFRA) did not recognise this presumption. Before medical advancements, it was clear that the mother was always known (*maters semper certa est*), but with the development of assisted reproductive technologies, the legislator found it reasonable to codify this presumption. (125) However, this presumption can be contested, as will be explained further. The FC specifies that a child's mother is also the woman who consented to the assisted reproductive technologies procedures, according to the regulations governing these procedures. (126)

44 The legal system of Slovenia does not recognise a mother's right to anonymous birth.

2. *Fatherhood*

45 When it comes to establishing paternity, the FC recognises several different methods, including the presumption of paternity, acknowledgement of paternity, and a judicial process ie a lawsuit to establish paternity.

46 The FC enforces various challengeable presumptions of paternity, namely:

- For the husband of the child born within a marriage, the husband of the child's mother is presumed to be the father; (127)
- If the marriage ends due to the death of the husband of the child's mother, and the child is born within 300 days after the marriage's termination, the deceased husband is presumed to be the child's father; (128)
- The mother's husband from a new marriage is presumed to be the father of a child born within 300 days after the termination of the previous marriage, regardless of the reason for the termination of the previous marriage; (129)
- For a child conceived through assisted reproductive technologies, the mother's husband or her cohabitant is presumed to be the father, provided they consented to the procedures according to the regulations governing assisted reproductive technologies.

47 In the case of legal presumptions, no action by the father is required to establish his parenthood; the status of the father is acquired *ipso iure*.

48 The second method of establishing paternity is through the acknowledgement by the father of being the child's father. A man for whom the aforementioned presumptions do not apply can acknowledge paternity.

---

(125) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 368.

(126) Family Code, art 133.

(127) Family Code, art 113(1).

(128) Family Code, art 113(2).

(129) Family Code, art 113(3).

Acknowledgement of paternity is an administrative procedure and can take place without court intervention. However, a man wishing to acknowledge paternity must be capable of understanding the significance and consequences of such acknowledgement. The father can acknowledge paternity at the CSW, before a registrar, in a public document, or in a will. (130) The child's mother must consent to such acknowledgement. If the person whose paternity is being acknowledged has reached the age of 15 and is capable of understanding the significance and consequences of acknowledgement, their consent is also required. The acknowledgement can be made for a conceived but unborn child if the child's mother consents. Such acknowledgement only takes effect if the child is born alive. If the father is unknown after the child's birth, the registrar informs the CSW, which invites the mother to state the child's father. Based on this statement, the CSW invites the person mentioned by the mother as the child's father to acknowledge paternity. (131)

49 In special cases of acknowledging paternity, the consent of third parties is required. For instance, if the mother is deceased or her residence is unknown, and the child is incapable of giving consent to the acknowledgement of paternity, the consent of the child's guardian is required, along with permission from the CSW. In such cases, if the child's guardian is the person acknowledging paternity, a collision guardian is appointed for the child. Another scenario requiring third-party consent arises when the mother is deceased or her residence is unknown, and a man acknowledges paternity of a child, who had descendants of his own, after the child's death. (132) In this situation, the child's children can provide consent if available; if not, the next generation of the child's descendants can give consent. (133)

50 Children whose presumed paternity has been challenged and whose paternity remains undetermined can also be acknowledged. However, this does not apply when the presumption of paternity is challenged by a man who believes he is the child's father. In such cases, the father must file a lawsuit both to challenge paternity and to establish paternity simultaneously. (134)

51 An acknowledgement of paternity is a unilateral, strictly personal statement by the father, which is not verified. This means that only the person claiming to be the father can make such a statement personally, even for a child they

(130) If the acknowledgement is not made in one of the listed forms, it is null and void.

(131) Family Code, arts 115ff.

(132) According to the Family Code, art 119(3), acknowledgement of a deceased child can only occur when the child leaves descendants. An exception to this rule exists in cases of acknowledging a stillborn child or a child who dies immediately after birth.

(133) Family Code, art 118.

(134) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 371.

know is not theirs. As mentioned, this acknowledgement can be given in a will. Given that this is a unilateral legal act, it can be unilaterally amended and revoked. Declarations made before the CSW, a registrar, or in a public deed are subject to the general rules of the Obligations Code, (135) meaning they are subject to rules of nullity or contestability. (136) In this regard, (137) it is important to note that nullity can be claimed at any time, while contestability is subject to a time limit, and after the expiration of that period, this right ceases to exist.

52 The third way to establish paternity is linked to court intervention. In accordance with Slovenian legislation, it is possible to:

— Initiate a paternity determination at the request of the mother; (138)
— Initiate a paternity determination at the request of the child; (139)
— Initiate a paternity determination after the death of the presumed father, filed against the legal heirs of the alleged father; (140)
— File a petition for paternity determination in the absence of the mother's consent; (141)
— For the man himself to file a petition for paternity determination. (142)

53 These proceedings follow the provisions of the NCCPA and are strictly bound by deadlines. Jurisdiction lies with the district court according to the permanent residence (143) of the individual against whom the petition is filed. (144) In cases where the petition is filed by a child, they may file it before the district court (145) based on their permanent or temporary residence. (146) Regarding international elements, the jurisdiction of Slovenian courts is assessed based on bilateral or multilateral agreements concluded by the Republic of Slovenia. For cases where Slovenia has no such agreements with a particular country, the PILPA applies. Article 71 of the PILPA stipulates that Slovenian courts have jurisdiction even if an individual does not have a permanent residence in Slovenia but holds Slovenian citizenship. It specifi-

---

(135) Uradni list RS, št. 97/07 – uradno prečiščeno besedilo, 64/16 – odl. US, 20/18.
(136) III Cp 1588/2006, (VSM 22 August 2006).
(137) III Cp 1186/2015, (VSL 26 October 2015).
(138) Family Code, art 121.
(139) Family Code, art 122.
(140) Family Code, art 123.
(141) Family Code, art 124.
(142) Family Code, art 125.
(143) Non-Contentious Civil Procedure Act, art 11(1).
(144) NCCPA, art 11, also stipulates that the motion can be filed with the district court where the person against whom the motion is filed has temporary residence or where circumstances indicate that the person will reside for an extended period.
(145) Non-Contentious Civil Procedure Act, art 15.
(146) The same applies to the procedure for contesting paternity or maternity.

cally legislates jurisdiction if the petition is filed against a child who is a Slovenian citizen and has a permanent or temporary residence in the Republic of Slovenia. (147)

54 A mother's request to establish paternity can be filed within one year of the child's birth or within one year of discovering the circumstances crucial to filing the request. If the mother provides a statement about the child's father, and the father does not acknowledge the child, the request can be filed within one year of the statement. For children born outside of marriage or within 300 days of a termination of marriage due to the death of the mother's husband, or for children whose paternity has been contested, they can file a lawsuit to establish paternity within five years of discovering the decisive circumstances. However, this five-year limit cannot start to run until the child, in accordance with procedural laws, can independently perform procedural acts. (148) In cases specified in the fourth case of the list above, the father can file a lawsuit within one year of acknowledging paternity, and in the last case of the list above, within one year of learning the circumstances that led to the assumption of him being the child's father. (149)

55 The FC further stipulates in Article 127 that the provisions establishing the determination of paternity are applied *mutatis mutandis* to cases of determining maternity. In practice, it is quite unimaginable to conceive scenarios involving the recognition of maternity. Even if a child is born outside an institution and abandoned by the mother, upon later discovery, there will most likely be a legal determination of maternity or an adoption process.

56 The determination of paternity or maternity is restricted in cases of assisted reproductive technologies. When a child is conceived using assisted reproductive technologies with a donated egg cell, establishing maternity of the donor is not permitted. Similarly, determining paternity is disallowed if the child is conceived using assisted reproductive technology involving a donated sperm cell. (150)

3. *Challenging paternity/maternity*

57 Both the father and the mother of the child are registered in the registry office. Errors in the recording of this data in the registry can be rectified at any time in an administrative procedure in which no ruling is issued, it is merely a legal action. This duty falls upon the registrar of the competent

(147) The same applies to the procedure for contesting paternity or maternity.
(148) When the child reaches 15 years of age and gains legal competency.
(149) Family Code, arts 121ff.
(150) Family Code, arts 133 and 134.

authority where the incorrect data was entered, either upon request or *ex officio*. (151) However, these cases concern only obvious clerical errors, not changes in the identity of the father or mother in cases of legal presumptions. In such instances, the FC envisages a judicial non-contentious procedure to contest paternity or maternity. (152) These procedures, similar to the determination of paternity or maternity, are conducted before the district courts, and the territorial jurisdiction of the courts is similarly determined. (153) Regarding international disputes, jurisdiction is determined by the Brussels IIb Regulation.

58 The right to contest the presumption of paternity or maternity (154) is limited to specific individuals outlined in the FC and does not extend to potential descendants. According to the FC, this right is granted to the father for whom the presumption of fatherhood is established, the child's mother, the child, and the presumed father, with these procedures being subject to time limits. For the father for whom the presumption of fatherhood is established, there is a one-year deadline from when he became aware of circumstances raising doubts about his paternity. (155) This one-year deadline also applies to the child's mother and the presumed father, with the latter required to concurrently file a request to establish paternity. (156) However, the child has a longer time frame of five years from becoming aware of circumstances casting doubt on paternity, but this period cannot commence until the child reaches the age of 15 and is considered capable of judgement. Before reaching this age, the child theoretically can file a lawsuit, represented by a guardian who cannot be either parent, necessitating the appointment of a collision guardian. (157).

59 As with the determination of paternity and maternity, challenging paternity or maternity in certain cases of assisted reproductive techniques is not permitted. Contesting maternity is not allowed if the mother consented to the assisted reproductive procedure in accordance with the relevant regulations.

---

(151) Rules on the Implementation of the Deaths, Births and Marriages Act (Pravilnik o izvrševanju zakona o matičnem registru) Uradni list RS, št. 40/05, 69/09, 77/16, 102/20, 108/22.

(152) To contest paternity and maternity, the same rules apply. However, for the purpose of preparing this report, terminology related to contesting paternity is used.

(153) See the section on establishing paternity or maternity.

(154) The provisions for challenging paternity are applied equally in cases of challenging maternity, as specified in FC, art 132.

(155) This timeframe logically commences only from the child's birth onward, as the presumption of paternity takes effect from that point forward.

(156) Family Code, arts 128, 129 and 131.

(157) Karel Zupančič, *Družinsko pravo* (Uradni list RS 1999) 107.

Similarly, contesting paternity of the individual acknowledged as the child's father through assisted reproductive techniques is not permitted, except when claiming that the child was not conceived through such procedures. (158)

60 As already mentioned, these procedures (both challenging and establishing paternity or maternity) are conducted according to the rules on non-contentious proceedings. The procedure is initiated upon the request of the entitled applicant and must necessarily include all passively legitimate parties on the opposing side. As repeatedly stated, in these proceedings, if children are not yet legally competent, a collision guardian is appointed to safeguard the rights and obligations of the child within the procedure. During the evidentiary phase, the court is authorised to collect evidence and conduct inquiries, even *ex officio*, not solely based on the parties' requests. Furthermore, within the substantive and procedural guidance, the court may request the applicant to adequately supplement the proposal. (159) The most commonly used evidential means in these procedures is a DNA analysis, which must be expressly ordered by the court; otherwise, such evidence is inadmissible. (160) Pursuant to NCCPA, an individual can refuse to participate in a DNA analysis only if it poses a serious or permanent threat to their life and health. (161) Following the completion of the evidentiary process, the court issues a decision, which becomes final only in decree and can be challenged through an appeal. Upon finality of such a decision, requests for the protection of legality, review, and a reopening of the proceedings against it are admissible. Similarly, in these proceedings, the principle of *lis pendens* applies, and the relationship between judicial, administrative, or non-judicial jurisdiction is neither regulated nor necessary, as all such procedures are subject to judicial jurisdiction.

C. *Adoption*

61 The FC exclusively provides for full adoption of a child; partial adoption or adoption of an adult is not possible. (162) The adoption procedure is closed,

---

(158) Family Code, arts 133 and 134.

(159) Vesna Rijavec, Aleš Galič et al, *Zakon o nepravdnem postopku (ZNP-1), Razširjena uvodna pojasnila* (GV založba 2020) 210–211.

(160) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019).

(161) Non-Contentious Civil Procedure Act, art 89(2).

(162) A child, as defined in Article 5 of the Family Code, is an individual who has not yet reached 18 years of age, unless they have acquired full legal capacity earlier. This can occur in two instances: if the child obtains permission from the Centre for Social Work (CSW) to

meaning that the biological parents of the adopted child do not have the right to know who has adopted the child, and likewise, adoptive parents do not have the right to information about the biological parents of the child. However, access to this information is possible if the person to whom the data relates agrees to such access. In any case, the adopted person or their legal representative is entitled to information regarding the health status of the biological parents. Regardless of whether Slovenian applicants wish to adopt a foreign child, the procedure is identical to that of adopting a Slovenian child. However, there are some differences in the adoption process by foreign citizens, which will be described below. Slovenia is also a signatory to the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption. The Convention was ratified by law on 20 May 1999.

1. *Conditions for adoption*

62 Among the conditions for adoption, the conditions comprise of active and passive adoptive capability. Active adoption capability pertains to the adopter, who must not have had parental care revoked, nor can they be a person living with individuals from whom parental care has been withdrawn. Additionally, the adopter cannot be someone who has been legally convicted for an intentional criminal offence, prosecuted *ex officio*, specifically against life, body, or sexual integrity, or living with such a person. (163) The adopter must be an adult, at least 18 years older than the adoptee; this condition can be overlooked in exceptional cases if the adoption would benefit the child. (164) Moreover, it is not possible to adopt a relative in the direct line or a sibling. (165) Furthermore, a guardian cannot adopt their ward while the guardianship relationship exists. (166) The adopter must be a Slovenian citizen; exceptionally, a foreigner may be chosen as an adopter if the CSW cannot find a suitable Slovenian adopter. However, in such cases, the adoption must be approved by the Minister responsible for labour, family, social affairs, and equal opportunities, unless the adopter is married to, or in cohabitation with, one of the child's parents or a relative of the child. (167)

---

enter into a marriage, or if the court issues a decision granting full legal capacity to a minor who has become a parent.

(163) Family Code, art 216.
(164) Family Code, art 215.
(165) Family Code, art 214(1).
(166) Family Code, art 214(2).
(167) Family Code, art 217.

As already mentioned, only a child who is already alive has passive adoptive capability. ([168]) A child, capable of understanding the procedure's significance and the consequences of the decision, must consent to the adoption. ([169]) An additional condition is that the child's parents must be deceased, unknown, or their residence has been unknown for a year, or they consented to adoption after the child's birth. Parents can give their consent before the CSW or a court. If the parents consent to adoption before the child is eight weeks old, they must reaffirm their consent when the child reaches this age; otherwise, it has no legal effect. Parental consent is not required if parental care has been revoked, or the parents are permanently unable to express their will. ([170]) Adoption cannot occur before six months have elapsed from fulfilling the conditions, except in two exceptions: if the parents have died, or if it would be in the child's best interests. ([171]) **63**

2. *Adoption procedure*

The adoption process according to the FC consists of two phases. The first phase is called the general part of the adoption process and is common to all potential adopters. In this phase, the CSW assesses the general suitability of the adopter, determining the objective suitability of individuals seeking to become adoptive parents. The second phase focuses on assessing the subjective suitability concerning the specific adoptee, evaluating whether the adoptee and adopter can adapt to the new situation and whether the adoption will be in the child's best interests. ([172]) **64**

In the first phase, spouses, cohabitants, or individuals must express their desire for adoption through a written statement. ([173]) Following this, the candidates undergo initial social counselling, in which they are informed about the purpose of adoption, its conditions, possibilities, procedures, and the professional doctrine in the field of adoption. ([174]) Once the initial counselling is completed, candidates submit a written application for child **65**

([168]) FC, art 5, defines a child as a person who has not yet reached the age of 18, unless they have already obtained full legal capacity, either based on a decision by the CSW in cases of marriage, or by the court when becoming a parent.

([169]) Family Code, art 215.

([170]) Family Code, art 410(1).

([171]) Family Code, art 218(3).

([172]) Suzana Kraljič, *Družinski zakonik s komentarjem* (Poslovna založba MB 2019) 792.

([173]) Family Code, art 223.

([174]) Sonja Založnik, Posvojitev ali večno rejništvo? <https://revijapamfil.si/clanki/2017/9/28/posvojitev-ali-veno-rejnitvo> accessed 22 December 2023

adoption to the CSW, including the required (175) attachments. (176) Upon receiving a complete application, the CSW initiates the process to determine the suitability of the applicant, assessing compliance with the conditions stipulated in the FC, (177) the motives for adoption, (178) and other relevant circumstances. (179)

66 After reviewing the application, a social worker and psychologist have sessions with the applicants to assess their suitability for adoption. Additionally, a home visit is conducted to assess the living conditions for the child. Following these steps, the CSW issues a professional opinion regarding the suitability of the candidate for adoption. (180)

67 When, and if, the conditions for adoption are met and the CSW issues a positive professional opinion, the applicants gain the status of adoptive parents' candidates and are registered in the central database of candidates as adoptive parents. The candidates and the CSW then enter into an agreement for preparation for adoption. The CSW must also prepare an opinion on the suitability of the applicant for adoption in cases where the adoption procedure will be carried out in another country and a request for it is made. (181)

68 If, at this stage, the CSW determines that the applicant is not suitable to become an adoptive parent, it issues a ruling denying the applicant the status of a candidate as adoptive parent. In this case, a mandatory meeting must be held with the applicant regarding the reasons for not fulfilling the conditions for adoptive parents and potential further steps. (182)

---

(175) Attachments required include: a CV, employment certificate, personal income statements for the last three months, a medical certificate, and proof of payment of the administrative fee. Additionally, the CSW acquires, as an official duty, the applicant's extract from the birth registry, an extract documenting any marriage, a citizenship certificate, a confirmation of no deprivation of parental rights, a certificate of no criminal record, a declaration of no pending indictments, and verification of not being under guardianship.

(176) Suzana Kraljić, *Družinski zakonik s komentarjem* (Poslovna založba MB 2019) 794–795.

(177) The existence of marriage or cohabitation, possible prohibited degree of kinship, and the age of the applicant.

(178) If the primary motive of the applicant is not ensuring the child's welfare but rather fulfilling personal needs and wishes for having children, such a person is considered unsuitable to adopt.

(179) Family Code, art 224.

(180) CSW is bound by a deadline in this regard – the opinion must be issued within one year from the date of the application's submission, as provided in FC, art 224.

(181) Suzana Kraljič, *Družinski zakonik s komentarjem* (Poslovna založba MB 2019) 799.

(182) Polona Dremelj, Jasmina Rosič, Andreja Črnak Meglič, Barbara Kobal Tomc, Smernice za delo na področju posvojitev, <https://irssv.si/wp-content/uploads/2023/10/Posvojitve_2019.pdf> accessed 27 December 2023, 23.

Within the first phase, once the CSW identifies a child in need of adoption, it searches the central database for the most suitable candidates as adoptive parents. Suitability is determined based on the child's characteristics and needs, the expressed desires of the candidates, the professional opinion of the CSW, the wishes of the biological parents, and the time of registration in the central database of adoptive parent candidates. When the CSW identifies the most suitable candidates, it submits a proposal for adoption to the court. (183) **69**

The first phase of adoption proceeds according to the provisions of administrative proceedings, and an appeal is possible against the ruling. However, for an administratively final ruling (a ruling that cannot be further appealed), an administrative dispute can be initiated before the administrative court. **70**

In the second phase of the procedure, the court becomes involved according to the provisions on non-contentious proceedings, (184) where the rules regarding statements are the same as in contentious proceedings. As mentioned before, the court is entitled to conduct inquiries and gather evidence; additionally, parties can present their claims and evidence until the end of the proceedings, including during appeals. Before the court makes a final decision regarding the adoption, the child may be placed in the prospective adoptive family. During this time, a fostering relationship is established between the candidates and the child. (185) **71**

The court, throughout the procedure, assesses whether all conditions for adoption are met, both on the side of the candidates and the child. If the adoption is in the best interests of the child and all required conditions are fulfilled, the court issues a ruling on adoption, against which an appeal can be filed. Once the ruling becomes final, the court forwards it to the competent CSW and administrative unit for registration in the central registry of completed adoptions and in the civil register. (186) Such a ruling has *erga omnes* effect. Jurisdiction is determined in the same manner as in other non-contentious procedures. In cases involving an international element, the PILPA determines the form of adoption according to the laws of the country where the adoption takes place. (187) **72**

---

(183) Family Code, art 226.

(184) Before the legislative change, this process also took place before the CSW.

(185) Pertaining to jurisdiction, the regulations under the NCCPA apply uniformly to all procedures, hence this is not reiterated for each individual process to avoid repetition.

(186) Suzana Kraljič, *Družinski zakonik s komentarjem* (Poslovna založba MB 2019) 804–805.

(187) Private International Law and Procedure Act, art 46(4).

73 If the court determines that adoption is not in the child's best interests or if the conditions for adoption are not met, the adoption petition is rejected. The permissibility of submitting a new adoption petition depends on the nature of the unfulfilled condition. If the condition can be rectified, it is permissible to submit a new petition. (188)

3. *Adoption of a child by a spouse or cohabitant*

74 In such cases, the procedure is simpler as it does not require meeting all the conditions specified by the FC for adoption. However, the CSW still needs to produce an adoption opinion, which the court considers in the process. Consequently, certain conditions need not be fulfilled – the adopter can be a person living with an individual who has been definitively convicted of an intentional criminal offence prosecuted *ex officio* or a criminal offence against life and body or against sexual integrity, which is prosecuted upon a motion. Additionally, only the opinion of the CSW is required in the initial phase of the procedure, not all the steps as described above. Therefore, the applicant submits the adoption petition directly to the court. (189)

4. *Challenging an adoption*

75 Adoptions, established with the purpose of ensuring a firm and enduring bond between the adoptee and the adopter, cannot be dissolved. If the conditions for adoption are not met, the adoption is deemed invalid. (190)

76 Invalidity of adoption can be claimed for the following reasons: the child was not a minor at the time of adoption; the child was adopted by multiple individuals who were not married or in cohabitation; the adopter and the child are related in a direct line or are siblings; the adoption took place while there was a guardianship relationship between the adopter and the child; the adopter is not at least 18 years older than the child, and despite the absence of the required age difference, the adoption was not defined to be in the child's best interests; the child capable of understanding the meaning and consequences did not express their opinion; a child capable of understanding the meaning and consequences of adoption did not give consent; the adopter was a person from whom parental responsibility was revoked or lives with such a person; the adopter is a person who does not provide assurances that they will exercise parental care in the child's best interests; the adopter is a

(188) Family Code, art 229(2).

(189) Family Code, art 228.

(190) Suzana Kraljić, *Družinski zakonik s komentarjem* (Poslovna založba MB 2019) 804–805.

person reasonably presumed to have exploited the adoption to the detriment of the child; the potential adopter is a person who lacks legal capacity or has an illness or mental disorder that would not be in the child's best interests for adoption; or is a person who has been criminally convicted of an intentional offence, pursued *ex officio*, or for an offence against life and body integrity or an offence against sexual integrity, prosecuted upon a motion, or lives with such a person. Additionally, the adoption is invalid if the provisions of Article 217 of the FC, which establishes conditions for the adoption of a Slovenian child by a foreign citizen, and Article 218 of the FC, which determines conditions for adoption, were not fulfilled. (191)

77 The ruling on adoption in a non-contentious procedure is annulled by the court that issued it, either *ex officio* or upon the request of the adopted person, their biological parents, or adopter. The annulment of the ruling begins to take effect upon its finality with an *ex nunc* effect.

D. *Parental responsibility*

78 With the renewal of family legislation (FC), the concept of 'parental responsibility' was introduced into the legal system, replacing the 'parental right' regulated by the MFRA. The legislator justified this change by placing the parental duty to care for the minor child and their well-being at the forefront rather than considering it solely as their right. (192) In line with Article 6 of the FC, 'parental responsibility' is attributed jointly to both parents, encompassing the entirety of parental duties and rights to create, within their capabilities, an environment ensuring the comprehensive development of the child. Parental responsibility involves caring for the child's life, health, upbringing, care, supervision, and education. Parents are also the child's lawful representatives, responsible for their maintenance and managing their assets. (193) Parents have priority over everyone else in terms of care and responsibility, and in all activities related to the child, they must look after their best interests, respecting their person, individuality and dignity. This is particularly considered by appropriately meeting the child's material, emotional, and psychosocial needs, considering the child's personality, age, developmental stage, and wishes. Such care and responsibility are demonstrated through actions that foster the child's development while providing suitable guidance and encouragement. (194)

---

(191) Family Code, art 230.
(192) Gak Natali, 'Zakonik v korist otroka' (2010) 14 PP 32, 32.
(193) Family Code, art 136.
(194) Family Code, art 7.

79 An issue arises when one or both parents are unable or incapable of fulfilling their parental responsibilities or fail to do so in a manner that serves the child's best interests. In such cases, the State intervenes to take measures to safeguard the rights and interests of the child. (195) However, these interventions depend on the reasons for the failure to fulfil parental responsibilities. Rights and duties of parents can only be revoked or restricted for reasons specified by law, aiming to protect the child's interests, as stipulated by Article 44 of the Constitution of the Republic of Slovenia.

80 Regarding this, it is important to emphasise that in cases where parents decide not to live together anymore, they must agree on the custody and upbringing of their joint children, prioritising the children's best interests. (196) The same applies to child maintenance and visitation rights with the child's other relatives and those they have a personal connection with. If the parents cannot reach an agreement on these matters themselves, the CSW assists them, and mediators can also help if they are requested to do so. If an agreement cannot be reached even with such help, the court rules in a non-contentious procedure, which can include a judicial settlement. If circumstances change or if it is in the child's best interests, the court can issue a new ruling on custody and visitation rights but not regarding other matters. (197)

1. *Exercise and termination of parental responsibility*

81 Parental responsibility is jointly exercised by both parents. If the parents live separately, and both parents are not entrusted with the care and upbringing of the child, they should consensually decide on matters significantly influencing the child's development, always acting in the child's best interests. (198) If the parents fail to reach an agreement, the CSW assists them, and mediators can also be involved upon their request. However, if an agreement is still not reached, especially on issues significantly impacting the child's development, the court decides on these matters in a non-contentious procedure. (199) In cases where one parent is unable to fulfil parental responsibilities, the other parent acts alone. Similarly, if the other parent is

---

(195) Ibid.

(196) The legal framework of the Republic of Slovenia does not differentiate between separation and divorce. In any case, as extensively explained above, courts must also decide on the protection, upbringing, maintenance, and contact arrangements for minor children in divorce proceedings.

(197) Family Code, arts 138–142.

(198) Barbara Novak, *Družinski zakonik z uvodnimi pojasnili* (Uradni list RS 2017a) 195.

(199) Family Code, art 151.

deceased, missing, or parental rights have been revoked, the 'remaining' parent assumes the parental responsibilities. Generally, parental responsibilities continue until the child reaches the age of adulthood ie, at the age of 18. However, Slovenian law recognises two exceptions: if the child enters into marriage before turning 18, or if the court grants the child full legal capacity as a parent, being both physically and mentally mature enough for independent life. (200)

2. *Measures to protect the best interests of the child*

82 If the child's welfare is jeopardised by one or both parents, the State has the right, through court intervention, to restrict one or both parents from exercising specific rights within their parental responsibilities. (201) State intervention in parental rights is an exception and must be interpreted restrictively. Moreover, a court's ruling to limit parental rights should only occur to the extent necessary to safeguard the child's welfare and is equally applicable to both parents. (202) The revocation of parental responsibilities does not automatically revoke the parents' right to have contact with the child or cease their obligation to provide maintenance for the child's needs. The right to contact, the obligation of maintenance, and parental responsibilities are separate and independent rights. (203) Additionally, any intervention should not continue for a period longer than prescribed by law, but the court may extend the imposed measure if necessary. (204)

83 The court, upon issuing any measure, assesses whether all conditions are met, and for each measure, the condition of endangerment to the child is pivotal. To determine the child's endangerment, a test of endangerment is applied, typically requiring a causal link between the parents' actions and the harm or potential harm to the child. The parents' conduct can be active, yet even omission alone can suffice to jeopardise the child's welfare. (205)

84 The FC, in Article 153, grants both the court and the CSW general authority to carry out all necessary actions and measures required for a child's upbringing, care, and safeguarding their property and other rights and interests. Moreover, it stipulates that the court issues measures to protect a child's interests in all cases. (206) This change brought by the FC implies that

(200) Family Code, art 152.
(201) Family Code, art 71.
(202) Barbara Novak, *Družinski zakonik z uvodnimi pojasnili* (Uradni list RS 2017a) 43.
(203) IV Cp 3529/2014, (VSL 14 January 2015).
(204) Family Code, art 160(3).
(205) Frida Burkelc, Lina Burkelc Jurac, 'Odvzem otroka' (2018) 3 PB 75, 75–97.
(206) Family Code, art 155.

previously, certain measures were within the authority of the CSW. (207) The process is set in motion following a proposal (208) or *ex officio* if the court becomes aware of circumstances that could signify endangerment to the child. When deciding on the measures, the court is not bound by a proposal. It can choose a milder or stricter measure, decide not to issue any measure, or impose several measures simultaneously. When imposing a longer-term measure, the court must determine its duration within legal limits. The CSW is authorised to monitor the implementation of each specific measure. If circumstances significantly change or cease during the execution of the measure, the court is entitled to terminate or modify it accordingly. Similarly, it may extend the duration of the measure if deemed necessary. (209)

85 The procedure for deciding on measures for the protection of a child's interests is defined as an urgent process in Article 155 of the NCCPA. Throughout the process, the court must obtain the opinion of the child expressed by the child themselves or through a person they trust and have personally chosen, provided they are capable of understanding its meaning and consequences of the opinion. (210) These proceedings demonstrate the significance of the right to make a statement since the law does not limit the opportunity for a child to give their opinion based on their age. However, it is not necessary for the child's statement to be given directly before the court. It can be obtained in an informal meeting with the judge or at the CSW, accompanied by a trustee (211) or child's advocate. (212) Similar to civil proceedings, a collision guardian is appointed for the child in these matters when there is a conflict of interests between the child and their legal representative arising from the case itself.

86 Slovenian courts issue a decision after the judicial procedure, which can be

---

(207) This aims to achieve unified regulation, predictability, and legal security for individuals involved in such procedures.

(208) The proposal can be made by one of the parents, by the child itself if they have reached the age of 15 and is capable of understanding the meaning and legal consequences of their actions, by the child's guardian, the CSW, or the public prosecutor.

(209) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 501–502.

(210) Family Code, art 158(1).

(211) A trustee is a person chosen by the child because they trust them. A child's advocate, introduced by the NCCPA, is someone appointed for the child in accordance with the Human Rights Ombudsman Act (Zakon o varuhu človekovih pravic, Uradni list Republike Slovenije, No. 71/1993, 15/1994, 56/2002, 109/2012, 54/2017, 69/2017). The court appoints the child's advocate upon a reasoned proposal from the ombudsman for human rights when they assess that it is necessary for the protection of the child's rights and interests.

(212) Barbara Novak, *Družinski zakonik: z uvodnimi pojasnili* (2nd edn, Uradni list RS 2020) 174.

appealed. A legally final decision can be reviewed through a revision or a request for legal protection, but not through a reopening of the procedure. Jurisdiction is determined similarly as for other non-contentious procedures, and the court within the area where the child has their permanent or temporary residence (in the latter case, where this is expected to be the case for an extended period) is competent. (213) In cases involving an international element, jurisdiction is established based on bilateral or multilateral agreements concluded by the Republic of Slovenia. However, outside these agreements, the PILPA governs Slovenian court jurisdiction, even when the respondent has permanent residency in Slovenia. If only one person is involved in the proceedings, jurisdiction lies where that person is resident in Slovenia. The same applies to the jurisdiction of other authorities involved in these procedures. (214) In particular, in disputes concerning the care and upbringing of children under the care of parents, Slovenian courts have jurisdiction especially if both parents or the child are Slovenian citizens. (215) Exclusive jurisdiction of the Slovenian court is established if both the person against whom the motion is filed and the child are Slovenian citizens and have permanent residence in Slovenia.

a) *Interim injunctions*

Interim injunctions are extraordinary measures issued by the court only upon finding that without their issuance, a child would suffer significant and irreparable harm. (216) Article 162 of the FC lists examples, such as orders to remove a child from parents and place them with another person, in crisis centres, foster care, or institutions; orders for entry into the child's residence or other premises where the child is located against the parents' wishes; orders prohibiting or limiting contact, and similar measures. Interim injunctions may only be issued by a court within the proceedings for issuing a court ruling on the upbringing, care, and maintenance of the child, on contact, on the exercise of parental responsibility, or on a longer-term measure for the protection of the child's interests. In exceptional cases, a proposal for the issuance of an interim injunction can be submitted even if the procedure is not ongoing, but it must be initiated within seven days of submitting the proposal; otherwise, the court will suspend the procedure and, if necessary,

87

(213) Non-Contentious Civil Procedure Act, art 13.
(214) Private International Law and Procedure Act, arts 48 and 73(3).
(215) Private International Law and Procedure Act, art 73.
(216) IV Cp 2160/2015, (VSL 5 August 2015).

annul the performed actions. ([217]) They remain in force until the conclusion of this procedure unless the cause of endangerment ceases.

88 Interim injunctions, if they aim to achieve their purpose, must be issued swiftly. Nonetheless, the court must respect the fundamental rights of the parties involved in the proceedings, which also include the right to be heard. This notwithstanding, the court may issue an interim injunction without previously directly hearing the opposing party, but only if an immediate ruling for the protection of the child's interests is urgently required. ([218])

b) *Emergency removal of child from parents*

89 The CSW is authorised to execute the measure of urgent removal of a child, according to Article 167 of the FC. This is employed when there is such severe endangerment to the child that their interests can only be safeguarded by an immediate separation of the child from the parents. The CSW thus relocates the child to another person, a crisis centre, foster care, or an institution even before the court issues an interim injunction, with the assistance of the police. Simultaneously, within 12 hours after the child is removed, the CSW must propose the issuance of such an interim injunction to the court, and the court has 24 hours to decide on the proposal. From this, it follows that the only authorised petitioner is the CSW. If the CSW does not propose the issuance of an interim injunction to the court, or if the proposal is rejected, the child must be promptly returned to the parents. ([219])

c) *Measures of a more permanent nature*

90 Urgent measures of a more permanent nature include: restrictions on parental care, decisions regarding medical examinations or treatment, limitations or withdrawal of visitation rights, removal of the child, placing the child in an institution, and the withdrawal of parental care, listed in order from least to most severe. Concerning these measures, the CSW is empowered to provide its opinion, given that, in most cases, it has previously engaged with the family, offered assistance, and possesses expertise in the dynamics between children and parents. Considering the description of the role of the CSW in this report, it can be concluded that within proceedings related to parental responsibilities, the CSW functions as a proposer and

([217]) Family Code, art 166.

([218]) Barbara Novak, *Družinski zakonik: z uvodnimi pojasnili* (2. spremenjena in dopolnjena izdaja) (Uradni list RS, 2020) 1222.

([219]) Family Code, arts 167 and 168.

supervisor of the implementation of measures, while preparing reports on this matter, and acting as a body providing expert opinions. (220)

91 Before a court decides on a measure of a more permanent nature, it drafts a plan to assist the family and the child. This plan comprises an overview of the family's situation, the child's needs, the family's capabilities, monitoring methods, types of assistance, and a description of how the measure will be implemented. Additionally, the plan includes a family therapy programme and other forms of treatment (221) if the court believes that, following therapy or treatment, the parents will be capable of resuming their responsibilities for the child's upbringing and care. (222)

92 i) *Restriction of parental responsibility*. The court may prohibit one or both parents from exercising certain rights as regards their parental care if the child is at risk, and the child's best interests are sufficiently protected by this measure given the circumstances of the case. (223) The restriction can involve the child's person or their assets. (224) Furthermore, the court may order supervision of parental care by the CSW, which also implements the measure. (225) The measure can last for a maximum of one year, but the court can extend it after re-evaluating the conditions for its imposition. (226)

93 ii) *Decision on medical examination or treatment*. When a child's life is endangered or their health significantly at risk and it is deemed necessary, the court can decide on medical examinations or treatments, even if the parents do not consent or object to it. (227) This measure is typically employed for major medical procedures or extended periods of treatment. Interim injunctions are issued when immediate protection of the child's health is necessary. (228)

94 iii) *Restriction or withdrawal of right to contact*. Contact between a child and parents can be restricted or withdrawn if the child's well-being is endangered due to these interactions, and, by limiting or removing the right to contact,

---

(220) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019).

(221) Participation in therapies or treatment is voluntary.

(222) Family Code, art 170.

(223) Family Code, art 171.

(224) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 562.

(225) Ibid.

(226) Family Code, art 171.

(227) Family Code, art 172.

(228) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 569.

the child's interests and welfare can be protected. (229) In the decision-making process, the court, considering conflicting interests between parents and children, prioritises the child's best interests. As such, visitation rights can be limited to supervised sessions, non-personal contact, or through other means. All restrictions must be explicitly declared through a court ruling, except for supervised visitation, which can be issued as an interim injunction. The supervision of visits is commonly overseen by the CSW. (230)

95 iv) *Removal of child from parents*. A child has the right to live with their parents in a familiar and safe environment. (231) Therefore, the removal of a child should only be considered exceptionally if the protection of the child's best interests cannot be achieved otherwise. When this measure is implemented, the court also determines another person, foster parent, or institution where the child should be placed. (232) The removal of a child can occur only if the following conditions are cumulatively met: the child is in danger, the child's welfare can only be safeguarded by removal, and circumstances suggest that parents will resume care for the child after a certain period. (233) If the court, upon examination, sees no realistic chance for the child's return to the parents, the conditions for the measure are not met, and the court must impose a stricter measure. (234) Additionally, the court may impose restrictions on parental care or revoke visitation rights, while parents retain all other rights and responsibilities. (235) The measure may be in place for up to three years, (236) and generally, it cannot be extended even if the reasons persist. Extensions are exceptionally allowed when there is an anticipated change in the parents' circumstances.

96 v) *Placing a child in an institution*. The court may place a child in an institution due to the child's psychosocial issues, manifested through behavioural, emotional, learning, or other developmental challenges. (237) In these cases, the rights and responsibilities of parents towards the child do not cease to exist. The measure of placing a child in an institution differs from that of

---

(229) Family Code, art 173(1).

(230) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019).

(231) Suzana Kraljić, *Družinski zakonik s komentarjem* (Poslovna založba MB 2019) 576.

(232) Family Code, art 174(1).

(233) Suzana Kraljić, *Družinski zakonik s komentarjem* (Poslovna založba MB 2019) 577.

(234) Barbara Novak, *Družinski zakonik: z uvodnimi pojasnili* (2nd edn, Uradni list RS 2020) 193.

(235) Family Code, art 174(2,3).

(236) Family Code, art 174(4).

(237) Family Code, art 175(1).

removing the child and subsequently placing them in an institution in that the court does not issue a removal order before placement. In cases where the child is placed in an institution without a removal order, the measure is carried out with the parents' consent. If parents do not provide consent, the placement measure cannot be executed, but the court could order the child's removal and placement in an institution. The measure of placing a child in an institution is the only measure that can be issued based solely on parental consent. (238) This measure can be in place for up to three years, and it can be extended multiple times without a specified limit on extensions. (239)

vi) *Withdrawal of parental responsibility*. This is the most severe and enduring measure to protect a child's rights, representing the most significant infringement upon parental rights due to its generally permanent nature. (240) While the return of parental responsibility is possible, the court can issue the measure of withdrawing parental responsibility if the child is at risk and circumstances suggest that the parents are unlikely to resume care for the child's welfare and upbringing. This might happen particularly if the parents have severely violated their obligations or abused their rights stemming from parental responsibility, abandoned the child, or demonstrated through their actions that they will not care for the child. The law states that parental responsibility can be restored if the reason for its removal ceases, except in cases of adoption, where it tends to be a permanent measure. (241) In the case of adoption, the return of parental responsibility is no longer possible as it has permanently ceased, and the parental responsibility for the child has been granted to the adoptive parents. Simultaneously with the ruling to deprive parental responsibility, the court also decides on the parents' visitation right and the duty to support the child. **97**

d) *Other measures according to the family code – granting parental custody to a relative, fostering, guardianship of a minor*

Parental responsibility can be entrusted to a relative of the child who no longer has living parents, provided that the relative is willing to take care of the child and meets the conditions related to age, the age gap between the child and the relative, and there are no obstacles to adoption. Such a relative holds the same obligations and rights as the child's parents, including legal **98**

(238) Barbara Novak, *Družinski zakonik: z uvodnimi pojasnili* (2nd edn, Uradni list RS 2020) 197.

(239) Ibid 196.

(240) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 589.

(241) Family Code, art 176(2).

representation and support. (242) The allocation of parental responsibility to a relative is realised through a court ruling issued in a non-contentious procedure. Before issuing the ruling, the court must obtain the opinion of the CSW regarding the child's best interests, as well as the opinion of a child capable of judgement expressed by the child themselves or through their trustee.

99 A child is placed in foster care when they do not have a family, cannot live with their parents for various reasons, or if their physical and mental development in their living environment is at risk. The aim is to ensure the child's healthy growth, upbringing, education, harmonious personal development, and preparation for independent life and work. Meanwhile, the parents or guardian retain rights and obligations compatible with the purpose of foster care, unless stated otherwise. The ruling on placing a child in foster care and appointing a foster parent is issued by a court in a non-contentious procedure. The court informs the CSW of the ruling, and the CSW must strive to eliminate the reasons for the child's placement in foster care during their stay with the foster parent. Foster care ends with a court ruling if the reasons for it cease or when the minor gains full legal capacity, or *ipso iure* when the child turns 18. (243)

100 Guardianship for children is an institution established when a child lacks parents or when the parents are unable to care for them. The establishment of guardianship and the appointment of a guardian are decided by the court in non-contentious proceedings. However, the guardian does not have all the obligations that parents have, as their duty is solely to care for the child, without being obligated to provide for or have the child reside with them. Guardianship over a child ceases upon the child obtaining full legal capacity, through adoption, or by court ruling if the grounds for guardianship have ceased to exist. (244)

E. *Matrimonial property regimes*

1. *Property relations between spouses*

101 The FC defines the property regime between spouses (equally applicable to cohabitants) as a set of rules governing property relations between spouses and towards third parties. (245) As a rule, there is a presumption that the

(242) Family Code, art 231.
(243) Family Code, arts 232–238.
(244) Family Code, arts 257–261.
(245) Family Code, art 63.

statutory property regime applies to spouses if they have not chosen otherwise through a contract. Importantly, the FC has introduced a significant novelty in this area, allowing spouses to agree on the content of their property regime through a contract regulating property relations. In this case, they are governed by the contractual property regime. (246) After 15 April 2019, when this provision of the FC came into effect, the property regime of spouses is no longer mandatory, as the statutory property regime applies only if spouses do not wish, or cannot agree on, a contractual property regime. (247) However, Slovenian law (FC) does not offer preformed models of contractual property regimes, as is the practice in some foreign States. In Slovenia, therefore, spouses can freely shape their property regime according to their own wishes. (248)

102 The statutory property regime between spouses consists of a regime of co-owned property for shared assets and a regime of separate property for the individual assets of each spouse. (249) Therefore, the statutory property regime is composed of the co-owned property regime for spouses and the regime of separate (individual) property for each spouse. In essence, under normal circumstances, each spouse in a marriage possesses both their share in the common assets and their own individual property.

103 The co-owned property of spouses is defined as all property rights acquired through work or payment during the duration of the marriage and domestic community of the spouses, as well as property acquired on the basis, and by means, of the co-owned property or the property that arises from such property. (250) It is important to note that the condition for property rights constituting the co-owned property of spouses is that they have been acquired through work or payment, although the work of the spouses is not necessarily joint. Case-law defines the concept of co-owned property, encompassing: salaries, copyright royalties, remuneration under employment contracts, work-related bonuses, etc. (251) Co-owned property includes monetary resources from a loan that one or both spouses repaid from their salary, as well as items purchased with the loan. The existence of the spouses' intent to acquire property jointly is not necessary for the creation of

(246) Family Code, art 65.

(247) Barbara Novak, *Družinsko pravo po Družinskem zakoniku in Zakonu o nepravdnem postopku* (Uradni list RS 2022) 114.

(248) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 187.

(249) Family Code, art 66.

(250) Family Code, art 67.

(251) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 190.

co-owned property. (252) However, co-owned property must have been acquired during the duration of the marriage or the duration of their domestic community. The standpoint that co-owned property ceases to accrue upon the dissolution of their shared life has been consistently supported by case-law, and the legislator explicitly articulated this in Article 67 of the FC for legal certainty. (253)

104 The statutory marital property regime represents the joint ownership of spouses, and deliberately, the legislator did not opt for a co-ownership model. The chosen arrangement closely aligns with the ideal of property equality between a man and a woman to the greatest possible extent. (254) Co-owned property belongs jointly to the spouses, and their shares in it are not specified. A spouse cannot dispose of their unspecified share of the co-owned property during their lifetime, particularly by alienating or encumbering it. (255) The spouses jointly and consensually manage and dispose of the co-owned property. (256) However, they can also agree on a different management of the co-owned property if they so wish. (257)

105 The separate property of a spouse is that property acquired by the spouse before entering into the marriage or acquired other than through work or payment (for example, through inheritance or as a gift). Regardless of its origin, a spouse's separate property includes items of lower value intended exclusively for their personal use. (258) Each spouse manages their separate property independently. Regarding their separate property, each spouse can enter into all legal transactions that they could with third parties (such as gift, exchange, purchase, loan agreements). However, all property-related transactions between spouses must be formalised through a notarial deed to be legally valid. (259)

106 The co-owned property is typically divided upon the death of one of the spouses or, as a rule, upon divorce. (260) However, it can also be divided during the duration of the marriage. When dividing the co-owned property,

---

(252) Ibid.

(253) Barbara Novak, *Družinsko pravo po Družinskem zakoniku in Zakonu o nepravdnem postopku* (Uradni list RS 2022) 117.

(254) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 192.

(255) Family Code, art 68.

(256) Family Code, art 69.

(257) Family Code, art 70(1).

(258) Family Code, art 77.

(259) In accordance with Family Code, art 64(3), customary, minor gifts between spouses are an exception to the requirement for a notarial deed.

(260) Divorce at the request of one of the spouses is possible without simultaneously dividing the couple's co-owned property.

there is a legal presumption that the shares of the spouses in the co-owned property are equal. Nevertheless, the spouses can agree or, in a possible court proceeding, demonstrate that they contributed to the co-owned property in different proportions. (261)

2. *Consensual division of marital assets*

107 The spouses can agree on the extent of their co-owned property and the allocation of shares within it. A contract regarding the division of co-owned property (division agreement) must be formalised in a notarial deed. Through this contract, the spouses regulate their property rights and obligations, including in their agreement the extent of their co-owned property and the distribution of shares between them. With a division agreement, the spouses can deviate from the rules prescribed by law for property division, as the statutory property regime is not mandatory. The agreement regarding the division of co-owned property can either stand alone or be part of a contract regulating property relations. (262)

3. *Division of marital assets in a judicial procedure*

108 When the spouses cannot reach an agreement regarding the extent of their co-owned property and the allocation of shares within it, either of them can request a court ruling on this matter. (263) In a dispute over the respective share of each spouse in the co-owned property, the court considers all circumstances of the case, especially the income of each spouse, the assistance provided by one spouse to the other, childcare and upbringing, household tasks, care for the home and family, efforts to preserve the property, as well as any other form of work and cooperation in managing, preserving, and increasing the value of the co-owned property. (264) Disputes about the extent and allocation of shares in co-owned property fall under property disputes, decided upon by a court in a civil proceeding. If the spouses cannot agree on the method of division (who gets specific items from the co-owned property), they can propose the division of co-ownership in a non-contentious procedure, as stated in Article 164 of the NCCPA. (265)

---

(261) Family Code, art 74.

(262) Barbara Novak, *Družinsko pravo po Družinskem zakoniku in Zakonu o nepravdnem postopku* (Uradni list RS 2022) 127.

(263) Family Code, art 73.

(264) Family Code, art 74(2).

(265) Barbara Novak, *Družinsko pravo po Družinskem zakoniku in Zakonu o nepravdnem postopku* (Uradni list RS 2022) 130.

4. *Agreement on marital property relations*

109 The FC introduces a new possibility: the option to enter into a marital property agreement. (266) The very name of this agreement is a novelty since, in theory and practice until now, it was referred to as a 'marriage contract'. Previously, the marriage contract was not regulated in the MFRA.

110 The marital property agreement is a family law contract that has a civil law character in arranging property matters between spouses. Due to its content, it is a notably complex legal transaction. Its fundamental purpose is to regulate property relationships within the marriage and in the event of its termination. This contract encompasses a broad spectrum of property-related issues between spouses: from their ownership rights to the management and disposal of assets, their effects concerning third parties, and more. Within this contract, the spouses establish the content of the property regime, tailored to their needs, wishes, and interests. (267)

111 The statutory property regime, with the new option to enter into a marital property agreement, lost its obligatory nature as was the case under the MFRA. Now, it applies only to those spouses who have not excluded it by entering into a marital property agreement. Within this contract, the spouses can establish rules not only for their property relations during the marriage (the property regime) but also for the event of their divorce.

112 The subject matter covered by the marital property agreement may include: determination of a mutual property regime different from the legal one; (268) agreements on managing and disposing of co-owned property differing from what is stipulated in Article 69 of the FC; (269) agreements regarding the extent and division of the couple's co-owned property; (270) agreements about the allocation of shares within the co-owned property; (271) arrangements for dividing property during the marriage or in the event of its termination; (272) agreements on investing labour and/or funds into immovable property that constitutes the separate property of the other spouse, including the amount of the investor's claim and its security; (273) agreements

---

(266) Family Code, art 85.

(267) Barbara Novak, *Družinsko pravo po Družinskem zakoniku in Zakonu o nepravdnem postopku* (Uradni list RS 2022) 262–263.

(268) Family Code, art 85(1).

(269) Family Code, art 70.

(270) Family Code, art 71.

(271) Family Code, art 73.

(272) Family Code, art 75.

(273) Family Code, art 79.

on investing in the business of the other spouse; ([274]) arrangements concerning entrepreneurial assets (engagement in joint profit-making activities and participation in them); ([275]) agreements on all other property relations during the marriage and in the event of divorce; ([276]) agreements on mutual maintenance during the marriage, as well as agreements on maintenance in case of divorce, considered, despite the personal element of maintenance, as part of the agreement on the regulation of property relations according to the FC. ([277])

113 In accordance with the explicit provisions of Article 85 of the FC, spouses, future spouses, and cohabitants can enter into a marital property agreement. The marital property agreement can be concluded by entitled parties both before and after the conclusion of the marriage. If the spouses conclude the contract, it typically takes effect from the day of marriage. However, the spouses can also agree for the contract to take effect with a specific time delay, although the retroactive validity of the marital property agreement is not possible. Should the spouses agree that the contract comes into effect after a specified delay, their property relations from the day of marriage until the defined moment are judged according to the statutory property regime, which will also need to be properly settled upon conclusion. In cases where future spouses enter into a marital property agreement, it will generally come into effect only upon the conclusion of the marriage, but it can also take effect on any day after the conclusion, as specifically determined in the marital property agreement.

114 The challenge with entering into marital property agreements for cohabitants primarily lies in the fact that their cohabitation is not formalised, representing not a legal status but an actual relationship. Consequently, the moment of its commencement and termination is not externally evident.

115 The fourth paragraph of Article 85 of the FC specifies that marital property agreements are recorded in a special register for the regulation of property relations, which is maintained as a computerised database by the Notary Chamber of Slovenia. The manner of its management, the data included, and its effects are precisely defined in Article 90 of the FC. Within the general provision of marital property agreements between spouses, the FC emphasises the necessity to appropriately publish the existence of a property regime between spouses different to the statutory one. This publication aims to give it the necessary publicity effects, primarily essential for safeguarding legal

([274]) Family Code, art 80.
([275]) Family Code, art 81.
([276]) Family Code, art 85(1).
([277]) Family Code, art 86.

transactions. Article 85 of the FC, although broadly formulated and somewhat informative (complemented by Article 90 of the FC), nonetheless demonstrates the legislator's intent to regulate the registration of agreements on the regulation of property relations as obligatory. This implies ensuring that all concluded marital property agreements are indeed registered. However, the legislator did not adequately execute this intention in subsequent (implementing) provisions. The initial proposal from the working group preparing the FC was to introduce an optional system for registering marital property agreements between spouses in this register, as such a system (for various reasons) is more appropriate and widely established in comparative law. The correctness of such an approach has now been demonstrated in the case of inconsistent regulation, where for future spouses, the regulation is *de iure* obligatory but *de facto* not. In cases where future spouses fail to fulfil their obligations after submitting the marriage certificate to the notary, their marital property agreement will not be entered into the register. If the marital property agreement is not registered, concerning third parties, it is presumed that the statutory property regime between the spouses takes effect instead. (278)

116 Pursuant to the sixth paragraph of Article 85 of the FC, before entering into a marital property agreement, spouses must inform each other about their respective financial situation. Failure to do so renders such a contract challengeable.

117 Spouses can mutually agree at any time to terminate the validity of their marital property agreement, simultaneously arranging all legal consequences of termination. In the event of a divorce, the contract does not automatically cease to be valid. One of the purposes of the marital property agreement could precisely be to regulate property relations and potential maintenance in the case of divorce. However, it does terminate upon the death of either spouse, the contracting party. At that point, the surviving spouse or the legal heirs of the deceased will notify the notary about this fact, presenting the notary with an extract from the deceased spouse's death certificate.

II. Succession law

118 In the Republic of Slovenia, the right to an inheritance is guaranteed by the Constitution. The right to private property is closely linked to the right to inherit, and both are regulated in Article 33 of the Constitution of the Republic of Slovenia, which states: 'The right to private property and inheritance is ensured'.

(278) Family Code, art 94.

The Inheritance Act dates back to 1976 and was adopted in the former political, social, and economic system. This historical context is notably reflected in the relationship between intestate and testamentary inheritance, the prohibition of making inheritance contracts, the prohibition of designating an heir to an heir (fideicommissary substitution), and similar aspects. The Inheritance Act has undergone several amendments; the Inheritance Act-C introduced, among other things, the possibility of a renunciation of an inheritance that has not been initiated between spouses (and cohabitants), which was previously only allowed between descendants and ancestors. However, significant changes in the field of succession law in Slovenia have not yet occurred. **119**

The Inheritance Act includes provisions of both a substantive legal nature and procedural legal nature concerning the inheritance process. In the realm of succession, it is important to mention the Law on the Succession of Agricultural Holdings, which regulates specific aspects related to the inheritance of agricultural holdings. **120**

Among procedural laws, it is worth mentioning the NCCPA and CPA. The question about their relationship raises some dilemmas. The general provisions of the Inheritance Act, in fact, do not comprehensively regulate the succession procedure. Article 163 of the Inheritance Act stipulates that the provisions of civil procedure apply in the succession procedure unless otherwise specified. According to legal theory, the succession procedure is one of the classical non-contentious procedures and cannot be considered separately or outside the realm of non-contentious procedures. Therefore, ([279]) it is understood that the NCCPA governs those aspects that are not otherwise regulated in the Inheritance Act. However, since the NCCPA does not fully regulate the non-contentious procedure but rather contains rules differing from those in the CPA, the rules of the contentious procedure are applied by analogy to the non-contentious procedure. ([280]) **121**

A. *Initiation of an inheritance*

In Slovenia, inheritance is established upon the death of the deceased, and their estate automatically passes by law to their heirs at the moment of death, as stated in Article 132 of the Inheritance Act. The principle of *ipso iure* inheritance applies to both intestate and testamentary inheritance. This means that the heir becomes the legal successor of the deceased concerning the inherited property *ipso iure* (without the need for any action) at the time **122**

([279]) Vesna Rijavec, *Dedovanje: Procesna ureditev* (Gospodarski vestnik 1999) 28.
([280]) Non-Contentious Civil Procedure Act, art 41.

of the deceased's death, although the heir is not obliged to retain the inherited property. The legal succession can be renounced with retroactive effect (*ex tunc*). This is particularly important because legal succession also includes the debts of the deceased. However, the liability of an heir for the debts of the deceased is limited to the value of the inherited estate. The heir is personally liable for the debts of the deceased with their entire estate, both inherited and owned before the initiation of the inheritance (*pro viribus hereditatis*), however only up to the value of the inherited estate. Inheritance is voluntary, and therefore, no one is obliged to be an heir if they do not wish to. Renunciation of inheritance has retroactive effect, and by law, it is considered that the person who renounced an inheritance was never an heir. (281) The heir accepts or renounces the inheritance with a hereditary statement, which they sign. The signed hereditary statement is submitted to the court. The signature on the hereditary statement generally does not need to be notarised, but in cases of doubt, the court may require notarisation of the written hereditary statement of renunciation of the inheritance.

123 The primary condition for inheritance is the death of the deceased or the declaration of a missing person as deceased. (282) An heir can be a natural person or a legal entity. A natural person can become an heir provided they are alive at the time of the deceased's death (which is simultaneously the moment when inheritance commences). An exception to this rule applies to a conceived but unborn child (*nasciturus*). (283) Foreigners are eligible to inherit if there is reciprocity, meaning if citizens of Slovenia are eligible to inherit in the foreigner's country. (284) Legal entities can inherit only through a will and only when there are no specific provisions stating otherwise. (285)

1. *Title to inheritance*

124 The two legal ways to inherit are by law (intestate inheritance) or by will (testamentary inheritance). According to the Inheritance Act, any contract by which someone leaves their estate or a part of it to their co-contractor or someone else is invalid. (286) This is because the testator cannot be bound

---

(281) Karel Zupančič, Viktorija Žnidaršič Skubic, *Dedno pravo, Tretja, spremenjena in dopolnjena izdaja* (Uradni list RS 2009) 70.

(282) Inheritance Act, art 123.

(283) Inheritance Act, art 125.

(284) Inheritance Act, art 6.

(285) Inheritance Act, art 125(3).

(286) Inheritance Act, art 103.

(irrevocability of the contract) as to whom they will leave their property to. (287)

A will takes precedence over the law as a mode of inheritance. However, it is possible to inherit simultaneously through both modes, where a portion of the estate is inherited according to the law and another portion according to the will. (288) **125**

a) *Intestate inheritance*

In the case of intestate inheritance, the law determines the circle of individuals eligible for inheritance. The most crucial factors for inheritance rights are kinship (289) and marital status. (290) Inheritance follows specific orders, and heirs of closer orders exclude heirs of more distant ones. (291) These orders are organised by the parentelic system with representation (parentelic-linear system). (292) According to the Inheritance Act, inheritance is possible within three orders. In the first order, the deceased's children and spouse inherit; in the second, the deceased's parents and spouse; and in the third, the deceased's grandparents. Therefore, the deceased's spouse inherits either in the first or second order, in relation to the fact if the deceased had descendants or not. Similarly, a person who lived with the deceased as a cohabitant inherits in the same order. When the spouse inherits in the first order, they share the estate equally with the deceased's children. In the second order, the spouse receives half of the estate. The surviving spouse does not have inheritance rights if their marriage to the deceased was annulled, invalidated, or if their domestic community ceased. Furthermore, the surviving spouse loses inheritance rights if the deceased filed for divorce, and it is established posthumously that the divorce was justified. The spouse also loses inheritance rights if the marriage is annulled after the deceased's death for reasons the surviving spouse knew at the time of marriage. (293) The rules of intestate inheritance are adjusted through the institution of increas- **126**

(287) Karel Zupančič, Viktorija Žnidaršič Skubic, *Dedno pravo, Tretja, spremenjena in dopolnjena izdaja* (Uradni list RS 2009) 74.

(288) Ibid 75.

(289) Full adoption holds the same significance concerning inheritance rights as natural kinship.

(290) Inheritance rights regarding cohabitation are considered equivalent to those of legal marriages.

(291) Inheritance Act, art 10.

(292) Karel Zupančič, Viktorija Žnidaršič Skubic, *Dedno pravo, Tretja, spremenjena in dopolnjena izdaja* (Uradni list RS 2009) 79.

(293) Inheritance Act, art 22.

ing or decreasing the inheritance share, allowing the division of the estate based on the material needs of the heirs. (294)

127 i) *Forced heirs*. The institution of the forced heirdom limits the freedom of testamentary disposition. Forced heirs have the right to a portion of the estate which the testator cannot freely dispose of; this portion is called the statutory portion. The statutory portion is determined based on the calculated value of the estate, obtained by adding the value of the net estate to the value of specific lifetime gifts made by the testator. (295)

128 Absolute forced heirs include the descendants of the deceased, adopted children and their descendants, parents, and the spouse. Relative forced heirs encompass the deceased's grandparents, as well as brothers and sisters, but only if they are permanently unable to work and lack the necessary means for their livelihood. (296)

b) *Testamentary inheritance*

129 A will is a unilateral, revocable, formally prescribed, and strictly personal declaration of intent by which a person disposes of their property in the event of death. The forms of wills recognised in Slovenian law include: holographic wills, (297) wills written in the presence of witnesses, (298) court wills, (299) notarial wills, (300) wills drawn up during a state of emergency or war, (301) and international wills. (302)

c) *Central Register of Wills*

130 In Slovenia, the Central Register of Wills was established on 5 October 2007. It records information about wills drawn up in the form of a notarial deed, wills kept by a notary, wills prepared by lawyers or entrusted to them for safekeeping, as well as court wills and wills deposited with the court. Proposers for registration in the Central Register of Wills are notaries, lawyers, or the court that have either drafted the will or received it for safekeeping. The Register is maintained as a computerised database by the

---

(294) Karel Zupančič, Viktorija Žnidaršič Skubic, *Dedno pravo, Tretja, spremenjena in dopolnjena izdaja* (Uradni list RS 2009) 89.

(295) Inheritance Act, art 28(4).

(296) Inheritance Act, art 25(2).

(297) Inheritance Act, art 63.

(298) Inheritance Act, art 64.

(299) Inheritance Act, arts 65 and 66.

(300) It is regulated by the Notariat Act.

(301) Inheritance Act, art 71.

(302) Inheritance Act, art 71(a–g).

Notary Chamber of Slovenia. In 2022, the computerised database of the Central Register of Wills underwent a complete overhaul, and now, all entries into the database are exclusively carried out electronically by authorised proposers.

B. *Devolution of the estate*

131 As mentioned above, inheritance passes to heirs by operation of law (*ipso iure*) at the moment of the testator's death. (303) Because the moment of initiation of inheritance (delation) coincides with the moment of acquisition of the inheritance (acquisition), Slovenian inheritance law does not recognise the concept of a 'lying estate'. (304) Heirs acquire the inheritance *ipso iure* upon the initiation of inheritance, so there is no specific action required from them, such as making a statement to accept the inheritance, as there is a presumption that heirs accept the inheritance. Of course, heirs can also expressly renounce the inheritance, a statement that must be made by the end of the probate proceedings. (305) Additionally, renunciation of the inheritance in favour of a specific heir is possible, essentially constituting the acceptance and simultaneous disposal of the inheritance share.

132 Renunciation of an unopened inheritance usually has no legal effect, except for two exceptions: first, in the case of an agreement between a descendant and an ancestor where the descendant renounces inheritance that would have been theirs in case of the ancestor's death, and second, in the case of an agreement to renounce unopened inheritance between spouses or cohabitants.

1. *Heirless estate*

133 The situation of an estate without heirs occurs when there are no known heirs or when all known heirs have renounced the inheritance. An estate without heirs becomes the property of the Republic of Slovenia, unless such an estate is transferred to the bankruptcy estate in bankruptcy proceedings for an estate without heirs. (306)

---

(303) Inheritance Act, art 123.

(304) Karel Zupančič, Viktorija Žnidaršič Skubic, *Dedno pravo, Tretja, spremenjena in dopolnjena izdaja* (Uradni list RS 2009) 205.

(305) Inheritance Act, art 133(1).

(306) Inheritance Act, art 9.

2. *Probate proceedings*

134 In Slovenia, the procedural entity that conducts the probate proceedings is the court, with the district court having substantive jurisdiction. ([307]) The territorial jurisdiction for probate proceedings is determined by the court within whose jurisdiction the deceased had a permanent or temporary residence at the time of death (the probate court). ([308]) Parties cannot mutually alter substantive and territorial jurisdiction. ([309]) Notaries are considered as entities involved in the probate process, although their role is currently somewhat limited. ([310]) The court can only authorise a notary for deposit of the estate and to provide an inventory of the estate and other tasks, which in practice occurs infrequently. In the preparatory phase of the probate court, the administration unit also participates. ([311])

135 In Slovenia, probate proceedings are initiated and conducted *ex officio*. Although probate proceedings are predominantly of an official nature, the principle of dispositivity arises in some instances. The legislature has provided for the division of an estate within the probate proceedings as a disposition by the parties, allowing them to divide the inheritance within the probate process itself. ([312]) Within the realm of disposition also falls the separation of the estate (*separatio bonorum*), which is carried out upon the request of the entitled person (creditors of the deceased). The entitled person also has discretion in asserting the rights of forced heirs and rights of other individuals from the estate, based on the demands of the latter. This includes their exclusion in favour of descendants, incorporating gifts into the inheritance share, reducing testamentary dispositions, and similar actions. ([313])

136 In probate proceedings, the principle of investigation is predominantly established: the court, *ex officio*, collects all factual and evidentiary material, and the parties participate insofar as they have an interest. The court is authorised to require evidence it deems necessary, regardless of the parties' wishes. The judge oversees the probate proceedings, yet participants are entitled to take part in the gathering of procedural evidence, and the principle of hearing all participants is introduced in their favour. The court issues a ruling based on the results of the entire hearing, taking into account evidence provided by the parties and that which the court itself pro-

---

([307]) Courts Act, art 99(ii)(2).
([308]) Inheritance Act, art 177(1).
([309]) Inheritance Act, art 178(2).
([310]) Vesna Rijavec, *Dedovanje: Procesna ureditev* (Gospodarski vestnik 1999) 73.
([311]) Inheritance Act, art 179.
([312]) Vesna Rijavec, *Dedovanje: Procesna ureditev* (Gospodarski vestnik 1999) 116.
([313]) Ibid.

cures. (314) Regarding rights not contingent upon explicit assertion, for which participants have not made a statement, the court decides based on the information available. (315) The principle of adversarial proceedings is also applied in an adapted form in probate proceedings. (316)

137 The Inheritance Act does not specifically regulate when the probate proceedings commence. Theory suggests that the proceedings begin (317) when the court performs the first procedural act. (318) While it is the registrar's duty to notify the court of an individual's death with a coroner's certificate, this action is preparatory in nature. The coroner's certificate, typically prepared by the registrar, is a public document containing relevant data for reaching decisions in probate proceedings. The official commencement of probate proceedings is the judicial entry of the matter based on the notice of death. However, the court, *ex officio*, conducts probate proceedings only if the estate includes real estate; otherwise, the probate hearing is conducted upon request. If the deceased made a will, the court declares it. (319) The focal point of probate proceedings is the probate hearing, which takes place in one or more sessions. The court summons 'affected' individuals (320) to the hearing – those called to inherit by law or will, individuals entitled to exclude specific assets from the estate, and possibly the executor of the will or the estate guardian. During the probate hearing, the court resolves all matters related to the estate, particularly its extent, the identity of heirs and potential legatees, issues concerning any will, the amount of inheritance shares, acceptance and renunciation of inheritance, disinheritance, and other inheritance-related matters. Regarding agreements in probate proceedings, it is a recognised view in theory and court practice that a settlement agreement on an estate's division within probate proceedings is a judicial settlement. Consequently, it can only be contested through a lawsuit for the annulment of the judicial settlement.

138 When there is a dispute among heirs, either concerning facts or the application of law, the probate court suspends the probate hearing and refers the parties to contentious or administrative proceedings in the following instances: firstly, if there is a dispute among heirs regarding whether certain assets belong to the estate; and secondly, if there is a dispute among heirs due

---

(314) Inheritance Act, art 167(1).

(315) Inheritance Act, art 207.

(316) Vesna Rijavec, *Dedovanje: Procesna ureditev* (Gospodarski vestnik 1999) 119.

(317) Vesna Rijavec, *Dedovanje: Procesna ureditev* (Gospodarski vestnik 1999) 135.

(318) Karel Zupančič, Viktorija Žnidaršič Skubic, *Dedno pravo, Tretja, spremenjena in dopolnjena izdaja* (Uradni list RS 2009) 247.

(319) Inheritance Act, arts 193–198.

(320) Inheritance Act, art 205.

to the request of the deceased's descendants, who lived with the deceased in a shared household, seeking exclusion from the estate of a portion reflecting their contribution to the increase or preservation of the estate's value. (321) The probate court refers the party with less likely rights to litigation. (322) Failure to initiate litigation or administrative procedures within the specified period results in the court resuming the probate proceedings after the deadline expires. The entire probate process concludes solely with a decree of distribution or legacy, which might encompass the inheritance agreement, as previously explained.

a) *The inheritance agreement and the settlement agreement of the estate*

139 The community of heirs arises at the moment of the deceased's death and exists until the inheritance is divided. In this community, heirs jointly manage and dispose of the inheritance. A co-heir can manage their share by transferring it to another co-heir, but only to third parties with limited effect, as the heir will be obliged to surrender their share to the contractual party after division. (323) Heirs can agree to convert their collective community into co-ownership, and such an agreement, as a settlement agreement of the estate, is incorporated into the decree of distribution or legacy. (324)

140 The opinions within legal theory regarding whether the determination of inheritance shares in the distribution or legacy transforms an existing co-heirship into co-ownership are divided. An argument against this notion is the fact that the decree of distribution or legacy is not the division referred to in Article 144 of the Inheritance Act since Article 214 of the Inheritance Act specifically discusses the settlement agreement included in the decree of distribution or legacy. Conversely, the opposing view is primarily established in judicial practice. Similarly, there is no consensus on the legal nature of the inheritance agreement concluded within the framework of the inheritance procedure. The prevailing standpoint suggests that the inheritance agreement concluded within the inheritance procedure and incorporated into the decree of distribution or legacy has the character of a judicial settlement. (325)

---

(321) Inheritance Act, art 212.
(322) Inheritance Act, art 213.
(323) Inheritance Act, art 146.
(324) Inheritance Act, art 214(3).
(325) Vesna Rijavec, *Dedovanje: Procesna ureditev* (Gospodarski vestnik 1999) 168–170.

Therefore, heirs can mutually propose the division and method of dividing the estate within the inheritance procedure, and the court can incorporate such an agreement into the decree of distribution or legacy. (326) **141**

The method of dividing the estate can be determined by the deceased in their will. (327) Alternatively, heirs can agree on this during the inheritance procedure (and, for this purpose, enter into an inheritance agreement, which is included in the decree of distribution or legacy) or later, after the completion of the inheritance procedure (by entering into a partition agreement). If an agreement among heirs is not possible, the estate is divided in a non-contentious judicial procedure. **142**

C. *Decree of distribution or legacy*

The decree of distribution or legacy is a legally final, substantive, and declarative ruling of the probate court, determining that after the deceased's death, a certain person or persons become their heirs and establishing the legal effects arising from the deceased's death. (328) The court issues the decree of distribution or legacy usually after completing the probate hearing. The scope of the inheritance decision is determined by Article 214 of the Inheritance Act. It comprises the deceased's identification, date of death, scope of their estate, list of heirs, their respective shares, the legal basis of their inheritance rights, and any limitations on inheritance. (329) According to Slovenian law, all real estate included in the estate must be identified in line with the land registry entries, using an identification number. (330) Specific regulations governing the inheritance of protected farms are covered by a separate law, as mentioned above. **143**

1. *Finality and enforcement of the decree of distribution or legacy*

The court serves the decree of distribution or legacy to all heirs and legatees, as well as to individuals who have asserted claims in the inheritance procedure. (331) These parties have the right to challenge the decision through legal **144**

---

(326) Inheritance Act, art 214(3).

(327) If the deceased specifies in their will that specific items belong to individual testamentary heirs, this effectively divides the estate. The deceased's intention regarding the division of the estate is binding on the court, unless the heirs unanimously determine a different method of division.

(328) Vesna Rijavec, *Dedovanje: Procesna ureditev* (Gospodarski vestnik 1999) 158.

(329) Ibid 160.

(330) Ibid 162.

(331) Inheritance Act, art 215(1).

means. Additionally, the court sends the final and binding decree of distribution or legacy to the competent tax office. (332)

145 The final and binding decree of distribution or legacy binds the parties involved in the inheritance procedure, provided they are not granted the right to pursue their claim in court. (333) However, the decree of distribution or legacy does not bind the creditors of the deceased since they are not considered parties to the procedure; creditors are involved solely in the division of the estate or the distribution of the heir's property. (334)

146 Regarding the enforcement of the legally final decree of distribution or legacy, Article 216 of the Inheritance Act stipulates that necessary entries in the land register are conducted *ex officio*, and movable assets held by the court are handed over to the entitled parties.

147 In the inheritance procedure, the regular legal remedy is an appeal, which must be filed within 15 days of service and suspends the enforcement of the decree of distribution or legacy unless the court rules otherwise. The court decides that the appeal does not suspend the enforcement of the decree of distribution or legacy especially in cases where measures to secure the estate are ordered, and delaying these measures could jeopardise their execution. (335)

148 The appeal is submitted to the court that issued the decree of distribution or legacy. The peculiarity of this appeal is that the court, upon receiving the appeal, can modify its previous decree of distribution or legacy or annul it with a new decree of distribution or legacy, as long as the rights of other parties relying on the initial decree of distribution or legacy are not affected. (336) If the lower court does not amend or annul its decree of distribution or legacy, the appeal is then sent to the higher court, even in the case of an untimely appeal. The higher court typically considers only timely appeals but may also consider untimely appeals if they do not infringe upon the rights of other parties relying on the decree of distribution or legacy. (337)

149 Against a final decree of distribution or legacy a review and a request for protection of legality are permissible, however a reopening of proceedings is not allowed.

---

(332) Inheritance Act, art 215(3).

(333) Inheritance Act, art 220.

(334) Therefore, creditors can only file legal remedies against decisions that concern their rights in particular.

(335) Inheritance Act, art 172.

(336) Inheritance Act, art 173(1).

(337) Inheritance Act, art 173(3).

2. *The role of notaries in the inheritance process*

150 The role of notaries in the inheritance process in Slovenia is governed by Article 2, paragraph 1 of the Notariat Act, which states that notaries: 'perform tasks assigned to them by law upon the court's request'. In the field of inheritance, these tasks include: (338)

- The drawing up of an inventory and an appraisal of the deceased's estate, if so decided by the probate court. The notary conducts these tasks in accordance with the provisions of inheritance law;
- Safeguarding the deceased's estate or a portion thereof when necessary, pursuant to the provisions of inheritance law and upon the decision of the probate court;
- Appointment by court order as the estate guardian;
- Receipt into safekeeping of inheritance documents at the court's request. (339)

151 Notaries prepare notarial deeds (typically notarial minutes) for these tasks. However, the involvement of notaries in the field of inheritance law in the Republic of Slovenia occurs only exceedingly rarely in practice.

3. *Inheritance with an international element*

152 In Slovenia, regarding inheritances with an international element in the area not covered by the Succession Regulation, (340) the provisions of the PILPA apply. The PILPA contains rules on determining the law in personal, family, labour-social, property, and other civil law relationships with an international element. (341)

153 For inheritance, the PILPA provides a rule that applies the law of the country of which the deceased was a citizen (342) at the time of death, (343) combined with the location of the estate for immovable property. This rule ceased to apply in cases covered by the Succession Regulation. Particularly worth noting is the issue of inheriting immovable property. According to the provisions of the PILPA, for the handling of immovables of a Slovenian citizen, the exclusive jurisdiction lies with the courts of the Republic of Slovenia (*forum rei sitae*) if the property is located in Slovenia. (344) However,

---

(338) Notariat Act, art 71.
(339) Notariat Act, art 92.
(340) Council Regulation (EU) 650/2012 [2012] OJ L201/107.
(341) Private International Law and Procedure Act, art 1.
(342) Applying the *lex nationalis* of the deceased is in order.
(343) Private International Law and Procedure Act, art 32(1).
(344) Private International Law and Procedure Act, art 79(1).

when the immovable property of a Slovenian citizen is situated abroad, Slovenian courts have jurisdiction only if, under the law of the country where the property is located, the competent authority of that country is not established. This represents a hypothetical ancillary jurisdiction since most countries reserve jurisdiction over immovable property on their territory as their exclusive competence. (345) Even in cases where the deceased was a foreign national but had immovable property in Slovenia, the PILPA grants exclusive territorial jurisdiction to Slovenian courts. (346) In the case of movable property of a Slovenian citizen, Slovenian courts have jurisdiction if the assets are within Slovenian territory (347) or, if located abroad, when the competent authority of the country where they are located is not established or refuses to handle the inheritance. Furthermore, for the handling of movable property of a foreign national in Slovenia, Slovenian courts have jurisdiction unless the deceased's country has jurisdiction over the movable property of Slovenian citizens. (348)

a) *European Certificate of Succession*

154 The European Certificate of Succession (hereafter referred to as ECS) represents a complement to the national process, as the substantive ruling in an inheritance matter is still issued within the probate proceedings by a decree of distribution or legacy. With the ECS, the issuer (district court) does not make a decision on the inheritance matter but provides the heir with the ability to obtain assets located in another Member State. Its use is not mandatory and does not replace the national decree of distribution or legacy. It applies only when the estate is in two or more States. (349) In Slovenia, the ECS, similar to the national decree of distribution or legacy, is issued by the courts. For the purposes of implementing the Succession Regulation, (350) Slovenian inheritance law has been amended to include a new chapter (Articles 227.a to 227.k). As a rule, the provisions of the Inheritance Act

(345) Tjaša Ivanc, 'Vpliv evropske uredbe o dedovanju na slovensko dedno pravo – nič novega ali leži kaj pod površino?' [2014] 9ff.

(346) Private International Law and Procedure Act, art 80(1).

(347) For movable property located in Slovenia, there is a specific provision in Article 203 of the Inheritance Act. The second paragraph of Article 203 stipulates that if, according to the information in the death certificate, the deceased left only movable property and none of those entitled to inherit request proceedings, the court decides not to carry out the probate procedure.

(348) Private International Law and Procedure Act, art 80(2).

(349) Vesna Rijavec, 'Čezmejno dedovanje – glavni poudarki za odvetnike' [2020] 97 Odvetnik.

(350) Council Regulation (EU) 650/2012 [2012] OJ L201/107.

apply in matters governed by the Succession Regulation unless otherwise specified in the Succession Regulation or the third chapter of the Inheritance Act.

155 A request for issuing an ECS is submitted to the probate court, which also decides on the request and issues the ECS. (351) It also decides on requests for correction, modification, or annulment thereof. Slovenia notified the European Commission in accordance with point (c) of the first paragraph of Article 78 of the Succession Regulation that the district court, which decides in probate proceedings, is competent for issuing the ECS in Slovenia.

156 Under the Inheritance Act-C, an appeal against a decision ruling on the request for issuing an ECS, a decision on the correction of the ECS, and a decision on the amendment or revocation of the ECS is a non-suspensive appeal. The deadline for filing an appeal is 30 days from the service of the decision. The Inheritance Act-C does not specify which court decides on the appeal. However, considering the system of legal remedies in the Slovenian legal framework, it is presumed that the appellate court is the higher court. (352)

157 The Inheritance Act-C amendment specifically addresses the temporary suspension of ECS effects, (353) the adjustment of real rights, (354) interim injunctions, and the protection of the inheritance. (355) The process of declaration of enforcement (exequatur) begins upon the request of an interested party, who files a petition for declaration of enforcement with the competent court (the district court). (356) The anticipated legal remedies against the declaration of enforcement in Slovenia are objections, (357) decided upon by the district court, and appeals, adjudicated by the Supreme Court of the Republic of Slovenia. (358)

158 The issuance of a certificate of enforceability, in accordance with point (b) of the third paragraph of Article 46 of the Succession Regulation for the purpose of recognising or declaring the enforceability of a decree of distri-

---

(351) The request for the issuance of the certificate can be filed by heirs, legatees, administrators of the estate, and the executor of the will, who must prove their status or assert the rights of an heir, legatee, or authorisation as an executor or administrator in another country (Inheritance Act, art 63(1)). Creditors do not have a possibility to assert within the issuance of the certificate.

(352) Vesna Rijavec, 'Čezmejno dedovanje – glavni poudarki za odvetnike' [2020] 97 Odvetnik.

(353) Inheritance Act, art 227.d.

(354) Inheritance Act, art 227.f.

(355) Inheritance Act, art 227.g.

(356) Inheritance Act, art 227.h.

(357) Inheritance Act, art 227.i.

(358) Inheritance Act, art 227.j.

bution or legacy in another Member State falls under the competence of the probate court. (359)

b) *Process of entering foreign ECS and national decrees of distribution or legacy into the Slovenian land register*

159 The land registry procedure in Slovenia generally unfolds as follows: in land registry proceedings, decisions are made at the first instance by a judicial assistant, unless the law specifies that, in particular cases, the land registry judge or a commission makes decisions in the process. (360) The land registry procedure commences when the land registry court receives the land registry application. (361) The land registry court decides on the registration based on the entries in the land register at the commencement of the land registry procedure. (362) The land registry court makes a ruling on the registration through a decision. (363) Participants in the procedure can file an objection against the decision on the registration issued by the land registry judicial assistant. (364) The land registry judge decides on objections against the decisions on registration made by the judicial assistant. (365) Participants in the procedure can lodge an appeal against the judge's decision on objections. (366) If a judge is the decision-maker in the initial instance, participants have the option of lodging an appeal, not an objection. The appellate court, the higher court in Koper, adjudicates on the appeal. (367)

160 In one case (368) where registration was proposed based on a German ECS, the real estate subject to inheritance was not specified. The higher court took the stance that the subject of inheritance encompassed all the deceased's assets under statutory succession. Consequently, it was deemed unnecessary to append attachments concerning the real estate data, as the applicant could fulfil everything required in Article 31 of the Land Register Act through other means, and the identification number of the property within the ECS itself was not mandatory. Even after the European Court of Justice's

(359) Inheritance Act, art 227.k.
(360) Land Register Act, art 127(1).
(361) Land Register Act, art 133(1).
(362) Land Register Act, art 147.
(363) Land Register Act, art 152.
(364) Land Register Act, art 157.
(365) Land Register Act, arts 126(2) and 158.
(366) Land Register Act, art 159.
(367) Land Register Act, art 126.
(368) CDn 196/2018, (VSK 23 April 2018).

ruling, ([369]) which acknowledged each Member State's right to establish conditions for real estate rights' registration and the ability to reject applications not meeting these criteria, the higher court has not yet altered its aforementioned stance. The same higher court also addressed the necessity and scope of translating foreign ECSs into Slovenian. It maintained ([370]) that a translation of a foreign ECS is necessary in all cases, considering that land registry proceedings are governed by national law, Slovenian courts operate in the Slovenian language, and despite the standardised ECS form, which may contain text in a foreign language crucial for the decision-making process.

161 When it comes to foreign national certificates of inheritance, specifically for Italian ([371]) and German ([372]) ones, the same court requested, prior to allowing entry into the Land Register, the submission of a certificate of enforceability according to Article 43 of the Succession Regulation. Despite the appellants claiming that the decree of distribution or legacy, which would serve as the basis for registering property rights in the country of origin, is not enforceable, the higher court considered this irrelevant for the ruling. Enforceability refers to whether the ruling, according to national law, allows registration in public records. As such a certificate was not provided for the ruling, the registration of property rights based on it was not permitted.

D. *Administration of estates*

162 Inheritance is managed collectively among the heirs. ([373]) Handling the inheritance community by co-heirs involves the joint and unanimous management and use of the inheritance. Decision-making does not rely on a majority of votes or the size of individual inheritance shares; instead, for any action, whether regular or extraordinary, the consensus of all co-heirs is necessary. In exceptional cases, a co-heir may act independently if there is a risk of destruction or damage to the object of the inheritance.

1. *Guardian of an estate, executor of a will and administrator of an estate*

163 When issues arise during the transfer of an estate to heirs (such as unknown heirs or unknown residence, or in other cases), the court appoints a temporary guardian of the estate who is entitled to sue or be sued on behalf

([369]) *R.J.R. v Registrų centras VI,* (CJEU 30 August 2021).
([370]) CDn 148/2023, (*VSK Višje sodišče v Kopru*, 3.10.2023).
([371]) CDn 112/2022, (*VSK Višje sodišče v Kopru* 14.7.2022).
([372]) CDn 130/2023, (*VSK Višje sodišče v Kopru*, 17.10.2023)
([373]) Inheritance Act, art 145.

of the heirs, to collect claims, settle debts, and generally represent the heirs. (374) The court informs the CSW about the appointment of the temporary guardian that may also appoint another guardian. (375) The function of the estate guardian ends when the reason for their appointment ceases.

164 The executor of a will is a person designated as such in the will by the testator. However, the designated executor is not obliged to take on this duty. (376) The primary responsibility of the executor is to manage the estate, settle debts, and ensure the will is executed according to the wishes of the testator. The appointment of the executor is not made by the court but by the testator. However, the court has the authority to remove the executor if their actions are not in line with the testator's wishes or the law. (377)

165 In the case of a community of heirs, the court may, upon the request of any of the heirs, appoint an administrator of the estate. The administrator's task is to manage the inheritance for all parties or the court can assign a portion of the inheritance to each heir for management. The court may also appoint one of the heirs as the administrator. With the court's approval, the administrator can manage the items in the estate if they are entitled to do so by the will or if it is necessary to cover expenses or prevent any damage. (378)

IV. Status of natural persons

A. *Name changes*

166 Under the Personal Name Act (hereafter referred to as PNA), a personal name consists of a first and surname, each composed of words, indivisible units, or letters. (379) Parents must determine and register a child's personal name at the administrative office within 30 days of birth, (380) considering legal constraints when choosing the name. (381) If a person's name or

(374) Inheritance Act, art 131(1).
(375) Inheritance Act, art 131(2).
(376) Inheritance Act, art 95.
(377) Inheritance Act, art 98.
(378) Inheritance Act, art 145.
(379) Personal Name Act, art 3.
(380) Personal Name Act, art 6.
(381) For instance: a personal name must consist of both a first name and a surname, with neither containing only a single letter. When assigning a name, parents are obligated to prioritise the child's best interests. If they fail to do so, the administrative unit will alert them; if the parents persist with the name, the administrative unit will notify the CSW, which can take actions within its child care and protection responsibilities.

surname comprises multiple words or indivisible units, they may choose a name for legal purposes. (382) This legal name is then recorded in the civil registry. (383)

1. *Change of personal name*

167 A personal name can be changed due to alterations in certain family legal relations, by request, (384) and following a change in gender. In all cases, the consent of a minor is required if their name is being changed, provided the individual is at least nine years old and, considering their personal development, capable of expressing their will. (385)

168 The family law relations that serve as the basis for changing a name include paternity recognition, adoption, and marriage annulment or divorce. When a father acknowledges paternity until the child reaches 18 years of age, the parents can determine a new personal name through a statement made during the paternity recognition procedure. As previously mentioned, if the child is over nine years old, their consent is required for the change, provided they are capable of expressing their will considering their personal development. (386) Similarly, an adoptive parent can choose a new name for the adoptee during the adoption process, which must be specified in the adoption ruling, serving as the basis for updating the information in the civil registry. (387) However, there is an exception: according to the second paragraph of Article 14 in the PNA, an adopted child can receive a new surname at any time, but their first name cannot be changed between the ages of four and nine. After the age of nine, any change must be made with the child's consent. (388)

169 When entering into a marriage, a spouse can retain their surname, choose the spouse's surname, combine the spouse's surname with their own, or have both surnames. (389) A citizen of the Republic of Slovenia who marries someone from a foreign country may use the spouse's surname in Slovenia as it is used in the spouse's country. (390) The spouses indicate the chosen surname for each upon registering the marriage. Upon concluding a mar-

(382) Personal Name Act, art 4.
(383) Rules on the Implementation of the Deaths, Births and Marriages Act, art 14(2).
(384) Personal Name Act, art 11.
(385) Personal Name Act, art 12.
(386) Personal Name Act, art 13.
(387) Rules on the Implementation of the Deaths, Births and Marriages Act, art 30(1).
(388) Personal Name Act, art 14.
(389) Personal Name Act, art 15.
(390) Personal Name Act, art 16.

riage, they sign a document called the marriage certificate, which serves as the basis for updating the surname in the civil registry. In the event of divorce or annulment of their marriage, the spouses can keep the agreed surname, but within one year of the final court decision or within one year of signing a notarial deed or an equivalent document for a consensual agreement on divorce, they can declare their wish to revert to their pre-marital surname. However, a spouse who changed their surname during the marriage cannot make this declaration. When there is no existing marriage recorded in the civil registry, an individual automatically retains their pre-marital surname upon registration unless they changed their surname during the marriage. ([391])

170 Besides changes in family legal relations, a person can request a change of their personal name. The request can be made by a legally capable citizen. ([392]) Minors can submit the application through their legal representative. In cases of guardianship, the guardian is authorised, but they must first obtain consent from the relevant CSW. If a child's parents live separately, the application is submitted by the parent with whom the child resides or to whom custody and care have been entrusted, but the other parent must also agree. If the parents fail to reach an agreement, the CSW assists them in reaching an agreement. If even the intervention of the CSW does not help, the justification for the request is determined by the court in a non-contentious procedure, initiated by one or both parents. The application must include proof from the CSW that the parents actually attempted to agree on the child's new personal name, and the CSW submits an opinion on the child's best interests. The court's decision in this process must be attached to the application for a change of the personal name.

2. *Procedure for changing a personal name*

171 The process of changing a personal name is an administrative procedure heard by a non-judicial body – the administrative unit, except in cases where the child's parents disagree on changing the child's name. The person seeking the name change submits an application on a prescribed form, along with a statement or document serving as the basis for registration at any administrative unit, as there is no longer local jurisdiction for these procedures. At the beginning of the process, the applicant must pay the procedure's costs, the amount depending on whether the person has previously changed their personal name. Based on the applicant's submission, the

([391]) Personal Name Act, art 17.
([392]) Personal Name Act, art 18.

administrative unit decides on the name change and issues an administrative ruling. Against this ruling, an appeal can be lodged, which is decided upon by the Ministry of the Interior. Additionally, an administrative dispute can be initiated against the administratively final ruling before the administrative court. Even though it is an administrative procedure, rules regarding *lis pendens* and expression of will, similar to those in a judicial process, apply. The decisions made in these procedures have *erga omnes* effects.

3. *Restrictions on changing a personal name*

172 The PNA restricts or even prohibits changing a personal name in certain instances. The change of a personal name is not allowed for a citizen who has been convicted of a criminal offence with a final judgment, prosecuted *ex officio*, until the sentence is executed, or as long as the probation period determined in a conditional sentence lasts, or as long as the legal consequences of the conviction persist. (393) If a criminal procedure for a criminal offence prosecuted *ex officio* is still ongoing, the administrative unit must, within three days of the name change taking effect, notify the court overseeing the ongoing proceedings. In the process of changing a personal name, the administrative unit must obtain data from the criminal records if the applicant does not provide them or if there are doubts about the authenticity of the documents. A specific requirement applies to Slovenian citizens abroad, who must also submit a certificate stating that they do not have a criminal record issued by the competent foreign authority in the process of changing a personal name. (394) Apart from these exceptions, Slovenian legislation does not include other limitations, which means that a person can change their personal name multiple times, similar to the provisions regarding the determination of the name, including the number of characters allowed, permissible letters in the name, and similar criteria. The competent authority may refuse a name change only in the mentioned instances and in cases where it is necessary to protect public security, morality, or the rights and freedoms of others.

B. *Legal gender change*

173 Slovenian legal legislation regulates gender change quite sparingly, specifically within the Register of Deaths, Births and Marriages Act, the Rules on the Implementation of Deaths, Births and Marriages Act, and the Central

(393) Personal Name Act, art 19(1).
(394) Personal Name Act, art 19.

Register of the Population Act. (395) The Slovenian legal terminology does not use the term 'gender recognition' but rather employs the term 'gender change'.

174 In accordance with Article 37 of the Rules on the Implementation of Deaths, Births and Marriages Act, the change of gender is recorded in the civil registry based on the decision of the administrative unit regarding the alteration of the registered data. This decision is issued upon a certificate from the relevant institution or physician, confirming the gender change. Before the alteration is entered into the civil registry, a new unique personal identification number (known as the Personal Identification Number of the Citizen) is assigned to the individual. However, the Rules and the mentioned Laws do not regulate other aspects, such as which institution or physician is authorised to issue the certificate confirming the gender change. Consequently, significant disparities and various procedures occur among administrative units, which are often unprepared for such processes in practice. (396)

175 From the description, it is evident that in Slovenia, a change of gender from male to female and vice versa is possible, where the alteration must also be based on the physical characteristics of the body. This does not necessarily require, for instance, sterilisation, but at least hormone therapy. Thus, a gender change based solely on self-identification and beyond the binary gender system of female/male is not permitted. The Ministry of the Interior has clarified that the authority to issue a certificate for gender change lies with psychiatric institutions. (397) However, in practice, it is mostly a psychiatrist from the Interdisciplinary Council for Confirming Gender Identity. The individual seeking a gender change must also obtain a diagnosis of transsexualism, classified as a mental disorder. (398)

176 The process of gender change is an administrative procedure handled by the administrative unit. An application on the prescribed form can be submitted to any administrative unit or at the diplomatic-consular representation of the Republic of Slovenia abroad. The procedure requires covering the costs of €22.60. There is a possibility to appeal the decision made in the administra-

---

(395) Uradni list RS, št. 72/06 – uradno prečiščeno besedilo, 3/22 – ZDeb.

(396) Nika Bobek, Petra Brvar et al, 'Uveljavljanje pravic do pravnega priznanja spola v Sloveniji', <https://www.pf.uni-lj.si/media/uppps.-.koncno.besedilo.pdf> accessed 27 December 2023.

(397) Društvo informacijski center Legebitra, Pravno priznanje spola in sprememba osebnega imena, <https://lgbtpravice.si/trans/pravno-priznanje-spola/> accessed 27 December 2023.

(398) Miha Istenič, 'Pravno priznanje spola v Sloveniji' (2017) 14 Pravna praksa 20, 20–21.

tive procedure and later initiate administrative dispute proceedings. As previously mentioned, rules regarding *lis pendens* and expression of will apply in these proceedings. The decision is declaratory in nature, and its effect is *erga omnes* since it concerns status-related matters. Marriage, in accordance with Article 95 of the Family Code, only terminates with the death of one of the spouses, the declaration of one of the spouses as deceased, divorce, or annulment, with the reason for annulment not being a change in gender. Considering this and the provision that marriage is the life partnership of two individuals (and no longer specifically a husband and wife), it can be concluded that the marriage remains valid.

C. *Guardianship over an adult person*

The Slovenian legal system, before the adoption of the FC, recognised both guardianship and extended parental rights beyond a child's legal age. The latter extended to parents of children with physical or mental disabilities who were unable to care for themselves, look after their own interests, and exercise their rights. (399) Guardianship, on the other hand, applied to individuals whose legal capacity was removed, to minors without parents, or in other specific cases. However, since the adoption of the FC, the institution of guardianship now applies to all these cases, and it no longer automatically removes legal capacity. The entire process of placing someone under guardianship takes place at the district court, whose jurisdiction is determined by the permanent or temporary residence of the person being placed under guardianship. The procedure follows the rules of non-contentious proceedings, ensuring judicial impartiality by granting the right to a fair trial and the possibility of a judge's disqualification. Following the procedure, the court issues a constitutive decision, determining the person's placement under guardianship and simultaneously appointing a guardian. An appeal against such a decision can be made to the appellate court, with the possibility of three extraordinary legal remedies: a request for protection of legality, revision, and a reopening of the case. (400)

(399) Marriage and Family Relations Act, art 118.

(400) The Supreme Court of the Republic of Slovenia, according to the Non-Contentious Civil Procedure Act, has the authority to intervene in a final decision if it determines that a request for the protection of legality, submitted in a procedure that can also be initiated *ex officio*, is justified. This means that the court can annul or amend the decision rather than solely establishing that the law was violated in the case, as stated in Non-Contentious Civil Procedure Act, art 38.

1. *Establishment and termination of guardianship*

178 The proposal to initiate the process of appointing a guardian can begin upon the proposal of the CSW, the public prosecutor, the person to whom the procedure will apply (if capable of understanding the significance and legal consequences of the proposal), the spouse of such a person, their cohabitant, or relatives within the direct line or relatives by blood up to the second degree. Additionally, the court can also commence the procedure *ex officio* if it becomes aware of circumstances indicating a justifiable reason to place a particular person under guardianship. (401)

179 The FC has removed the authority of the CSW to decide on appointing a guardian and the nomination of a guardian. However, it still maintains an important role in nominating a guardian for an individual. According to the FC and the NCCPA, when the CSW is the petitioner of this process, it must specify in the proposal which natural or legal person the court should appoint as a guardian for the individual. (402) When the CSW is not the petitioner, (403) the court may request an opinion on this matter. (404) If the CSW fails to provide such an opinion upon the court's request, the court appoints the CSW as the guardian, but the CSW can be relieved of this obligation only if it simultaneously proposes another natural or legal person for the court to appoint as a guardian. (405) Nevertheless, the CSW retains an important role in this procedure, even when it is not the party that initiated it. Besides the CSW, the temporary guardian of a person undergoing the procedure is considered a lawful participant in the process. (406) Their role throughout the process involves adequately explaining to the individual the purpose and procedure of the process, the rights and duties they have during the procedure, the consequences of non-participation, and the content and implications of the court's decisions. (407) Additionally, the temporary guardian has the same duties and rights as a guardian for the duration of their appointment. However, the court is not obligated to appoint a temporary guardian or an authorised representative for the ward unless indicated under certain circumstances.

---

(401) Non-Contentious Civil Procedure Act, art 57.

(402) If a legal entity is appointed, it must authorise one of its employees as the responsible person for executing the guardianship. This applies equally in cases where the CSW is appointed as the guardian, as stated in the Family Code, art 242(2).

(403) Family Code, art 272(3).

(404) Non-Contentious Civil Procedure Act, art 64(2,3).

(405) Non-Contentious Civil Procedure Act, art 64.

(406) Non-Contentious Civil Procedure Act, art 58(1).

(407) Non-Contentious Civil Procedure Act, art 59(2).

180 After receiving a complete proposal and payment of the court fee (except when the proceedings are carried out *ex officio* by the court), the court conducts the evidentiary procedure. Within this procedure, the court hears testimonies unless, when attempting to do so, it determines that testifying would harm the person's health or, considering their health condition, is not possible. If the properly summoned person fails to appear for the hearing, the court may order forced attendance. (408) Additionally, the court appoints a medical expert to provide a report and opinion on the health condition of the person for whom guardianship is being considered. (409) If, according to the expert, it is necessary to assess the person's health condition by examination in a psychiatric hospital and a specific period is required, the court may order the person to stay in the psychiatric hospital for up to two days, but only if a temporary guardian has been appointed for that person. A ruling by the court in this regard can be appealed, and the appellate court decides on the appeal. (410) Throughout the evidentiary process, the court also interviews the person proposed as the guardian. The court explains the rights and duties of the guardian and seeks their consent (411) since guardianship in our system is unpaid and considered voluntary and honourable work. (412) Throughout the interview, the court assesses whether the person meets the criteria for a guardian, possesses the necessary personal qualities, and has the ability to fulfil the duties of a guardian. (413) A person cannot be appointed as a guardian if their parental responsibility has been removed, if they lack legal capacity, if their interests conflict with those of the ward (for example, if they have a contract for lifelong support with the ward), or if their spouse or partner has such an agreement. Additionally, a person who, considering their personal qualities or relationship with the ward or their parents, cannot be expected to fulfil the guardian's duties, cannot be appointed as a guardian. (414) The law generally gives priority to a spouse, partner, or relative, provided it is possible and in line with the ward's best interests. Furthermore, the court is required to consider the wishes of the ward, if they are capable of understanding their significance and consequences, and those of their relatives. (415)

---

(408) Non-Contentious Civil Procedure Act, art 61.
(409) Non-Contentious Civil Procedure Act, art 62.
(410) Non-Contentious Civil Procedure Act, art 63.
(411) Non-Contentious Civil Procedure Act, art 64.
(412) Family Code, art 240(2).
(413) Family Code, art 240(1).
(414) Non-Contentious Civil Procedure Act, art 241.
(415) Non-Contentious Civil Procedure Act, arts 242 and 243.

181 Following this procedure, the court issues a decision either placing the person under guardianship and appointing a guardian or rejecting the proposal for guardianship if it determines that the conditions are not met. In the decision, the court decides on the scope of the guardian's obligations and rights, considering that placing the ward under guardianship does not entirely deprive them of legal capacity. In each specific case, the decision is based on the decision-making capacity of the ward. The court's decision is based on the findings and opinion of a medical expert in the relevant field of medicine.

182 If the individual placed under guardianship owns real estate or other property where public registers or records are maintained, the court sends notifications to the relevant authorities about the initiation of the guardianship process. This includes notifications and the final decision on the placement of the individual under guardianship to ensure appropriate annotation of this fact in public records. The same applies in cases of termination of guardianship. Upon the finality of the decision on guardianship placement, the court also provides this information to payment processing organisations where the individual under guardianship holds transactional or other accounts and to members of the central depository company where the individual holds an account for dematerialised securities. (416)

183 When the reasons for which a person was placed under guardianship cease to exist, the guardianship also ends, with the court issuing a decision on this matter. (417) If the ward passes away, no court intervention is needed, and the guardianship ends *ipso iure*. (418)

2. *Guardians' duties and rights*

184 The purpose of adult guardianship is to protect their personality by allowing the guardian to manage affairs that the individuals cannot handle themselves. This includes efforts towards their healthcare, training for independent living, safeguarding their property, rights, and other interests. (419) Additionally, the guardian acts as the representative for the ward. (420) Before entrusting the ward's assets to the guardian's management, the CSW or the

(416) Non-Contentious Civil Procedure Act, art 69.

(417) Family Code, art 266.

(418) Matej Čujovič, Andrej Del Fabro et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 837.

(419) Family Code, art 239(2,3).

(420) Family Code, art 245.

court must, for the protection of the ward, order an inventory and appraisal of the assets. (421)

185 The guardian acts as the direct representative of the ward, conducting representation activities in the ward's name and on their behalf. They are generally independent in their work, except for significant financial transactions. (422) Such transactions include alienating or encumbering the ward's real estate, disposing of valuable immovable property, or dealing with substantial property rights. This also encompasses renouncing a will, inheritance, or refusing a gift, as well as filing a lawsuit concerning paternity or challenging paternity. In these cases, the guardian requires permission from the CSW, similar to entering into a legal transaction with the ward. (423) However, before undertaking any significant action, the guardian must also consult with the ward, considering their opinion if the ward is capable of understanding the matter's significance and consequences. (424)

186 The CSW annually requests the guardian submit a report detailing the actions taken for the ward's protection, especially concerning their health, upbringing, and education. This report must encompass information on managing the ward's assets and any transactions made with them. (425) After reviewing the report, if minor irregularities are detected, the CSW calls upon the guardian to rectify them. However, in the case of significant irregularities, the CSW initiates a procedure to dismiss the guardian and takes all necessary steps to safeguard the ward's interests. When proposing the dismissal, whether due to the stated reasons or because the guardian is found negligent in their duties, abusing their rights, or jeopardising the ward's welfare through their actions, the CSW simultaneously proposes another person as the new guardian. (426) The guardian themselves may also propose their dismissal without specifying reasons. (427) Upon dismissal for any reason, the guardian must provide a final report on their work and accounts of asset management to the court and transfer these to the new guardian. (428)

187 The ward does not have the right to propose the dismissal of the guardian but is entitled to raise objections against both the guardian and the CSW if capable of understanding the meaning and consequences of the objection.

---

(421) Family Code, art 246(1).

(422) Matej Čujovič, Andrej Del Fabro, et al in Barbara Novak (ed), *Komentar družinskega zakonika* (Uradni list RS 2019) 792.

(423) Family Code, arts 248 and 249.

(424) Family Code, art 247.

(425) Family Code, art 250.

(426) Family Code, art 254(1).

(427) Family Code, art 254(2).

(428) Family Code, art 254(1).

The objection against the guardian is decided by the CSW, while the objection against the CSW is addressed to the Ministry of Labour, Family, Social Affairs and Equal Opportunities. The ward's spouse, cohabitant, relatives, competent authorities, and professional institutions also have the same right to object.

188 Duties performed by a guardian are generally unpaid. However, they are entitled to reimbursement of expenses incurred while fulfilling their duties and may receive remuneration if the nature of their work demands special qualifications due to its complexity and responsibility. (429) On the other hand, the guardian is obliged to compensate any damage caused to the ward due to the negligent performance of their duties or the arbitrary neglect of their responsibilities. (430)

V. Conclusions

189 In the Republic of Slovenia, for resolving disputes in family law and matters involving children, the competent authority is the court. The FC has additionally burdened the courts by transferring certain matters listed in this report from the CSW to the courts. Simultaneously, it has allowed consensual divorces before a notary, but this is applicable only when the spouses do not have joint minor children over whom they exercise parental care. Moreover, it is now possible to enter into marital property agreements. No significant changes are expected in the field of family law in the near future.

190 The picture is different in the field of succession law, which would require reform both in material and procedural law. Succession law in Slovenia is an area open to de-judicalisation. There is also a growing inclination toward transferring the jurisdiction for handling succession matters from courts to notaries. It is mainly a matter of time until there might be the political will for such a step. During the JuWiLi project event, the former President of the Supreme Court of Slovenia, Damijan Florjančič, highlighted that transferring succession matters to notaries would undoubtedly bring significant staff savings to the courts and financial savings to the State budget. Additionally, he expressed the belief that the primary role of the judiciary is to resolve disputes between parties. 'It would be appropriate to entrust succession matters to notaries. In cases where a notary finds that these matters cannot be resolved due to disputes among heirs or conflicts with other parties involved, the notary would appropriately refer the matter to court, and the

(429) Family Code, art 252.
(430) Family Code, art 253.

succession procedure would continue after the final conclusion of the litigation', he added. (431)

In the field of family and inheritance law, many very personal and sensitive issues are addressed. It is certainly not always necessary for the courts to decide on them. It would always be worth considering which tasks could be transferred to non-judicial bodies for resolution, as this could relieve the courts and find solutions without compromising the legal security of the parties involved.

VI. Tables

A. *Table of abbreviations*

Slovenian Term	**English Translation**	**English Abbreviation**
Socialistična federativna republika Jugoslavija	Socialist Federal Republic of Yugoslavia	SFRY
Evropska unija	European Union	EU
Zakon o pravdnem postopku (ZPP)	Civil Procedure Act	CPA
Zakon o nepravdnem postopku (ZNP-1)	Non-Contentious Civil Procedure Act	NCCPA
Družinski zakonik	Family Code	FC
Zakon o zakonski zvezi in družinskih razmerjih (ZZZDR)	Marriage and Family Relations Act	MFRA
Center za socialno delo (CSD)	Centre for Social Work	CSW
Zakon o partnerski zvezi (ZPZ)	Civil Union Act	CUA
Zakon o mednarodnem zasebnem pravu in postopku (ZMZPP)	Private International Law and Procedure Act	PILPA
Evropsko potrdilo o dedovanju	European Certificate of Succession	ECS
Zakon o osebnem imenu (ZOI-1)	Personal Name Act	PNA

(431) Vrhovno sodišče Republike Slovenije, Predsednik Florjančič na mednarodni konferenci o pravici brez pravdanja, https://www.sodisce.si/vsrs/objave/2022051313585577/predsednik-florjancic-na-mednarodni-konferenci-o-pravici-brez-pravdanja/ (accessed 27 December 2023).

B. *Legislation reference table*

Legislation, treaties, and conventions
Ustava Republike Slovenije, Uradni list RS/I [Official Gazette of the Republic of Slovenia], št. 33/91, Uradni list RS, št. 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13, 47/13, 75/16 – UZ70a, 92/21 – UZ62a.
Družinski zakonik, Uradni list RS, št. 15/17, 21/18 – ZNOrg, 16/19 – ZNP-1, 22/19, 67/19, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US, 5/23.
Zakon o dedovanju, Uradni list SRS, št. 15/76, 23/78, Uradni list RS/I, št. 17/91 – ZUDE, Uradni list RS, št. 13/94 – ZN, 40/94 – odl.US, 82/94 – ZN-B, 117/00 – odl. US, 67/01, 83/01 – OZ, 73/04 – ZN-C, 31/13 – odl. US, 99/13, 63/16.
Zakon o notariatu, Uradni list RS, št. 2/07 – uradno prečiščeno besedilo, 33/07 – ZSReg-B, 45/08, 91/13, 36/20 – ZZUSUDJZ, 175/20 – ZIUOPDVE, 189/20 – ZFRO, 130/22, 49/23, 102/23.
Zakon o osebnem imenu, Uradni list RS, št. 20/06, 43/19.
Zakon o matičnem registru, Uradni list RS, št. 11/11 – uradno prečiščeno besedilo, 67/19.
Temeljni zakon o posvojitvi, Uradni list FLRJ, št. 30/47, 24/52, Uradni list SFRJ, št. 10/65, 29/71, Uradni list SRS, št. 51/71, 15/76 – ZZZDR.
Zakon o partnerski zvezi, Uradni list RS, št. 33/16, 94/22 – odl. US, 5/23.
Zakon o izvajanju rejniške dejavnosti, Uradni list RS, št. 110/02, 11/03, 3/04, 142/04, 7/06, 56/06 – odl. US, 114/06 – ZUTPG, 5/07, 5/08, 73/08, 8/09, 53/09, 7/10, 56/10, 3/11, 57/11, 96/12 – ZPIZ-2, 109/12, 22/19, 46/19, 17/22, 25/23.
Zakon o sodiščih, Uradni list RS, št. 94/07 – uradno prečiščeno besedilo, 45/08, 96/09, 86/10 – ZJNepS, 33/11, 75/12, 63/13, 17/15, 23/17 – ZSSve, 22/18 – ZSICT, 16/19 – ZNP-1, 36/20 – ZZUSUDJZ, 61/20, 80/20 – ZIUOOPE, 104/20, 152/20 – ZZUOOP, 203/20 – ZIUPOPDVE, 18/23.
Zakon o dedovanju kmetijskih gospodarstev, Uradni list RS, št. 70/95, 54/99 – odl. US, 30/13, 44/22 – ZKZ-G).
Zakon o mednarodnem zasebnem pravu in postopku, Uradni list RS, št. 56/99, 45/08 – ZArbit, 31/21 – odl. US.
Zakon o zemljiški knjigi, Uradni list RS, št. 58/03, 45/08, 37/08 – ZST-1, 28/09, 25/11, 14/15 – ZUUJFO, 23/17 – ZDOdv, 69/17, 11/18 – ZIZ-L, 16/19 – ZNP-1, 121/21.
Zakon o pravdnem postopku, Uradni list RS, št. 73/07 – uradno prečiščeno besedilo, 45/08 – ZArbit, 45/08, 111/08 – odl. US, 121/08 – skl. US, 57/09 – odl. US, 12/10 – odl. US, 50/10 – odl. US, 107/10 – odl. US, 75/12 – odl. US, 76/12 – popr., 40/13 – odl. US, 92/13 – odl. US, 6/14, 10/14 – odl. US, 48/14, 48/15 – odl. US, 6/17 – odl. US, 10/17, 32/18, 16/19 – ZNP-1, 70/19 – odl. US, 1/22 – odl. US, 3/22 – ZDeb.
Zakon o nepravdnem postopku, Uradni list RS, št. 16/19, 28/21.
Zakon o zakonski zvezi in družinskih razmerjih, Uradni list RS, št. 69/04 – uradno prečiščeno besedilo, 101/07 – odl. US, 90/11 – odl. US, 84/12 – odl. US, 82/15 – odl. US, 15/17 – DZ, 94/22 – odl. US, 94/22 – odl. US.
Zakon o zdravljenju neplodnosti in postopkih oploditve z biomedicinsko pomočjo, Uradni list RS, št. 70/00, 15/17 – DZ.
Obligacijski zakonik, Uradni list RS, št. 97/07 – uradno prečiščeno besedilo, 64/16 – odl. US, 20/18.

Pravilnik o izvrševanju zakona o matičnem registru, Uradni list RS, št. 40/05, 69/09, 77/16, 102/20, 108/22.
Zakon o varuhu človekovih pravic, Uradni list Republike Slovenije, No. 71/1993, 15/1994, 56/2002, 109/2012, 54/2017, 69/2017).
Zakon o centralnem registru prebivalstva, Uradni list RS, št. 72/06 – uradno prečiščeno besedilo, 3/22 – ZDeb.
Council Regulation (EU) 2016/1103[2016] OJ L183/1.
Council Regulation (EU) 2016/1104[2016] OJ L183/30.
Council Regulation (EU) 2019/1111 [2019] OJ L178/1.
Council Regulation (EU) 1259/2010 [2010] OJ L343/10.
Council Regulation (EU) 650/2012 [2012] OJ L201/107.

C. *Table of case-law*

U-I-486/20, Up-572/18, 94 Uradni list Republike Slovenije 7104, 7104-7112 (USRS 16 June 2022).
U-I-91/21-19, Up-675/19-32, 94 Uradni list Republike Slovenije 7112, 7112-7126 (USRS 16 June 2022).
III Cp 1588/2006, (VSM 22 August 2006).
III Cp 1186/2015, (VSL 26 October 2015).
IV Cp 3529/2014, (VSL 14 January 2015).
IV Cp 2160/2015, (VSL 5 August 2015).
CDn 196/2018, (VSK 23 April 2018).
R.J.R. v Registrų centras VĮ, (CJEU 30 August 2021).
CDn 148/2023, (VSK Višje sodišče v Kopru, 3.10.2023).
CDn 112/2022, (VSK Višje sodišče v Kopru 14.7.2022).
CDn 130/2023, (VSK Višje sodišče v Kopru, 17.10.2023)

SPAIN

by *Laura Esteve Alguacil*

I. An overview of the relevant Spanish legal system

The Spanish legal system is a civil law system that, in the past decades, has seen a progression towards de-judicialisation in some matters of family and succession law. This is especially true in matters regarding divorce and separation, succession law, care and support of adults, and the determination of a person's legal gender and name. **1**

Most substantive Spanish family and succession law is part of private law, and is regulated by the Spanish Civil Code (*Código Civil*, hereinafter: CC). (1) However, due to its territorial configuration, which is the process of a historic integration of diverse territories, Spain has more than one civil law system. Some territories, Autonomous Communities or *Comunidades Autónomas*, have the constitutional power to enact their own civil rules on matters that had already been regulated by them prior to the Spanish Constitution of 1978 ex art 149.1.8 of the Spanish Constitution (hereinafter: SC). These territories are Catalunya, (2) Aragón, (3) Galicia, (4) Illes Balears, (5) Navarra, (6) and the Basque Country (7). The CC, though, is **2**

(1) Royal Decree of July 24, 1889, through which the Civil Code was published. An outdated translation of the text from 2016 by the Ministry of Justice can be found under the following link: <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Spanish_Civil_Code_(Codigo_Civil_Espanol).PDF>.

(2) The Catalan Civil Code is contained in six different laws, which will be referred to throughout the text jointly as CCCat. In particular, they are: Law 29/2002, of December 30, containing the first law of the Catalan Civil Code; Law 25/2010, of July 29, containing the second book of the Catalan Civil Code, referred to the person and the family; Law 4/2008, of April 24, containing the third book of the Catalan Civil Code, referred to legal persons; Law 10/2008, of July 10, containing the fourth book of the Catalan Civil Code, referred to succession law; Law 5/2006, of May 10, containing the fifth book of the Catalan Civil Code, referred to property law; and Law 3/2017, of February 15, containing the sixth book of the Catalan Civil Code, referred to obligations and contracts, and modifying books first, second, third, fourth and fifth.

(3) The Aragonese civil law is contained in the Legislative Decree 1/2011, of March 22, of the Government of Aragon, through which the *Código del Derecho Foral de Aragón* is passed; hereinafter: CDFA.

(4) The civil law of Galicia is contained in Law 2/2006, of June 14, of the civil law of Galicia (hereinafter: Civil Law of Galicia).

(5) The civil law of the Balearic Islands is included in the Legislative Decree 79/1990, of September 6, containing the Compilation of the Civil Law of the Balearic Islands (hereinafter: the Balearic Islands Compilation).

applicable in the remaining territories as a whole and regarding all those matters which are not regulated by the regional civil code in those territories that have one (art 149.3 SC). The rules that govern regional conflicts of law are included in art 9 of the CC.

A. *Courts and judicial procedures*

3 While Spain primarily operates under a civil law system with statutes as the primary source of law, judicial decisions, especially those of higher courts, contribute to the development of legal doctrine and jurisprudence.

4 Judicial power has not been decentralised in Spain. Thus, adjudication of law and the design of courts are regulated uniformly in Spain in accordance with art 3 of Organic Law 6/1985, of 1 July on the Judiciary Power (hereinafter: LOPJ). Jurisdiction is attributed to courts and tribunals (arts 117 SC and 26 LOPJ) of which judges or magistrates are respectively responsible.

5 These professionals are part of the judicial career track (art 298 LOPJ), which only people with Spanish nationality and with a degree in law can access, according to arts 301 and 302 LOPJ. Admission to the judicial career track is based on the principles of merit and ability to exercise the judicial function, which are tested through a State-level examination (*oposición*). Independence is one of the key elements of the Spanish judicial system and that of judges and magistrates is regulated in arts 12–14 and 378ff LOPJ. Judicial decisions that can be issued by either judges or magistrates can be classified into three categories: *providencias* (which deal with procedural matters), (8) *autos* (which decide 'minor' matters), (9) or *sentencias* (that put an end to judicial proceedings). (10)

6 The *Letrado de la Administración de Justicia* (hereinafter: LAJ) is a civil servant in the judicial administration who leads the Judicial Office (11) (art 440 LOPJ). Again, only people with Spanish nationality and a degree in law can access this professional category if they pass a State-level examination (art 442 LOPJ). The LAJ are the depositaries of judicial public faith in order to guarantee the accuracy of judicial proceedings (art 453 LOPJ). In the

---

(6) The civil law of Navarra is included in Law 1/1973, of March 1, containing the Compilation of the Civil Law of Navarra (hereinafter: FNN).

(7) The civil law of the Basque Country is contained in Law 5/2015, of June 25, containing the Basque Civil Law (hereinafter: Basque Civil Law).

(8) See arts 245.1.a LOPJ, and 206.1.1 and 208.1 LEC.

(9) See arts 206.1.2 and 208.2 LEC.

(10) See arts 206.1.3, 208.2 and 210.3 LEC.

(11) The Judicial Office is the instrumental organisation that supports the judicial activity of judges and magistrates (art 435 LOPJ).

exercise of their functions, the LAJ shall comply with and ensure compliance with all decisions taken by judges or magistrates within the scope of their competences (art 452 LOPJ). They can also issue two types of decisions. On the one hand, they can issue *diligencias*, which deal with processing or procedural matters, and, on the other hand, they can issue *autos*, which have a more substantial content. Article 456 LOPJ states that, generally, LAJ are competent in matters of execution, non-contentious proceedings, conciliation, mediation, and the processing of payment orders.

7 Most of the judicial proceedings that will be analysed in this report are of a civil nature (private law) and thus are regulated by the procedural civil law or *Ley de Enjuiciamiento civil* (hereinafter: LEC). (12) This Act establishes that the first instance courts or *juzgados de primera instancia* (hereinafter: JPI) will know of all matters and procedures that do not fall in the competence of other courts (art 45 LEC). Territorially, under art 50 LEC, the default territorial jurisdiction for cases involving physical persons is the court located in the defendant's place of residence. However, the parties can generally agree to submit the case to a different court, as long as it is also legally competent.

8 Declaratory proceedings can be ordinary or verbal, when the issue demands a faster judicial response. (13) There are also some special procedures listed in art 748 LEC, in particular, regarding (a) the establishment of support measures for persons with disabilities; (b) parenthood or filiation; (c) matrimonial annulment, separation and divorce; (d) child custody or maintenance; (e) the recognition of civil effects for ecclesiastic decisions in matrimonial matters; (f) international child abduction; (g) opposition to administrative decisions on child protection; and (h) the need for assent in adoption. The judicial division of estates is separately regulated in arts 782ff LEC. This category includes the division of inherited estates and the liquidation of matrimonial property regimes. The particular rules of all these processes will be highlighted throughout this report.

9 There are several types of challenges to judicial decisions. (14) In terms of what is relevant to this chapter, the 'reposición' and the 'revision' challenges should be highlighted, which can be brought against decisions of the LAJ, depending on whether these are final or not (arts 451–454bis LEC). A further type of challenge is the appeal (arts 455–467 LEC), which encom-

(12) Law 1/2000, of January 7, on the Civil Proceeding.

(13) See arts 249 and 250 LEC for which actions proceed according to each one of them.

(14) See Title IV of Book II of the LEC for the complete regulation of challenges to judicial decisions in civil matters.

passes a full review of JPI decisions handed down by tribunals, referred to as *Audiencias Provinciales* (arts 80 and 82 LOPJ). Two other challenges relate to breaches of procedure and cassation challenges, which are extraordinary challenges to decisions of the Spanish Supreme Court or the Autonomous Communities' High Courts (arts 55-bis, 56 and 73 LOPJ).

10 As for private international law, art 21 LOPJ establishes that international treaties and conventions to which Spain is a party, the rules of the European Union and national rules govern these issues in Spanish law. Given the subject matter of this chapter, it should be highlighted that the following European Regulations are applicable:

- Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereinafter, Brussels IIb);
- 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 (hereinafter, Succession Regulation);
- Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes;
- Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

B. *Non-contentious jurisdiction or* jurisdicción voluntaria

11 Non-contentious jurisdiction (*jurisdicción voluntaria*) proceedings are those in which the intervention of a third party who has been invested with authority is needed to resolve a particular legal situation related to private law matters, in cases in which there is no controversy or conflict among the parties. (15) This type of procedure was particularly expanded in the Spanish legal system in 2015, one of the main goals for this development being to reduce the workload of traditional courts.

(15) Although some degree of opposition is generally admitted and it is only when the law explicitly foresees the conversion of the procedure to a judicial and contentious one that this takes place (art 17 LJV).

Non-contentious jurisdiction proceedings are now designed in such a way that certain functions have been transferred to notaries and LAJ, among other professionals. (16) Judges are still competent when the case affects a person's civil status. **12**

Law 15/2015, of 2 July, of Non-contentious Jurisdiction (hereinafter: LJV) regulates the 'judicial' non-contentious jurisdiction procedure, ie, when a judge, a JPI, or a LAJ is competent to hear the case. Proceedings are ended by an *auto* or a *decreto*, respectively (art 19.1 LJV). These decisions can be challenged according to art 20 LJV, ie, through a 'reposición' challenge, a 'revision' challenge, or an appeal. The resolution of a non-contentious proceeding has executive force (art 22 LJV) but it cannot prevent the initiation of a subsequent contentious judicial proceeding with the same subject (art 19.4 LJV). **13**

C. *Notaries*

Notaries are State-level, public, civil servants required to provide citizens with legal certainty within the context of extra-judicial legal matters. Additionally, they are legal professionals practising under the rules of competition. As of 1 January 2022, there were 2,725 notaries in Spain, 1,771 of which were male and only 954 were female. (17) Their profession, including its access and some of the proceedings they may become involved in, is regulated in the Law of the Notary, of 28 May 1862 (hereinafter: LN) and its Regulation: Decree of 2 June 1944 (hereinafter: RLN). Notaries must be EU citizens, hold a law degree and pass a State-level exam in order to become one (art 10 LN). In their provision of services, they apply a government-fixed tariff which is charged to the citizen/user. **14**

As stated above, notaries are involved in non-contentious proceedings relating to certain issues. Notarial proceedings end with the production of two types of documents (art 144 RLN): public deeds (*escrituras públicas*) or notarial statements/affidavits (*actas notariales*). Public documents authorised or executed by a notary have public faith, and their content is presumed to be true and complete. These characteristics may only be rejected or undermined by courts. In this regard, objections to the different actions under- **15**

(16) Eva María Corbal San Adrián, 'Tres Años Desde La Entrada En Vigor de La Ley de Jurisdicción Voluntaria: Visión Notarial En Los Expedientes de Familia' in Joan Picó i Junoy, Xavier Abel Lluch and Carlos de Miranda Vázquez (eds), *Problemática actual de los procesos de familia. Especial atención a la prueba* (1st edn, JM Bosch 2018) 435–436.

(17) CGPJ, La Justicia Dato A Dato, 2022. Data available at: <https://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Actividad-de-los-organos-judiciales/Juzgados-y-Tribunales/Justicia-Dato-a-Dato/>.

taken, or to the documents issued, by a notary can be raised in judicial or extra-judicial proceedings. That is, they can be reviewed by the same notary who is instructing the proceedings, or through a judicial action. In the first case, the notary, considering all available evidence, will decide whether or not to suspend the proceedings. A judicial application regarding the same matter requires the notary to suspend them in any case.

D. *Civil Registry*

16 The Civil Registry (hereinafter: RC) is an official institution of an administrative nature whose function is to guarantee the authenticity and publicity of facts relating to the civil status of people. That is, facts and acts that refer to the identity, marital status and other circumstances of the person are registered in the RC. Through a free, public service, it provides and contains knowledge and has an element of publicity that allows it to be used as proof of those facts.

17 Law 20/2011 of the Civil Registry fully came into force in 2021. De-judicialisation is one of the pillars of the current regulation of the RC. Additional regulations of the RC are contained in a somewhat older statute: in the Decree of 14 November 1958 of the Regulations of the Civil Registry Law (hereinafter: RRC). The civil registrar (*encargado del Registro Civil*) is an LAJ, and their decisions are administrative in nature. This relieves courts and judges of certain functions that are not related to the proper adjudication of law.

18 The registrations in the RC are called *asentamientos* (art 38 LRC). They can be entries (*inscripciones*), which have evidential value; annotations (*anotaciones*), which are informative; or cancellations. The civil registrar can issue certificates of registrations (arts 81 LRC and 17 RRC). There are some specifications as regards registry proceedings in arts 88 and 89 LRC and 341ff RRC. However, they are structured as a common administrative proceeding. (18) The civil registrar's decisions can be administratively challenged before the competent administrative unit, the General Directorate of Legal Certainty and Public Faith, within a period of one month (arts 85 LRC and 355 RRC), which allows for subsequent judicial control if necessary.

E. *Administrative proceedings*

19 The general administrative proceedings in the Spanish legal system are regulated in Law 39/2015, of 1 October on the Common Administrative

(18) See para 19.

Proceeding of the Public Administrations (hereinafter: L39/2015). In particular, procedural dispositions are included in arts 53ff. The Spanish legal system allows for an administrative review (arts 106ff L39/2015). Judicial review of the public administration's decisions is generally undertaken according to the regulation contained in Law 29/1998 of 13 July 1998, regulating the Contentious Administrative Jurisdiction.

II. Family law

20 The landscape of family law in Spain is characterised by its diversity, particularly due to the legislative powers granted to different regions in enacting their own family and succession law rules. Despite this diversity, certain common traits shape the overall framework.

21 Spanish family law is anchored in constitutional principles that emphasise gender equality (arts 14 and 32.1 SC), the protection of the family (art 39.1 SC), equalisation of the position of all children (art 39.2 and 3 SC), and the investigation of paternity (art 39.2 SC).

22 In the past decades, Spain has enacted some progressive laws regarding the family, exemplified by the recognition of same-sex marriage, the facilitation of fast and easy divorces, and, recently, a facilitation of the establishment of dual motherhood. However, the Spanish family is still mainly nuclear and rooted in the two-parent paradigm.

23 The legal framework emphasises joint parental responsibility of both parents, with a notable promotion of joint custody in judicial proceedings. In 2022, in 45.5% of divorces that involved different-sex marriages with children, joint custody was awarded. Whereas, in 2013, this type of custody was only awarded in 17.9% of the cases. (19)

24 While civil partnerships or stable, cohabitation relationships are not explicitly recognised in the CC, many regional civil codes acknowledge and provide legal effects to these relationships. The Spanish Constitution does not equate marriage to cohabitation, (20) but, at the same time, it does not require marriage when referring to the protection of the family in its art 39. (21) Consequently, beyond private family law, there are some circumstances in

(19) Instituto Nacional de Estadística, Estadística de Nulidades, Separaciones y Divorcios, 2022. Data available at: <https://www.ine.es/dyngs/INEbase/es/operacion.htm?c=estadistica_C&cid=1254736176798&menu=ultiDatos&idp=1254735573206>.

(20) Spanish Constitutional Court Decision no 93/2013, of April 23. ECLI:ES:TC:2013:93.

(21) Spanish Constitutional Court Decision no 222/1992, of December 11. ECLI:ES:TC:1992:222.

which stable, cohabitation relationships are equated to marriage in relation to certain effects. (22)

25 Spanish family law displays a discernible progression towards family autonomy. This is particularly true regarding matters that exclusively affect spouses. (23) However, autonomy and de-judicialisation are still limited in child-related issues. Notaries now play a key role in facilitating certain aspects of marriage, such as its celebration and its dissolution, contributing to a more streamlined and accessible procedure. According to some authors, in matrimonial issues, notaries should be considered 'judicial authorities' in terms of the Brussels IIb Regulation, given that the regulation of non-contentious proceedings gives them powers that entail judicial powers that used to belong to judges. (24)

26 Most of the judicial proceedings that will be referenced throughout the section share the same specific regulation, that in Title I of the Book IV of LEC, 'Of the processes on the provision of judicial measures to support people with disabilities, filiation, marriage and minors'. Generally, these proceedings will follow the rules and structure of a verbal proceeding as regulated in arts 437ff LEC. The public prosecutor (*ministerio fiscal*) has to be involved in the proceedings whenever a minor child's interest is involved in the case (art 749 LEC), and the parties must have the legal counsel of an attorney and be represented by a *procurador*. (25) In these proceedings, parties are not allowed to waive their action (*renuncia*), to accept all the claims (*allanamiento*), or to settle. Generally, withdrawal requires the public prosecutor's authorisation (art 751 LEC). The law is quite flexible regarding evidence in this kind of procedure, allowing it to be introduced at any time by the parties and also *ex officio* by the judicial authority (art 752 LEC). Since

---

(22) This is the case, for example, in the possible subrogation in rental contracts of the personal home in Law 29/1994, of November 24, 1994, on Urban Leases; or the extension of the protection of gender-based, intimate-partner violence protection in Organic Law 1/2004 of December 28, 2004, on Comprehensive Protection Measures against Gender-Based Violence.

(23) Celia Martínez Escribano, 'Privatization of Divorce in Spanish Law' in Camino Sanciñena Asurmendi and Julio Carbajo González (eds), *La voluntad privada en las relaciones jurídico-familiares* (Thomson Reuters Aranzadi 2018) 217.

(24) Mª Ángeles Rodríguez Vázquez, 'El Divorcio Notarial Español a La Luz de La Jurisprudencia Del Tribunal de Justicia de La Union Europea' 15 Cuadernos de derecho transnacional 853, 857.

(25) In Spanish procedural law, citizens obtain legal counsel and defence from their attorneys/lawyers (*abogados/-as*), but their formal representation or standing is attributed to another, different, legal professional called *procurador*. Their profession is regulated in the Royal Decree 1281/2002, of December 5, on the General Statute of the Spanish Courts' Procuradores.

their outcomes may affect the civil status of the people involved, the law foresees the communication of the judicial decisions to the Civil Registry *ex officio* (art 755 LEC).

A. *Matrimonial breakdown*

27 Rules regarding the breakdown of marriage are regulated uniformly in Spain due to the exclusive competence of the State over the forms of marriage, as stipulated in art 149 SC.

28 Significant transformations have reshaped Spanish divorce and separation law over the last five decades, particularly in the aftermath of the restoration of democracy following Franco's dictatorship. The liberalisation of marriage dissolution has been an ongoing process since then. In the 20th century, a pivotal shift occurred with the enactment of Law 15/2005, (26) which marked the end of the 'causal system' established in 1981. (27) This system, which included legal separation as both a cause and prerequisite for divorce, underwent substantial reform. In this regard, LJV played a crucial role by introducing consensual and de-judicialised divorces. While legal separation and annulment continue to be regulated, as elaborated further below, these legislative changes underscore a significant departure from the earlier, more restrictive frameworks governing marital dissolution in Spain.

1. *Types of family breakdown*

29 As mentioned earlier, the Spanish legal system regulates three types of family breakdown: separation, divorce, and annulment.

30 Separation can be merely factual, or legal. Legal separation is nowadays residual in the Spanish society. There were only 3,210 cases in 2022. It entails the breakdown of matrimonial cohabitation, but it does not affect the matrimonial union. If spouses seek a legal separation, they can choose between judicial (art 81 CC) or non-judicial (art 82 CC) proceedings in the terms explained below.

31 The main effects of separation are (a) the termination of certain matrimonial rights and duties such as those regarding fidelity and cohabitation pursuant to art 83.1 CC; (b) the possibility of liquidating the matrimonial property regime of gananciales after one year of separation pursuant to art 1393.3

(26) Law 15/2005, of July 8, on the amendment of the Civil Code and the Civil Procedural Law in matters of Separation and Divorce.

(27) Several reforms were introduced in Spanish family law in 1981 in order to adapt it to the recently approved constitutional principles. Particularly, Law 30/1981 introduced a causal divorce system.

CC; [28] or (c) the exclusion of some legal succession rights such as the legítima or the designation as an intestate heir. [29] However, the Supreme Court has admitted the possibility of spouses to conclude certain agreements regarding the particular consequences of their separation.

32 According to art 83 CC, the effects of separation shall be produced once the judgment or decree that declares it becomes final or once the consent of both spouses is granted in a public deed. A copy of the judgment or decree, or a copy of the public deed, shall be sent to the Civil Registry for registration. Legal separation will not produce full effects vis-à-vis bona fide third parties until such registration takes place.

33 In a situation of separation, there can be a reconciliation among the spouses (art 84 CC). This results in the previous separation having no effects if notice is given to the judge or it is formalised in a public deed. As regards separation, reconciliation must be registered in the RC.

34 On the other hand, divorce entails the termination of the matrimonial union. As explained earlier, the requirement of a previous legal separation is no longer necessary to obtain a divorce under Spanish law. The proceeding can be initiated at the will of one of the spouses, with a minimum waiting period of three months after the celebration of marriage. An exception to the time requirement exists, allowing divorce to be sought at any time if there is a risk to the life, physical integrity, freedom, moral integrity, or sexual freedom of the petitioner spouse or the children of either of the spouses (art 86, cf 81 CC). Divorce has *ex nunc* effects after the judicial decision, the decree or the public document that attests it. However, and like separation, it only produces legal effects with respect to third parties upon registration in the Civil Registry.

35 While divorce proceedings are always available through a judicial procedure (art 86 CC), a non-judicial alternative is available in specific cases (art 87 CC, 54 LN, and art 777.10 LEC). Thus, the form of divorce can take the shape of a judicial decision (*sentencia*), a decree issued by the LAJ (*decreto*), or a public document authorised by a notary (*escritura pública*). In 2022, there were a total of 81,302 divorces in Spain, of which 65,033 were by mutual agreement between the spouses. Within this latter group, 49.29% were formalised through a judicial decision, 33.62% through a decree, and 17.09% through a public document authorised by a notary. [30]

---

[28] See para 178–179.

[29] See para 190ff.

[30] Instituto Nacional de Estadística, Estadística de Nulidades, Separaciones y Divorcios, 2022. Data available at: <https://www.ine.es/dyngs/INEbase/operacion.htm?c=Estadistica_C&cid=1254736176798&menu=resultados&idp=1254735573206#!tabs-1254736194764>.

Finally, annulment is still regulated in Spanish family law, but it is scarcely used in practice. There were only 39 of them in 2022 (less than 0.1% of the matrimonial breakdown proceedings that took place that year). It has *ex tunc* effects and must always be obtained judicially if one of the legally foreseen causes concurs (see art 73 CC). Intervention of the public prosecutor in the proceedings is mandatory, even if no minor children are involved (art 749 LEC). Withdrawal of the action is possible without the public prosecutor's authorisation in some cases: when the annulment is requested because of error, coercion, or grave fear, or because of reasons of age once the petitioner is an adult (art 751 LEC). **36**

2. *Extra-judicial divorce or separation*

Extra-judicial divorce or separation is an option for spouses in cases of non-contentious breakdowns where there are no minor children or adult children who need legal support involved. (31) Otherwise, divorce or separation must be obtained through the judicial process described in the next subsection. **37**

To qualify for a non-judicial divorce, both spouses must unanimously agree on the fact of the divorce and on the post-divorce measures, which must be detailed in a regulatory contract (*convenio regulador*) pursuant to art 90 CC. (32) If spouses have economically-dependent adult children, an extra-judicial divorce is still available, but these adult children must also concur with the agreed-upon measures. Spouses must be legally assisted by a lawyer, but since they are in agreement, they can share the same one. If these criteria and all the legal requirements regarding separation and divorce are satisfied, the non-judicial authority, a notary or a LAJ, must authorise the divorce. (33) **38**

Nevertheless, there exists some control over the effects which the spouses have agreed upon, which can impede the non-judicial dissolution of marriage. (34) If the effects are found to be illegal or harmful to either party, the notary must refuse their services, and the LAJ must decline further action, **39**

(31) Legal support must be understood in the sense described in para 260ff. That is, an extra-judicial divorce is not possible when spouses have adult children regarding whom a support measure has been established.

(32) See the Spanish Supreme Court decision of December 23, 1998, ECLI-:ES:TS:1998:7876.

(33) However, regarding the three-month waiting period and its exception in cases of risk, some argue that the notary or LAJ should not consider these circumstances and that, in these cases, the divorce should be judicial: Corbal San Adrián (n 16) 448.

(34) 'The notary's function is not merely receptive, because, during the processing of the divorce proceedings, they have to carry out a legality and lawfulness control of the divorce': Rodríguez Vázquez (n 24) 860.

without imposing alternative content to their agreement. ([35]) This limitation, however, relies on the parties not seeking a different notary, raising concerns about the enforceability of this control.

40 Regarding procedural aspects, art 777.10 LEC regulates extra-judicial divorce or separation proceedings when the parties choose a LAJ to be the competent authority. The LAJ's decree declares the separation or divorce of the spouses and it cannot be challenged. On the other hand, art 54 LN regulates the proceedings when the spouses authorise a notary to declare the divorce in a public deed. In this case, a notary in the territorial area of the last common residence or of the residence of either of the applicants is competent to declare the separation or divorce. This public deed that declares the divorce must be considered a decision in the terms of the Brussels IIb Regulation. ([36]) The *convenio regulador* is attached to the main document of the public deed. ([37])

41 The agreed measures included in the *convenio regulador* can be modified again by agreement pursuant to art 90.3 CC. Only a lack of valid consent may annul it, under the same terms as the general regime for contracts in Spanish law (art 1261 CC).

3. *Judicial divorce or separation*

42 Judicial divorce or separation proceedings are regulated in arts 748ff LEC and, particularly, in arts 769ff LEC.

43 The competent court to decide on the divorce or separation is the JPI of the place where the marital home is located (art 769 LEC) and both spouses must be legally represented in the proceedings by an attorney (art 750 LEC). A withdrawal of the action is possible without the public prosecutor's authorisation (art 751 LEC). When common minor children are involved, the intervention of the public prosecutor in the proceedings is necessary. These children shall be heard if they are mature enough or in any case when they are 12 or older (art 770.4 LEC).

44 At any given moment, both spouses can agree to convert the proceedings into non-contentious proceedings (art 770.4 LEC). If this is the case, or if there was agreement from the beginning of the proceedings, the divorce or separation will be processed according to the specific rules of art 777 LEC, which offers a simplified, faster course of action. In this case, spouses can share the same attorney (art 750.2 LEC).

([35]) Corbal San Adrián (n 16) 451.

([36]) Rodríguez Vázquez (n 24) 864.

([37]) Guillermo Cerdeira Bravo de Mansilla, *Separaciones y Divorcios Ante Notario* (Editorial Reus 2016) 126.

The judge must approve any measures agreed upon regarding the spouses (art 774.3 LEC). In patrimonial matters that concern them, the judicial function consists of a mere homologation. However, judges possess wide discretionary powers to review and decide on agreements related to children, ensuring the decisions align with the children's best interests (art 774.4 LEC). In matters concerning children, the judicial authority thoroughly examines the agreements and has the ability to impose a different content. **45**

The judicial decision can be appealed against in the general terms of the law (art 774.5 LEC). On the other hand, the established measures can be modified (art 90.3 CC). This can be done by agreement of the spouses following the proceedings described in art 777 LEC, or in a contentious manner, following the general proceedings, if there is a substantial change of circumstances since the measures were determined (art 775 LEC). **46**

B. *Parenthood*

Parenthood or filiation in Spanish law (*filiación*) determines who the parents of a particular person are. Spanish family law does not recognise multi-parenthood and thus it only allows for up to only two people to become the legal parents of a person. The Catalan Civil Code is the only one of the regional codes that, beyond the CC, regulates filiation. It does so in a very similar manner to the Spanish code and thus the differences will only be signalled when appropriate. **47**

The parent-child relationship entails important consequences for both parties. Both parent and child have reciprocal succession rights (arts 807ff CC). Children have the right to surnames (art 109 CC) ([38]) and to maintenance (art 110 CC) and parents have the obligation to care for the child, even if they do not hold parental responsibilities (art 111 CC). **48**

According to Spanish law, parenthood can be 'natural' or established by adoption. Both have the same effects (arts 108.2 CC and 14 SC), but they are subject to different principles and thus their establishment and termination rules differ. 'Natural' parenthood is the result of reproduction (also assisted reproduction), whereas adoption is the result of a judicial decision. 'Natural' parenthood will be dealt with in this section, whereas adoption will be analysed in the following one. **49**

'Natural' parenthood is based on the biological element with some exceptions: the biological match between parent and child is one of the main principles of the system. Thus, the biological role played at reproduction is fundamental regarding the establishment of parenthood and this biological **50**

([38]) See para 252ff.

role is still highly gendered. In this way, motherhood is linked to the fact of pregnancy and birth, and fatherhood to the provision of sperm for conception.

51 There are some exceptions to this rule, mainly the possibility to establish 'second' motherhood, not linked to the fact of pregnancy or birth. As will be developed later, until recently, this was only possible when the conception and birth were the result of the use of assisted reproductive techniques (hereinafter: ART). However, a reform of filiation rules introduced in 2023 has made some provisions gender-neutral. This makes it possible to include women in some of the possible ways of establishing filiation that were originally designed for men, based on their alleged biological contribution to procreation. Despite the noble aim of this reform of making the rules more LGBT-inclusive, the fact that the basic principle of the filiation system remains the biological truth still makes it difficult for couples of women to have the same possibilities of determining their filiation in a stable, challenge-free manner. That is, they are still vulnerable to challenging actions based on the lack of a biological match. ([39])

52 According to art 113.1 CC, parenthood can be determined by (a) its entry in the Civil Registry, (b) the public document or judicial decision that legally established it, (c) the marital presumption, or (d) the possession of status (*posesión de estado*). This last concept refers to the fact of acting and being socially recognised as the parent of a child, based on elements such as the name (*nomen*), treatment (*tractatus*), and reputation (*fama*) associated with that status.

53 In all judicial proceedings that relate to parenthood or filiation, the intervention of the public prosecutor is mandatory, even if there are no minor children involved. That is, even if the filiation that is being discussed is that of an adult (art 749 LEC). However, it is possible to withdraw the action without the public prosecutor's authorisation in cases where there are no minor children or people with disabilities and established support measures involved (art 751 LEC).

54 The procedural specifications of the judicial claims and challenges of parenthood can be found in arts 764ff LEC. According to art 766 LEC, in parenthood claim proceedings, the defendants are the alleged parent and the child if they are not the claimants. And in challenging processes, the defendants are the legal parent and the child if they are not the claimants. All

([39]) Even if the non-gestational mother provides her genetic material (ova) for the conception, this is irrelevant for Spanish law which, at least up until now, only gives relevance to the genetic link in relation to fatherhood but not to motherhood.

actions must be accompanied by prima facie evidence of the facts on which they are based.

55 The investigation of both paternity and maternity will be admissible through all kinds of evidence, including biological evidence. Although not considered to be a *ficta confessio*, the unjustified refusal to undergo a biological test for paternity or maternity allows the court to declare the claimed parentage, provided that there are other indications of paternity or maternity and the proof of this has not been obtained by other means. Even in the absence of direct evidence, parentage may be declared based on explicit or implicit acknowledgement, possession of status, cohabitation with the mother at the time of conception, or other facts from which parentage can be inferred in a similar manner.

1. *Establishment*

56 In Spanish law, the establishment of parenthood is usually extra-judicial according to the rules contained in art 44 LRC. Nevertheless, courts still play an important role, particularly when there is controversy among the parties.

a) *Motherhood or the role of the gestational parent*

57 Motherhood, understood as the role of the gestational parent, responds to the principle of *mater semper certa est*. It is the fact of birth that determines motherhood. (40)

58 Motherhood is established in the same manner, regardless of whether the parent is married or not (art 120.5º CC). Alternatively, if the fact of birth is not possible to verify, motherhood can be established by acknowledgement, an application before the Civil Registry, or a judicial decision. Anonymous birth is not possible in the Spanish legal system according to art 44.4.II LRC.

59 Following the rule *mater semper certa est*, surrogacy contracts are considered to be null and void (art 10 LTRHA). (41) Thus, the filiation resulting from this kind of practice is not explicitly foreseen in the Spanish legal system. However, it is increasingly common for Spaniards to go abroad to conclude such agreements and then bring the child back to Spain. In this scenario,

(40) There is no explicit direct rule that translates this principle in the CC but one does exist in the Catalan Civil Code: see art 235-3 CCCat.

(41) According to the latest Supreme Court decisions on the matter (see, for example, the decision of March 31, 2022, ECLI:ES:TS:2022:1153), surrogacy entails a violation of fundamental rights.

some possibilities to register the filiation of the child in relation to the commissioning parents are put in practice by the Civil Registries. (42)

b) *Non-gestational parent*

60 The way in which the non-gestational parent is established is, on the contrary, contingent on whether they are married to the mother or not. The Spanish legal system still makes a difference between matrimonial and non-matrimonial children in the way to determine a person's filiation but not as to its effects.

61 Firstly, if the parent is married to the mother, there is a presumption: *pater is est quem nuptiae demonstrant*. According to art 116 CC, the husband to a woman is the father of the children born after the marriage and up to 300 days after their separation or divorce.

62 This presumption can be rebutted in two ways: by a successful challenging claim that proves the existence of another biological father. (43) But the operation of the presumption can also be avoided extra-judicially if the child is born up to 180 days after the marriage and the husband provides a statement of unknown paternity within six months after the knowledge of the birth (art 117 CC). This statement needs to be formalised in a public document through a notary or given before the Civil Registry officer. It is not possible to rebut the presumption if the husband had already, explicitly or tacitly, acknowledged paternity, as well as if the husband knew of the pregnancy before the marriage. However, in this case, the spouses can jointly state, before or up to six months after they married, that he is not the father.

63 On the other hand, matrimonial parenthood can be established without reference to the presumption in certain cases. First, if the child is born after 300 days of separation but both spouses consent to determining the husband's paternity (art 118 CC). Even if the Code does not explicitly refer to this as such, this is a kind of matrimonial acknowledgement. Second, if the child is born before their parents marry, their parenthood is determined by the rules of extra-marital filiation, and when the parents marry, the filiation is thus marital (art 119 CC). Thirdly, the possibility of posthumous marital fatherhood also exists if the husband gave his consent in a public deed, will

(42) For a description of the situation in Spain and of these mechanisms, see Esther Farnós Amorós, 'Surrogacy in Spain' in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan, *Eastern and Western perspectives on surrogacy* (Intersentia 2019).

(43) See para 79ff.

or 'advance decisions document' (44) for his genetic material to be used in the fertilisation of his wife during the following 12 months after his death (art 9 of Law 14/2006, of 26 May, on Human Assisted Reproductive Techniques, hereinafter: LTRHA).

64 Lastly, the non-gestational parent can be the mother's wife, that is, a woman. In this case, marital motherhood can be established by the joint statement of both spouses (art 44.4.a LRC). As stated previously, this second motherhood, as it does not reflect the biological truth, is vulnerable to challenges. The only way to secure this type of motherhood is by procreating using ART and giving formal, previous, explicit consent to the use of these techniques. In this way, no challenges actions on the mismatch with the biological truth will be successful according to arts 7.3 and 8 LTRHA.

65 Secondly, if the non-gestational parent is not married to the mother, there are different ways through which their parenthood can be established according to arts 120 CC and 44.4.b) LRC. Both parents can provide a statement in an official form provided at the moment of birth. They can also acknowledge the child in a public document or in a testament. In this case, if the child to be acknowledged is already an adult, their personal consent will be required. If they are under the age of 18, their legal representative (usually the mother) must consent. In case the parent does not consent, the acknowledging parent must seek judicial approval according to the procedure described in the next subsection.

66 According to art 124 CC, there is no need for the legal representative's consent or judicial approval if the acknowledgement is included in a will or if it is given in the first 30 days after the birth, the time for the entry of the birth in the Civil Registry. In this case, if the mother is opposed to the acknowledgement, she can suspend it for a period of one year, in which the acknowledging parent will have to seek judicial approval.

67 The last option for unmarried parents is to initiate a Civil Registry procedure. This possibility operates as a last resort for cases in which it is impossible for the parent to use any of the possibilities described above (eg, they are dead) and there is no opposition to the establishment. The Civil Registry procedure can only be accessed in one of the following circumstances (art 44.6 LRC): (a) an indubitable written statement by the father or the mother recognising

(44) This is a document through which a legally capable and individual of legal age freely predefines their will to be executed in situations where they are unable to express it personally. This document pertains to decisions regarding the care and treatment of their health, and, posthumously, it also addresses choices concerning the disposition of their body or organs. It is regulated in art 11 of Law 41/2002, of November 14, regulating patient autonomy and rights and obligations in matters of clinical information and documentation.

that the filiation exists, (b) the child possesses the status of child of the father or the mother, justified by direct acts by them or their family, and (c) regarding the mother or the gestational parent, when the fact of the birth and the identity of the child can be proven.

68 Traditionally, these options were limited to unmarried fathers but now the Code uses gender-neutral terminology, making it possible for women to also use these options. However, this change in the rules, per se, does not protect the filiation from challenges based on the biological truth. At the same time, the LTRHA only refers to married women, raising doubts about whether unmarried female couples could have their filiation recognised if they used ART in the same way as married different-sex couples. Only the Catalan Civil Code allows for this option, explicitly recognising the possibility for unmarried women to consent to their partner's use of ART (art 235-13 CCCat). This consent can be given in a standardised form in the medical centre or in a public document before a notary.

69 Lastly, regarding the establishment of parenthood, it must be noted that the donor in ART, who is always anonymous in Spanish law, does not acquire the status of parent pursuant to art 5 LTRHA.

c) *Judicial establishment*

70 As stated above, whenever there is no agreement as regards the establishment of parenthood, Spanish law provides for it to be judicially determined.

71 There are two ways in which a judicial authority may be involved in the establishment of parenthood. The first is judicial approval of the acknowledgement as stated above, and the second is the judicial parenthood claim.

72 Regarding the acknowledgment of a child, although it is an extra-judicial act, there needs to be judicial intervention through a non-contentious proceedings in some circumstances (art 23 LJV). First, in case the child was conceived by two siblings (art 125 CC). That is, when the filiation that is being acknowledged has an incestuous character, it needs to be judicially authorised. Secondly, the judicial authority will need to approve the acknowledgement when it is made by children under the age of 16 or by a person with disabilities and established support measures in cases in which their legal representatives or designated carers (45) have not consented to the acknowledgement. Also, as stated above, judicial approval is necessary whenever the legally determined parent opposes the acknowledgement of their child. The competent court to hear this procedure is the JPI of the place of residence of the acknowledged person. Assistance or representation by an

(45) See para 276.

attorney or procurador (art 24 LJV) is not required. According to art 25 LJV, once the application is admitted, the LAJ will summon the applicant, the legal parent and the legal representative of the child to a hearing. If the child is sufficiently mature or is at least 12 years old, they have to be heard. The public prosecutor will also be heard on the matter. The judge will decide in a decision (*auto*) according to the discernment of the parent; the truth or authenticity of their acknowledgement; the likelihood of the procreative relationship, without the need for full proof thereof; and the interests of the individual to be acknowledged if they are a minor child. The judicial decision will be sent to the Civil Registry for the entry of this parenthood (art 26 LJV).

73 Regarding judicial parenthood claims (*acciones de reclamación*), and the necessary conditions to bring such a claim, the Spanish legal system distinguishes between cases where the applicant has possession of the status of parent (*possession d'état*) and those in which they do not. The result of a claim is a judicial decision that establishes parenthood.

74 If there is possession of status and only one filiation has been determined for the child, the action is not subject to any statute of limitations and can be brought by the child, the legal parent, the alleged parent, and any other person with a legitimate interest (art 131 CC).

75 If there is no possession of status, the CC establishes different actions depending on whether or not the filiation to be determined is matrimonial. When the parents are married, the action is not subject to any statute of limitations and can be brought by the child, (46) the legal parent or the alleged parent (art 132 CC). If the parents are not married, the child can still bring an action in the course of their lifetime, (47) but the parents can only do so within a period of one year after discovering the facts upon which to base their claim (art 133 CC).

76 Finally, the establishment of parenthood is also judicial when two parenthood relationships have already been determined for the child, because, in order for the new parenthood relationship to be established, one of the previous relationships will have to be terminated. In this case, the action is 'dual', that is, it has to be brought at the same time as the action to challenge

(46) According to art 132 CC, 'If the child dies before four years have passed since reaching full legal capacity, or within the year following the discovery of the evidence upon which the lawsuit is based, the right of action belongs to their heirs for the remaining time needed to complete those time limits.'

(47) According to art 133 CC, 'If the child dies before four years have passed since reaching legal majority or since the support measures provided for such purposes are removed, or within the year following the discovery of the evidence upon which the lawsuit is based, the right of action shall belong to their heirs for the remaining time needed to complete those time limits.'

(art 134 CC). A judicially established parenthood cannot be judicially challenged (*material res judicata* – art 764.2 LEC).

2. *Termination*

77 Termination of parenthood is always judicial through adoption by another person, [48] or as a result of an action that successfully challenged it. Parenthood can be challenged based on two reasons: its 'mismatch' regarding the biological element of procreation, or the invalidity of the title through which it was established.

a) *Mismatch regarding the biological element*

78 The general possibility to challenge and terminate a filiation relationship finds its exception when conception has taken place through ART and following all the legal requirements. In this case, the biological mismatch is assumed and recognised by the Spanish legal system and, thus, it is impossible to challenge filiation on this ground (art 8.1 LTRHA).

79 Beyond this case, the actions to challenge based on the biological mismatch are subject to different conditions depending on whether the established filiation was matrimonial or not.

80 In the first scenario, the mother's husband may bring an action to contest paternity within one year of its registration in the Civil Registry (art 136 CC). This *dies a quo*, however, has been declared unconstitutional by the Spanish Constitutional Court. [49] According to its mandated interpretation, a husband has one year from the moment he realised he was not the biological father to challenge paternity. The child can also challenge paternity in the year following its registration (art 137 CC). If the child is a minor or a person with disabilities and established support measures, this period runs from the moment the child reaches the age of majority or the indicated measures cease to exist. The action can also be brought by the legal representative of the minor child, the person responsible for providing support to a person with disabilities, or the public prosecutor under the same time limits. Additionally, if there is no possession of status, the claim may be brought at any time by the child or by their heirs.

81 The possibilities in the second scenario are regulated in art 140 CC. If there is no possession of status of non-matrimonial paternity, this may be contested at any time by any person who alleges that this filiation harms their interests.

---

[48] See para 84ff.

[49] See the Spanish Constitutional Court decisions no 138/2005 (ECLI:ES:TC:2005:138) and no 156/2005 (ECLI:ES:TC:2005:156).

If, on the contrary, there is possession of status, only the child, the alleged parents and those whose succession rights may be affected can challenge the non-matrimonial filiation within a period of four years.

b) *Invalidity of the acknowledgement through which it was established*

82 Article 141 CC regulates the action to challenge an acknowledgement given as a result of error, violence, or intimidation. Only the person who gave such acknowledgement can bring an action within a period of one year after the acknowledgement, or from the time when the defect of consent ceased. Such a claim may be brought, or continued, by the heirs of the person who granted it if they died before the expiry of that year.

c) *Motherhood*

83 Gestational motherhood can only be challenged in extraordinary, exceptional cases. According to art 139 CC, these are a situation of fake birth or an error in the identity of the child.

C. *Adoption*

84 In Spanish law, adoption is regulated in the different civil codes in force in some autonomous regions. This section will deal mainly with the regulation of the Spanish Civil Code (arts 175ff) but other regional codes or laws also regulate – in more or less depth – the institution of adoption in a similar manner. These are the Catalan Civil Code (arts 235-30ff CCCat) and the Civil Law of Navarra (Laws 59-63 FNN). Substantial and/or interesting differences will be highlighted throughout the section.

85 In Spanish law, adoption has a dual nature: it is both a way to establish parenthood (art 108.1 CC) and a protection institution for minor children. Spanish law, thus, allows for, and regulates, the full adoption of minor children. (50) However, it also exceptionally allows for the full adoption of adults (art 175.2 CC).

86 Beyond the Civil Code regulation, Law 54/2007 of 28 December, on Intercountry Adoption, (51) regulates some aspects of international adoption; in particular, it includes rules of private international law.

---

(50) Although simple adoption was the original type of adoption in the Spanish Civil Code, only full adoption remains regulated in Spanish law.

(51) Its English translation is available here: <https://www.mdsocialesa2030.gob.es/derechos-sociales/infancia-y-adolescencia/PDF/Adopcioninternacional/Normativa/Law_54_2007_of_28_December_on_Intercountry_Adoption.pdf>.

1. *Substantial requirements*

a) *Adoptee*

87 As stated earlier, generally, the adoptee must be a minor child (art 175.2 CC). Furthermore, usually, they must be an abandoned child. In this respect, the administrative authority that deals with child protection (52) has to declare the abandonment (*desamparo*) of the particular child to be adopted. Abandonment refers to the circumstance arising from the non-exercise or improper exercise of parental responsibilities by parents or guardians. (53) Spanish law allows for the adoption of children who are not abandoned only in some special cases, such as in stepchild adoptions.

88 Exceptionally, adults or emancipated children can also be adopted. This is only possible if, immediately prior to the emancipation, there had been a situation of foster care with the prospective adoptive parents or of a stable cohabitation with them for at least one year (art 175.2 CC). Adult adoption is most common among stepfamilies.

89 In any case, a person can only be adopted once (art 175.4 CC). An exception is made if the adoption follows jointly or successively by two spouses or members of a stable relationship, if the adopter dies or if the adopter is excluded from the exercise of parental responsibilities. (54)

b) *Adopter(s)*

90 Although the principle in Spanish law is of individual adoption, it is possible and common for couples to adopt jointly or consecutively. Civil partnerships or stable relationships are equated to marriages regarding adoption. In both cases, they can be formed by members of a different or the same gender.

91 According to art 175.1 CC, only people aged 25 years or older can adopt. Furthermore, the age difference between adopter and adoptee must be at least 16, but less than 45 years. (55) If a couple wants to jointly adopt, it is sufficient if one complies with these age requirements.

92 There are some cases, however, in which the age difference requirement can be waived. These are listed in art 176.2 CC, and are: (1) if the adoptee is an orphan and a relative of the adopter to the third degree by consanguinity or affinity; (2) if the adoptee is a child of the spouse or of one of the partners

---

(52) The particular administration is different in each Autonomous Community.

(53) See art 172 CC and para 120ff.

(54) Pursuant to art 179 CC; see para 118.

(55) In Catalan law, there is only a minimum difference of 14 years between adopter and adoptee (art 235-30 CCCat).

in a civil partnership/stable relationship, that is, in cases of stepchild adoption; (3) the adoptee has been in foster care for the purpose of adoption ([56]) for more than one year or to have been under the guardianship of the adopter for the same length of time; and (4) the adoptee is of legal age or an emancipated minor.

Finally, an adopter must show their suitability to adopt (*idoneidad*). This is understood as the adequate ability, fitness, and motivation to exercise parental responsibilities (art 176.3 CC). Consequently, persons deprived of parental responsibilities or suspended from exercising them, or who have entrusted the care of their child to a public administration cannot be declared eligible for adopt**93**ion. Neither can those who are unable to become guardians according to arts 216 and 217 CC.

c) *Prohibited adoptions*

According to art 175.3 CC, neither a descendant nor a relative in second degree of the collateral line by consanguinity or affinity can be adopted, nor can a ward (*pupilo*) be adopted by their guardian until the general account of the guardianship administration has been approved. **94**

2. *Formal requirements: adoption proceedings*

In Spanish law, adoption is always the result of a judicial decision and thus there is no extra-judicial or private adoption proceedings. **95**

Given its nature of a protective institution for children, in most cases, before the judicial proceedings can begin, there must be a previous procedure conducted by the administrative authority that deals with the protection of children. This administrative phase is not necessary in the cases listed in the first paragraph of art 176.2 CC, ie, when the adoptee is an orphan and a relative of the adopter to the third degree by blood or affinity, the child of the spouse or partner of the adopter or whenever the child has been under the adopter's guardianship or foster care for the purpose of adoption for more than one year. Of course, the intervention of this public authority that deals with the protection of children is not necessary when the adoptee is an adult. **96**

a) *Administrative pre-proceedings*

First of all, for there to be an adoption, generally, there must be an abandoned child. Thus, the first step of most adoptions is a prior abandon- **97**

([56]) This institution is regulated in art 176bis CC.

ment declaration. This proceeding is described in para 152 because it is also precedes a transfer of parental responsibilities.

98 On the other hand, there must also be a favourable declaration regarding the adopter's or adopters' suitability to adopt and to exercise parental responsibilities. This varies slightly from one autonomous community to another, but it requires a psychosocial evaluation of the personal, family, relational, and social situation of the adopter or adopters as well as their ability to establish stable and safe bonds, their educational abilities, and their capacity to tend to the needs of the particular children.

99 If the evaluation is favourable, the person or persons obtain a certificate of suitability in the terms of the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention). If it is negative, the applicant or applicants can both appeal this decision through administrative mechanisms (arts 112ff L39/2015) or, directly, before the civil jurisdiction pursuant to art 780 LEC.

b) *Judicial proceedings*

100 The judicial proceeding is, in principle, of a non-contentious nature and, as such, is regulated in arts 33 to 39 LJV. Given that it deals with children, this type of proceedings has preferential processing, and the intervention of the public prosecutor is mandatory. The proceeding is initiated by the favourable proposition of adoption by the public entity or the adoption application by the adopter(s) when applicable (art 35 LJV). No attorney or *procurador* is required (art 34 LJV).

101 The competent authority in adoption matters is the JPI of the place where the public authority which declared the abandonment and the suitability of the potential adopters is based and, subsidiarily, the place of residence of the adopter (art 33 LJV). According to art 177 CC, during the proceedings, some people have to consent to the adoption (art 36 LJV), some have to assent, and others only need to be heard (art 37 LJV).

102 Consent is a constitutive requirement with respect to adoption. Its absence, lack or nullity will lead to the non-existence of the adoption. It has to be given personally and explicitly, prior to the decision of the judicial authority. The persons who are part of the adoption relationship, such as the adopter and the adoptee (if they are over the age of 12), must consent to the adoption before the judicial authority. Consent is revocable until the judicial decision becomes final. Their consent is an essential precondition which cannot be made up for even by the effective conduct of the adopters as parents.

103 In cases in which the adoptee is an orphan and a relative of the adopter to the third degree by blood or affinity, the child of the spouse or partner of the

adopter or has been under the adopter's guardianship or in pre-adoption foster care for more than one year, adoption can be constituted after the death of the adopter (art 176.3 CC). They must have given their consent before the judge, in a public document or in their will prior to their death. The effects of the judicial decision constituting the adoption shall be backdated to the date on which such consent was given.

104 Assent, on the other hand, is a declaration of will by which some persons (who are not, strictly speaking, part of the adoptive relationship) agree to the adoption in some cases. (57) Under certain circumstances, there need be no assent at all, and this does not affect the effectiveness and validity of the adoption. The spouse or partner of the adopter, if there is not a factual or legal separation, must assent to the adoption when it is not a joint adoption. Also, the legal parents of an adoptee who is not emancipated, unless their parental responsibilities had been judicially terminated, have to consent to their child's adoption. The assent of the mother is only valid after a period of six weeks have elapsed since the birth.

105 Assent will not be necessary in those cases in which it is impossible for the persons who must give it to do so. This circumstance must be explicitly indicated in the judicial decision. It is also unnecessary for the legal parents to assent if their parental responsibilities have been suspended and two years have passed since the notification of the abandonment situation with no opposition or a rejection or if they are involved in a cause of termination of parental responsibilities. (58) In this case, if the legal parents oppose the adoption, a contentious judicial procedure that determines the necessity of their assent has to take place, ie, the non-existence of a cause to terminate parental responsibility (37.2 LJV). The same court will deal with this verbal proceeding, which will be processed according to art 781 LEC. The decision (*auto*) terminating the proceedings may be appealed against, with suspensive effect.

106 Lastly, the hearing of certain persons is simply an opportunity for them to make submissions in order to inform the judge so that they can make a well-founded decision. The legal parents, even when their assent is not needed, must be heard, as well as the possible guardian or members of the foster family if there are any. The adoptee must be heard when they are younger than 12 years old, according to their maturity and capacity. The opinion of these persons is not a basic statement or constitutes a *conditio iuris*

(57) Those who, although their consent is required, have given it prior to the initiation of the proceedings before the corresponding public entity or in a public document, will not be judicially summoned, unless more than six months have elapsed since they did so.

(58) Basically, a breach of their parental duties (see art 170 CC).

of the effectiveness of the adoption. The proceeding in this case is mandatory, but the result is in no way binding on the judge.

107 On the other hand, before agreeing to the adoption, the judge may order any measures they deem appropriate to ensure that the adoption is in the best interests of the adoptee (art 39.1 LJV). If it is, and all formal and substantial requirements are met, they will constitute it through an *auto* (art 176.1 CC). The decision shall be communicated to the Civil Registry for it to make the corresponding entry (art 39.5 LJV).

108 The decision can be appealed against. This procedure has preferential character and does not produce suspensive effects (art 39. 4. LJV).

3. *Effects on filiation relations*

a) *Establishment and extinction of filiation relationship*

109 In Spanish law, adoption always produces the establishment of a full filiation relationship (art 108 CC). It provides the adoptee with a full status *filii* and *familiae* in relation to the adopter.

110 Consequently, to respect and guarantee the two-parent paradigm that still reigns in Spanish law, the extinction of previous filiation links must take place (art 178.1 CC). Only in the cases of stepchild adoption or if the adoptee had just one filiation relationship determined, a previous filiation link can continue to exist if the parties to the adoption agree (art 178.2 CC). In any case, the adoptee is prohibited from marrying any members of their family of origin (see art 47 CC).

111 The Catalan Civil Code provides for an interesting different rule in this respect. Even if the general rule is also that of the extinction of previous filiation and family links, art 235-47.2 CCCat allows for some of them to continue to exist. In the cases of stepchild adoption or of the adoption of an orphan by their relatives, the links with the substituted legal parent's family remain, including succession rights. That is, some adoptees can keep their status in the family of those who were previously their parents and can have, for example, up to three pairs of grandparents. Although, not restricted to this situation, this rule is designed especially for those cases in which adoption takes place after the death of one of the parents and thus it is not desirable to cut off other family links.

b) *Open adoption*

112 Although no filiation links can exist outside the two cases listed above, in 2015, the Spanish legal system introduced the possibility to establish an open

adoption, [59] ie, an adoption in which the adoptee retains some kind of contact or personal relationship with those who used to be their legal parents and other relatives, especially siblings.

113 Article 178.4 CC provides that the judicial authority may agree to maintain some form of relationship when the interest of the adoptee so advises, due to their family situation, age or any other significant circumstance assessed by the public administration. This administration or the public prosecutor makes a proposal of the form and details of this contact. The consent of the adoptive family and an adoptee over the age of 12 years is required. In any case, the adoptee must be heard in this respect.

c) *Right to know one's biological origins*

114 The same legal reform that introduced open adoption in Spanish law also explicitly regulated the adopted person's right to know their biological origins.

115 Articles 180.5 and 6 CC determine that adopted persons, once they have reached the age of majority or while still a minor through their legal representatives, have the right to know information about their biological origins. In this respect, public administrations are obliged to store any information they have regarding the origins of adopted children for at least 50 years after the adoption.

4. *Extinction of adoption*

116 Since it establishes a full, undistinguishable filiation link, adoption is irrevocable in Spanish law (art 180.1 CC). However, it can be extinguished in some cases.

117 In the two-year period following the judicial decision, an adoption can be extinguished if the parents did not assent, without incurring any fault, when they should have done so (art 180.2 CC). The extinction of adoption must not have severely harmful consequences for the adoptee and, if they are over 18, they must consent to it. The termination of the adoption does not cause the loss of acquired nationality or personal law of the adoptee, nor does it affect the patrimonial effects previously produced.

118 There is also the possibility to exclude the adopter from parental responsibilities (art 179 CC) when the adopter fails to fulfil their duties and this results in the withdrawal of parental responsibilities (see art 170 CC). This

---

[59] This possibility was introduced in the Spanish Civil Code by Law 26/2015, of July 28, but it was already foreseen in Catalan law. In particular, in art 235-47-4 CCCat.

does not 'extinguish' the adoption but suspends its effects. If the adopted person has become of age, only they themselves will be able to apply for this exclusion within two years.

119 Both procedures are contentious in nature and thus the rules regarding the ordinary civil procedure in LEC apply.

D. *Parental responsibilities*

1. *Concept*

120 In Spanish law, only unemancipated children are subjected to parental responsibilities. Since 2021, adults cannot be subjected to extended parental responsibilities as was previously possible in cases in which their legal capacity had been judicially modified. (60)

121 Parental responsibilities are another area that some regional civil laws have dealt with. There is an important difference regarding terminology in this respect. The Spanish Civil Code calls this institution *patria potestad* (art 154 CC), which derives from the Latin concept *patria potestas*; the authority of the *pater familias* over the family. Some more modern regional codes have given other names to this institution, for example, the Catalan Civil Code generally uses the term *potestat parental*, which can be translated as parental power or authority, as well as the term parental responsibilities in some cases (see, for example art 233-8 and arts 236-1ff CCCat). The Fuero Nuevo of Navarra, modified in 2019, uses the term parental responsibility (Laws 64ff FNN).

122 In any case, regardless of terminology, this institution encompasses those rights and duties that parents have to exercise and fulfil respectively to the benefit of their children, in particular, as regards their personal care and economic maintenance, as well as the administration of their goods (art 164.1 CC) and their representation (art 162.1 CC) when applicable. Parental responsibilities are non-transferable and cannot be waived. That is, parents cannot voluntarily renounce them, although they can be suspended or terminated in cases of improper exercise.

123 The civil law of Aragon not only uses a different name for this institution but gives it a slightly different content. The family authority (autoridad familiar) only includes the personal care and economic maintenance of the children, but not their representation or the administration of their estate (art 65 CDFA). Given this difference, third persons, other than the parents, can de facto exercise the family authority over the child, but parents retain the administration and representation powers (arts 85ff CDFA).

---

(60) See para 239ff.

It is important to note that Spanish law in general distinguishes between holding (*titularidad*) and exercising (*ejercicio*) parental responsibilities. Physical custody is an important part of the exercise of parental responsibilities, for example. Some parents may just be holders of parental responsibility but do not exercise it due to causes that are not the consequence of an inadequate previous exercise of such, pursuant to art 156.4 CC (eg, they live in a different country than the child). In this case, the child has the legal right to contact (art 160.1 CC). **124**

Even when they are excluded from parental responsibilities, the parent-child relationship entails certain obligations of the parents towards their children, that is, to care for them and to provide them with the necessary maintenance (arts 110 and 111 CC). **125**

All situations regarding parental responsibilities may be registered in the Civil Registry (art 71 LRC). **126**

2. *Emancipation*

Whenever a person reaches the age of 18, they are considered of age in the Spanish legal system and thus nobody can hold parental responsibilities over them. **127**

Additionally, the Spanish legal system also foresees the possibility to emancipate earlier either by authorisation of the parents (art 239.2 CC) or by a judicial decision (art 239.2 CC). In order to obtain an earlier emancipation, the minor must have reached the age of 16 and consent to it. **128**

Emancipation by authorisation cannot be revoked (art 242 CC) and it is granted by public deed or by appearance before the Civil Registry. Judicial emancipation, that is, without the parents' consent, is only possible if: the parent who holds parental responsibilities marries or forms a new couple with a different person than the other parent; the parents live separately; or there is any circumstance that severely hinders the exercise of parental responsibilities. The judicial proceeding to obtain emancipation is regulated in arts 53–55 LJV. The competent authority is the JPI of the residence of the child. Neither a lawyer nor a *procurador* is required, unless an objection is raised, in which case the assistance of a lawyer is required from that moment onwards. The judge must hear the minor, their parents or, where appropriate, their guardian, the public prosecutor and those who have a legitimate interest. The judge, taking into account the justification offered and assessing the interests of the minor, decides whether to grant or deny the emancipation. Regardless of the procedure to obtain it, the fact of emancipation must be registered in the Civil Registry (arts 242 CC and 70 LRC). **129**

According to art 247 CC, emancipation entitles the child to govern their person and property as if they were an adult and they may appear and act in **130**

court alone. However, until they reach the age of majority, the emancipated minor may not borrow money, encumber, or alienate immovable property and commercial or industrial establishments or objects of extraordinary value without the consent of their parents or legal guardian.

3. *Exercise by parents*

131 According to art 156 CC, both parents, even if they are not married, automatically hold parental responsibilities, but there are different ways to exercise them. If parents live together, a joint exercise is presumed. If, on the contrary, they live separately, the legal rule is for the parent who lives with the child to exercise parental responsibilities individually.

a) *Ways to establish the exercise*

132 The different ways of exercising parental responsibilities can be judicially or privately established.

133 Even in cases in which the parents do not live together, judges can, and usually do, declare their joint exercise of parental responsibilities. There can also be a judicial distribution of functions. Parents can also reach these agreements privately, in a tacit or explicit manner (art 156.1 CC).

134 In the case of divorce or separation, the parents can agree on the personal measures regarding their children through what is usually called a parenting plan (*plan de parentalidad*). The Spanish Civil Code does not explicitly recognise this instrument, but some regional civil codes, such as the Catalan one, do (see art 233-9 CCCat). In any case, even if agreed upon, these measures have to be judicially approved and incorporated in a judicial decision. They may be reviewed in a new judicial proceeding if circumstances change.

b) *Controversies during the exercise*

135 If during joint exercise of parental responsibilities, disputes among parents arise, Spanish law foresees for them to be judicially solved (art 156.3 CC). The judge shall hear both parents and the child if they are mature enough and subsequently grant the decision-making power regarding the particular disagreement to one of them. In case such disagreements arise recurrently and could hinder an adequate performance of parental responsibilities, the judge may attribute the general exercise to only one parent or may distribute functions between them for a maximum of two years. These judicial proceedings have, perhaps surprisingly, a non-contentious nature and are regulated in art 86 LJV.

Additionally, art 158 CC provides that a judge can establish any measure with the aim of avoiding harm towards the child in the exercise of parental responsibilities. These measures can be adopted in any judicial procedure dealing with civil or criminal matters, and also in an ad hoc non-contentious procedure (arts 87–89 LJV). Similarly, art 167 CC establishes the possible judicial control of the administration of goods by parents. **136**

c) *Exclusion of one parent*

There are also situations in which only one parent holds parental responsibility. **137**

First of all, there is an automatic legal exclusion when one parent has been found responsible of a crime regarding the procreation of the particular child (eg sexual abuse of the child's mother) or when the parenthood relation (filiation) has been declared against their will (art 111 CC). This exclusion can be lifted if the other parent or legal representative of the child requests it and this request is judicially approved. The child may also bring this request once they become of age. **138**

Secondly, an inadequate exercise of parental responsibilities (a breach of the essential duties) may lead to an exclusion from the holding of such (art 170 CC). If only one parent is judicially excluded, the other will still hold parental responsibilities. **139**

Although the suspension or termination of parental responsibilities must be exceptionally adopted, in recent times, there have been legislative efforts to highlight its importance in cases of gender-based violence within the family. (61) If both parents lose their responsibilities or their exercise, third parties will need to intervene. (62) **140**

4. *Exercise by third parties*

a) *Jointly with parents*

The general rule in Spanish family law is that third parties only hold or exercise 'parental' responsibilities (63) when parents are excluded from exercising them, or any other circumstances impede them to exercise them. **141**

(61) See, for example, art 92.7 CC regarding custody and art 94 CC regarding contact with the child.

(62) See para 145ff.

(63) In these cases, they are not called parental responsibilities. Rather, the Spanish legal system generally refers to them as guardianship functions. For the sake of clarity, they will be regarded as parental responsibilities here.

However, there are exceptions to this rule in some regional civil codes. In particular, in the Aragonese and the Catalan codes.

142 In Aragon, art 63.2 CDFA includes the possibility that people other than the parents exercise the family authority (64). According to art 85 CDFA, only stepparents can do so jointly with one parent, their spouse, when the other parent has been excluded from family authority. Other persons who can exercise family authority are grandparents and adult siblings. These relatives do so, however, when both parents are de facto not doing so (arts 86 and 87 CDFA).

143 In Catalonia, it is possible for stepparents to exercise some parental responsibilities together with one or both parents pursuant to art 236-14 CCCat. These responsibilities extend only to decisions regarding daily life and are assumed jointly with the parent who is also their spouse or partner when they live together with the child in question.

144 Neither the Aragonese nor the Catalan code require any kind of judicial or extra-judicial decision as they operate automatically when the conditions are met. Most authors have understood that neither the Catalan nor the Aragonese provisions on stepparents' responsibilities can be excluded by means of an agreement, at least formally. (65)

b) *In the absence of parents: child protection institutions*

145 Except in some cases where the assumption of responsibilities can be informal, (66) parents must either be dead, or suspended or removed from the holding or exercise of parental responsibilities for third parties to assume them.

---

(64) Besides the different terminology, the most important feature of this concept is that, contrary to Spanish parental responsibilities, it does not include the legal representation of the child.

(65) José Antonio Serrano García, 'Artículo 85' in Jesús Delgado Echeverría (dir), María del Carmen Bayod López and José Antonio Serrano García (eds), *Código del Derecho Foral de Aragón. Concordancias, Doctrina y Jurisprudencia* (Departamento de Presidencia y Justicia Gobierno de Aragón 2015) 211; María Elena Lauroba Lacasa, 'Article 236-14. Facultats Del Cònjuge o Convivent En Parella Estable Del Progenitor' in Joan Egea Fernández, Josep Ferrer-Riba (dirs) and Esther Farnós Amorós (coord), *Comentari al llibre segon del Codi civil de Catalunya: família i relacions convivencials d'ajuda mútua* (Atelier 2014) 858.

(66) This is the case under the Aragonese law mentioned above and the case for the *de facto* guardianship (*guarda de hecho*) regulated in arts 237 and 238 CC. In this last situation, if a judicial authority has notice of it, in a non-contentious procedure, they may require the guardian to inform them about different circumstances regarding the child and they may impose some control and surveillance measures. This *de facto* guardianship is considered to be a transitional situation but until the adequate protection measure is in place, the judge can attribute guardianship functions to the informal guardian (see arts 43 and 52 LJV).

As mentioned earlier, suspension or termination of parental responsibilities must always be decided in judicial proceedings, pursuant to art 170 CC. These are extreme measures and thus must be applied in an exceptional and restrictive manner. The breach of duties by the parents must be grave and constant over time. This removal of parental responsibilities can take place through a civil process regarding family breakdown, a criminal process regarding certain crimes, or an ad hoc process caused by the constant non-observance of duties and responsibilities. **146**

The institution that steps in whenever a child is not subject to parental responsibilities or abandoned is guardianship (art 199 CC). Guardianship functions are a duty, which are exercised for the benefit of the ward and are safeguarded by the judicial authority (art 200 CC). The content of the responsibilities attributed to the guardian is very similar to those encompassed by parental responsibilities, but the law establishes some additional safeguards (see art 226 CC). On the other hand, the guardian has the right to a remuneration and to the reimbursement of justified expenses as long as the child's estate is able to provide them (art 229 CC). The remuneration can be set previously by the parents or, subsidiarily, by the judge. **147**

Both physical and legal persons can be guardians (arts 211 and 212 CC) and the general rule is of one individual guardian although there are situations in which there can be more than one (art 218 CC). There is an established order of preference that can nevertheless be altered if the judge justifies it adequately (art 213 CC). First of all, persons designated in a public document or testament by the parents must be considered. In their absence, an ascendant or sibling should be designated as a guardian. The judge can also designate as a guardian any person they consider to be the most suitable given their relationship with the child (art 214 CC). There are also certain causes (due to inability) that prevent a particular person from becoming a guardian (see arts 216 and 217 CC). **148**

Guardianship can (a) be established judicially through a non-contentious proceeding (art 208 CC and arts 44ff LJV); or (b) operate automatically in those cases where the child was declared abandoned. **149**

i. *The non-contentious process*. The appointment of a guardian, if judicial, takes place through a non-contentious proceeding, regulated in arts 43ff LJV. The JPI of the place of residence of the child is competent to hear the case. The intervention of a lawyer and a *procurador* is not required in these proceedings. **150**

The proceedings are initiated by an application submitted by the public prosecutor or by any of the persons legally entitled to file for the establishment of a guardianship. The application must indicate the circumstances that justify the need for a guardianship. At the hearing, the applicant, the person **151**

whose designation is proposed if different from the applicant, the person whose guardianship is sought if over 12 years of age or of sufficient maturity, their next of kin, the public prosecutor, and any other persons deemed appropriate, are heard. The court that has granted guardianship sends a copy of the decision and of the certificate of the position to the corresponding Civil Registry. The decision may be subject to appeal without suspensive effect.

152 ii. *The administrative process*. Declaring abandonment (*desamparo*) entails an administrative proceeding that, as such, is subject to the procedural rules of L39/2015. The superior interests of the child and their return to their family of origin are the main principles that guide it (art 2 LOPJM).

153 This declaration suspends the parental responsibilities of the parents until the judicial authority issues a decision that extinguishes them, if appropriate. If there is no adequate person to be appointed guardian of the child, the public administration automatically becomes their legal guardian. This designation does not need a judicial decision but has to be communicated to the public prosecutor. In this case, custody can be given to a foster family or, subsidiarily, a care centre (arts 172ter and 173 CC).

154 Parents can oppose this administrative decision according to art 780 LEC within a period of two years if they understand that, due to a change of circumstances, they are in a position to adequately once again assume the exercise of parental responsibilities (art 172.2 CC). During this period of time, they can also oppose any decision taken by the administration regarding the child through the same proceedings.

c) *The extinction of protection measures*

155 Article 223 CC recognises the possibility of terminating the position of guardian of a particular person. The causes that can lead to this termination are listed in art 275 CC and are all related to a previous inadequate exercise of guardianship functions. The termination is carried out judicially according to the procedural rules of art 49 LJV. The parties must be legally represented by an attorney and a *procurador*. On the other hand, guardianship terminates whenever the child under guardianship becomes of age, is later adopted, or dies, but also if one or both parents regain parental responsibilities (see arts 231 and 170.2 CC).

E. *Matrimonial property regimes*

156 In Spanish law, marriage always entails certain economic obligations, which are said to constitute the 'primary economic regime' and are similar in all

Spanish Civil Codes. (67) There is then a secondary regime, which determines how, and if, property is shared between spouses.

157 Some of the key features of the primary regime in the Spanish Civil Code are that, according to art 1318 CC, both spouses must contribute to the economic duties of marriage (*cargas del matrimonio*) and either of them can act individually to fulfill these duties as long as their acts correspond to their usual circumstances (art 1319 CC). Additionally, the family dwelling enjoys a certain protection and thus acts of disposition require the consent of both spouses or a judicial authorisation regardless of who the owner is (art 1320 CC).

158 Spouses can agree to their marriage being subjected to the secondary property regime (art 1315 CC). Each civil code provides some typical regimes among which spouses can choose, but they are free to make their own specific determinations. Each law designates one to operate by default if the spouses do not agree on another one.

1. *Types*

a) *Regime of community of property (*sociedad de gananciales*)*

159 According to art 1316 CC, this is the default regime whenever the Spanish Civil Code is the applicable law. (68)

160 This regime creates a common patrimony of the spouses, which coexists with their own private patrimony, that will be shared in equal parts upon liquidation pursuant to art 1344 CC. There is a presumption of the commonality of goods but arts 1346 and 1347 CC establish a list of goods that are considered private and common, respectively. Common goods are shared in a type of Germanic community: there are no quotas on the particular goods and spouses can only dispose of their global quota with *mortis causa* effects.

161 In Catalan law, the regime most similar to this is the community of goods regime (*règim de comunitat de béns*, arts 232-30 to 232-38 CCCat). According to the civil law of Aragon, the regime most similar to this is the matrimonial consortium (*consorcio conyugal*, arts 210ff CDFA) which is the default regime in Aragon. In Navarra, it is the *sociedad conyugal de conquistas* (Laws 87ff FNN).

---

(67) For regional examples, see arts 183 to 194 of CDFA, Laws 78 to 82 of FNN, 231-10ff CCCat.

(68) Also, in Galicia (art 171 of the Civil Law of Galicia) and the Basque Country (art 127.1 of the Basque Civil Law).

b) *Regime of separation of property (*separación de bienes*)*

162 When the Spanish Civil Code is applicable, this regime operates by default when the regime of community of property (*sociedad de gananciales*) cannot operate due to the express rejection by the spouses (art 1435.2 and 3 CC).

163 In this property regime, each spouse obtains and administers their income and goods individually, but both have the obligation to contribute to the matrimonial duties (*cargas*) while the matrimonial cohabitation lasts (art 1438 CC). Thus, each spouse keeps the goods and rights they had before marriage and all those acquired during it (art 1437 CC). If both spouses jointly acquire a good, the rules of an ordinary community will apply and there is a *iuris tantum* presumption of community when the ownership of a particular good cannot be determined.

164 This is the default regime in Catalonia (arts 232-1 to 232-12 CCCat) and on the Balearic Islands (arts 3.1, 65 and 67 of the Balearic Islands Compilation) but not in Aragon or in Navarra, where both regional civil codes include specific regulations of this type of regime (arts 203–209 CDFA, and Laws 101 and 102 FNN, respectively).

c) *Participation regime (*participación en las ganancias*)*

165 This particular regime is only applicable if spouses explicitly choose it. According to its rules (arts 1411–1434 CC), each spouse has the right to participate in the gains that their spouse obtains during marriage. This regime operates as if the spouses were married under the separation of goods regime. However, this changes when it terminates as each spouse has to liquidate their right to the gains of the other.

166 The participation regime is a type of property regime that is also regulated in the Catalan Civil Code (arts 232-13 to 232-21 CCCat). Its practical use is very limited, in particluar because its liquidation rules are very complex.

d) *Other regional regimes*

167 Other regional civil codes recognise their traditional property regimes.

168 The Catalan Civil Code regulates the so-called 'association in purchases and improvements' (*associació a compres i millores*, arts 232-25 to 232-27 CCCat), the twinning or agreement half by half (*agermanament o pacte de mig per mig*, art 232-28 CCCat) and the regime of agreement or half accrual (*pacte de convinença o mitja guadanyeria*, art 232-29 CCCat).

169 Navarrese civil law regulates the universal community of goods (Law 100 FNN).

170 The communications of goods regime (*comunicación foral de bienes*, arts 129ff. of the Basque Civil Law) is the default regime in some territories of the Basque country (Bizkaia, Aramaio and Llodio).

e) *Stable relationships or civil partnerships*

Most regional regulations of civil partnerships do not include a property regime and thus partners are able to organise their common economy as they wish. It must be noted that in most regulations, civil partnerships can automatically have civil effects as a consequence of cohabitating for two years without the need for any particular acts by the partners (eg art 234-1 CCCat). Thus, their effects tend to be limited due to a Constitutional mandate to respect free development of personality. In this respect, the Spanish Constitutional Court declared unconstitutional the Navarrese regulation of civil partnerships provided for in Laws 106ff FNN. (69) **171**

The exception to this general rule is the Aragonese regulation, which establishes a primary economic regime for registered stable unmarried couples in art 307 CDFA. **172**

2. *Establishment*

If it is not by the mere operation of the law in the case of the typical default regimes, the establishment of a particular matrimonial property regime follows by agreement. Spanish law foresees a particular type of 'marriage contract' referred to as *capitulaciones matrimoniales*. (70) **173**

The main goal of this type of agreement is to foresee, modify or substitute the particular property regime of a marriage, but it can also include other unrelated issues such as donations among spouses, succession agreements (where applicable), the acknowledgement of children, or possible patrimonial consequences of divorce, among others. The agreements, though, cannot contravene the principle of equal rights of the spouses (art 1328 CC). **174**

In order for it to be valid, such an agreement must be formalised in a public deed with the intervention of a notary (art 1327 CC) and their inefficacy is regulated by the general rules of contracts (art 1335 CC). These are nullity due to lack of the legally prescribed form and annullability due to vitiated consents. The agreements have to be entered in the Civil Registry for them to be opposable to third parties (art 60.4 LRC). **175**

According to art 9.3 CC, the agreements or *capitulaciones* by which the economic regime of the marriage is stipulated, modified, or replaced are valid when they are in accordance with either the law that governs the effects of the marriage, or the law of the nationality or residence of either of the parties **176**

(69) Spanish Constitutional Court decision no 93/2013, of April 23, ECLI:ES:TC:2013:93.

(70) On the islands of Ibiza and Formentera, these agreements are called *espolits* (art 66 of the Balearic Islands Compilation).

at the time of conclusion. The effects of the marriage are governed by the common personal civil law of the spouses at the time of contracting it [71] and, absent a common law, by the personal law or the habitual residence of either of them, chosen by both in an authentic document concluded before the celebration of the marriage. In the absence of this choice, by the law of the common habitual residence immediately following the celebration, and, in the absence of said residence, by that of the place of celebration of the marriage (art 9.2 CC).

177 Matrimonial property regimes can be established at three possible moments: before marriage, at the moment of marriage, or during marriage. Article 1326 CC foresees the possibility that *capitulaciones* are concluded before marriage. In this case, their effectiveness is contingent upon the celebration of marriage for a period of one year after its formalisation (art 1334 CC). The registration of any marriage in the Civil Registry must make reference to possible *capitulaciones* agreed between the spouses and the document that formalises the marriage must include a reference to the matrimonial property regime, even if it is the default one that operates without being explicitly chosen by the spouses (art 60.1 and 2 LRC). Finally, it is possible to change the matrimonial property regime of an ongoing marriage in accordance with arts 1317 and 1331–1332 CC.

3. *Extinction and liquidation*

178 A matrimonial breakdown or the death of one of the spouses entail the dissolution of the matrimonial property regime. The regime, particularly that of the community of property, can also be judicially extinguished at the request of one of the spouses when any of the circumstances included in art 1393 CC arises.

179 As pointed out earlier, some regimes require the liquidation of the common property upon extinction. This is the case in the CC's default regime, that is, the community of property regime. Liquidation can be conventional and included in the matrimonial regulatory contract (*convenio regulador*) presented before the competent authority to declare the divorce, annulment, or legal separation. If there is no agreement among the spouses, the liquidation must be done in court, according to the procedural rules of arts 806 to 810 LEC. The rules governing liquidation are included in art 1396ff CC.

III. Succession law

180 Spanish succession law is a set of legal rules in the area of private law intended to regulate the destiny of a person's property after their death. The

---

[71] See para 2.

Spanish Civil Code regulates successions in its arts 657ff., but succession law is probably the most diverse civil law matter in the Spanish legal system. All regional codes or laws include at least some regulation regarding inheritance. According to arts 9.8 and 16.1 CC, the law applicable to a succession depends on the personal civil law of the deceased (*vecindad civil*) at the moment of death. (72) Given that the Succession Regulation is enforceable in Spain, this rule is only applicable to regional conflicts of laws.

181 In general terms, depending on its origin, the succession can be testate or intestate. The Spanish Civil Code admits the compatibility of these two forms of succession (art 912 CC). On the contrary, some regional civil laws, such as the Catalan, consider them mutually exclusive. Depending on its effects, the succession can be universal, when somebody is named heir, or particularly, when someone receives a legacy. A legacy involves a particular division of goods and or rights. The entire inheritance can be distributed in legacies because, according to the regime in the CC, the designation of an heir is not essential to the will's validity (art 764 CC). (73)

182 In Spanish succession law, the notary is the main professional involved and the role of courts is limited to controversial cases. Article 52.4 LEC establishes the territorial jurisdiction of courts in those cases when they intervene: the last place of residence of the deceased. If this is in a foreign country, the applicant may choose between the place of the deceased's last residence in Spain or where most of the deceased's goods are located.

A. *Testate and intestate succession*

1. *Testate succession*

183 Wills (*testamentos*) are regulated in arts 667ff CC. The Spanish Civil Code describes them as individual, unilateral legal acts and thus forbids joints wills (arts 669 and 670 CC). However, some regional civil regulations do not. For example, the civil law of Galicia allows for joint wills (*testamentos mancomunados*) of two people or more (art 187 of the Civil Law of Galicia).

184 Wills are valid from the moment they are made but only produce effects once the testator dies. They are solemn legal acts. Thus, the failure to comply with their legal formalities results in their nullity according to art 687 CC. According to their form, several types can be distinguished.

185 The most common and most widely used is the open will (arts 679, 694–705

(72) See para 2.

(73) This is different in other Codes, for example in Catalonia: see art 423-1 CCCat.

CC). (74) It is drawn up before and by a notary, and this gives it evidentiary and executive force, even at the European level (arts 24–27 and 74 SR). The closed will (arts 680, 706–715 CC) is drawn up before a notary without them being aware of its content, thus, it is closed in nature. Finally, there is the holographic will (arts 678, 688–693 CC) which is handwritten by the testator without the presence of a notary. These last two types are hardly used in Spain. (75) According to data of the *Consejo Superior del Notariado*, in 2023 in Spain 609,564 open wills were made, as opposed to only 348 closed and holographic ones. (76)

186 Wills made before a notary must be registered in the General Register of Last Wills (*Registro General de Actos de Última Voluntad*), part of the Ministry of Justice.

187 Beyond any possible formal defect in their making, wills can be declared null and void if it is proven that the testator lacked the necessary capacity (arts 663 and 688 CC) or if their consent was vitiated (art 673 CC). Capacity to make a will is generally presumed in the absence of proof to the contrary (arts 663 and 688 CC). The notary may evaluate the testator's capacity exclusively at the time of making the will (art 685 and 666 CC).

188 Wills are totally or partially revocable while the testator lives (art 737 CC) and their interpretation criteria are set out in art 675 CC.

189 Agreements as to succession are not allowed in Spanish law according to art 1271.2 CC. However, some regional civil regulations do foresee this possibility. This is the case, for example, in Catalan civil law (see arts 431-1ff CCCat). Agreements allow people to plan their succession with the same scope as a testament and must be formalised in a public deed. They are essentially irrevocable and can only be concluded among spouses or partners and other close relatives.

2. *Legal limits to testamentary dispositions*

190 The possibility to voluntarily plan one's succession is not absolute. Mainly, Spanish law foresees the rights of the legal heirs (*legitimarios*) as well as some legal reserved portions (*reservas*).

---

(74) María Ángeles Fernández Egea, *La Jurisdicción Voluntaria Notarial En El Ámbito Sucesorio* (Marcial Pons 2016) 92.

(75) There are also special types such as the military will (arts 716–721 CC), the maritime will (arts 722–731 CC), and a will drawn up in a foreign country (arts 732–736 CC). Additionally, some situations admit extraordinary forms for a will. Those are imminent danger of death (art 700 CC), an epidemic (art 701 CC) and when the person cannot speak but can write (art 709 CC).

(76) This data is available at: <https://www.notariado.org/liferay/web/cien/estadisticas-al-completo>.

Legal heirs are not heirs as such but close relatives who hold the legal right to a share of the estate (*legítima*). This share of the estate is calculated in the following way: from the total estate (*relictum*), one must subtract the debts that do not derive from the circumstance of death and add any donations that the deceased made in their lifetime. This provides the basis upon which to calculate the global *legítima*. The share of the estate varies depending on who the *legitimarios* are. These are generally the deceased's descendants, but ascendants hold this right if the deceased had no descendants. Additionally, a spouse is concurrently entitled to some rights over a share of the estate (see arts 807ff CC). **191**

If there are descendants, these are entitled to a share of two-thirds of the estate. The first third is what is called strict *legítima* because it has to be divided equally among the children of the deceased. The second third is called the third of improvement and the testator can divide it freely among their children. The spouse (who is not legally separated) will get the usufruct of one-third of the estate if there are descendants as *legitimarios*. **192**

If there are no descendants and thus it is the deceased's ascendants who are entitled to the estate, the *legítima* is a half of the estate if the deceased was single and one-third if there is a surviving spouse. In this last case, the spouse has the right to the usufruct of half of the estate. **193**

If there are no descendants or ascendants of the deceased, the spouse is entitled to the usufruct of two-thirds of the state. **194**

The obligation to transmit the *legítimas* can only be excluded if the relatives in question are disinherited by any of the legally established causes included in arts 852–856 CC. **195**

Finally, *reservas* constitute limitations on the testator's autonomy referring to designated assets and goods rather than a proportionate share of the inheritance. There are two types of *reservas* in Spanish succession law: lineal *reservas*, and those imposed on the surviving spouse. Lineal *reservas* (art 811 CC) aim to preserve assets within the same familial lineage, limiting their transfer to people outside it. The surviving spouse's reserve (arts 968 to 980 CC) imposes an obligation on a widowed spouse with common children born in a marriage with the deceased. Should they remarry, they are obliged to retain the estate, or any assets acquired through the deceased spouse's succession for the benefit of descendants from that initial marriage. **196**

These and other details regarding *legítima* and *reservas* are different in regional civil codes. **197**

3. *Intestate succession*

According to art 658 CC, intestate succession operates alternatively or complementarily to testate succession when there are no designated heirs. **198**

This is not the case in some regional civil codes, such as, for example, the Catalan one, which establishes the incompatibility of both kinds of succession (art 441-1 CCCat).

199 Articles 930ff CC establish an excluding order of the calls to become intestate heir: (1) descendants, (2) ascendants, (3) spouse, (4) some close collateral relatives, and (5) the State. Descendants of an heir hold the right of representation according to arts 924 to 929 CC. This is the right to take the heir's position in those cases in which the aforementioned heir has not been able to do so due to external causes.

B. *Devolution of the estate*

1. *Initiation of probate proceedings (*apertura*)*

200 The initiation of all the proceedings of a person's succession happens the moment this person dies. The Spanish legal system calls this moment opening (*apertura*). At this time, a valid testament or other voluntary dispositions made by the deceased person in their lifetime are searched for. It is also the moment to determine which goods comprise the deceased person's estate. The estate, in itself, has the legal standing to be sued pursuant to arts 6.1.4 and 7.1.5 LEC.

201 If closed, holographic, or oral wills are found, there will need to be a proceeding of notarial homologation (*presentación, adveración, apertura y protocolización*). These proceedings are regulated in arts 57–65 LN and their goal is to transform these private documents into public ones by attesting their authenticity and the observance of all legal requirements in their making. For example, regarding closed testaments, art 58 LN establishes that the homologating notary may summon the notary who authorised the testament, if different, and, if applicable, the witnesses who were involved in the execution of the testament. These witnesses have to be questioned and heard, and the sealed will is brought before them so that they may examine it and declare under oath or promise whether they recognise as legitimate and ratify their signature. If the evaluation is favourable, the resulting notarial document is an *acta de protocolización*. (77)

202 According to arts 57, 61 and 64 LN, the interested parties can choose to involve in this matter any notary able to provide services in the place of the last residence of the deceased, where they had the most part of their assets,

(77) Some authors call for an increase in the communication among notaries so a prior negative response to a will's homologation is not avoided by requesting a different notary's services: Fernández Egea (n 74) 93.

or where they died, provided these places are in Spain. They can also choose a notary in the adjoining districts to the previously mentioned ones and, in absence of all of them, a notary of the place of residence of the applicant is competent to proceed. Regarding this particular notarial function, Spain communicated to the Commission the condition of authority of notaries in the terms of art 3.2 in fine of the Succession Regulation. (78)

2. *Abstract calling of heirs (*vocación*)*

203 The second phase of succession is called *vocación* and it can be described as a generic calling to potential successors and their possible substitutes. (79) This is the phase in which the notary evaluates their capacity to succeed (art 758 CC). At this time, the called persons merely have a legal expectation, but not a right to the inheritance.

204 In order to hold legal capacity to inherit, a person must have lived longer than the deceased and not be subjected to any disqualification causes (*causas de indignidad*), which are regulated in art 756 CC. However, the deceased may have accepted the behaviour that gave rise to the cause in a public document according to art 757 CC. Also, there are particular persons who cannot inherit from certain others because of the nature of their relationship (*incapacidades relativas*). This is the case, for example, of the notary who authorised the will (see arts 752–754 CC).

3. *Concrete calling or offering (*delación*)*

205 Once their capacity to succeed the deceased person has been affirmed, there is a concrete offering to the designated heir or heirs for them to accept the

---

(78) This information can be found at: <https://e-justice.europa.eu/380/EN/succession?SPAIN&member=1>. Some argue that notaries still have international jurisdiction according to the rules contained in LN due to the fact that the provisions of the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions still apply in Spain instead of the provisions of this Regulation with regard to the formal validity of wills and joint wills: Francisco-Manuel Mariño Pardo, Criterios de Competencia Territorial Interna Del Notario En la Protocolización de Testamento Ológrafo (y Expedientes Sucesorios En General), Iuris Prudente (May 27, 2016), <https://www.iurisprudente.com/2016/05/criterios-de-competencia-territorial.html>.

(79) Substitutes are legal mechanisms that the testator may establish so that, in the event the designated heir does not acquire the inheritance (due to death, incapacity, renunciation, etc), another person is called to receive the inheritance or part of it in their place. See arts 774ff CC.

inheritance or not. This offering is called *delación*, and designated heirs acquire the subjective legal right of *ius delationis* (art 1006 CC). ([80])

206 Spanish succession law follows a Roman model, that is, designated heirs do not automatically acquire the inheritance, but they have to accept or waive it as they wish (art 988 CC). However, their effects are retroactive to the moment of the deceased's death (art 989 CC). In the period of time between *delación* and acceptance, the inheritance (*herencia yacente*) has to be administered. It is not possible to accept or waive partially (art 990 CC), and both the acceptance and the waiver are irrevocable. They can only be challenged on the grounds of vitiated consent or the discovery of a new testament (art 997 CC).

207 Pure and simple acceptance can be explicit (in a private or public document), tacit (art 999 CC), or *ex lege* when certain circumstances listed in art 1000 CC occur. ([81]) On the contrary, repudiation must be in writing, in a public document authorised by a notary (art 1008 CC).

208 In some cases, acceptance or waiver may require judicial authorisation. In particular, this is the case of acceptance or waiver by minor children subjected to parental responsibilities (art 166 CC) or guardianship (art 199 CC), or persons with disabilities with support measures that require judicial authorisation for this matter (art 996 CC), among others. The proceedings for this authorisation are of a non-contentious nature and are regulated in arts 93–97 LJV. The application must be submitted to the JPI of the place of the last residence of the deceased and, if the deceased was resident in a foreign country, that of the place of their last residence in Spain or where most of their assets are located, at the choice of the applicant. Legal representation is only required when the value of the inheritance exceeds the amount of € 6,000. The decision may be appealed with suspensive effects.

4. *Acquisition and responsibility*

209 According to arts 988ff, the acquisition of the inheritance takes place after acceptance by the holder of the *ius delationis*. At this moment, the heir 'substitutes' the deceased, and this has retroactive effects up to the moment of death (art 989 CC). On the contrary, the acquisition of legacies is automatic, without express acceptance, although there is the possibility to renounce the particular legacy (art 881 CC).

([80]) See the Spanish Supreme Court decision no 340/2005, of May 4, ECLI-:ES:TS:2005:2816.

([81]) If the heir wishes to limit their liability, acceptance must be given before a notary as detailed in the following subsection.

According to arts 440ff CC, the heir automatically obtains the possession of the goods that encompass the inheritance, whereas legatees do not (art 885 CC). They must request the transfer of the possession to the heir or heirs or to the executor (*albacea*). **210**

The liability of heirs and legatees is also different. Heirs are, in principle, personally liable for the deceased person's debts (*ultra vires hereditatis*, art 1003 CC). However, they can limit their liability up to the value of the estate if acceptance occurs with the benefit of an inventory (*intra vires hereditatis*,art 1023 CC). If this is their wish, acceptance must then be explicit and conducted before a notary (art 1011 CC). The heir must then compile an inventory of the estate according to the rules in art 67 LN and the time limits provided in arts 1014 and 1015 CC. **211**

If according to the European Succession Regulations, ([82]) Spain has jurisdiction over the deceased's succession, the drawing up of the inventory must be done before any notary able to provide services in the place of the last residence of the deceased, where they had the most part of their assets, or where they died, provided these are located in Spain. A notary in the adjoining districts to the ones just mentioned can also be chosen and, in absence of all of them, a notary of the place of residence of the applicant is competent to proceed. **212**

If the legal requirements are not observed in the forming of such inventory, the heir loses the benefit of inventory (*intra vires hereditatis*), and the inheritance is understood to be accepted in a pure and simple manner (*ultra vires hereditatis*). **213**

C. *Administration of estates*

When a person's succession is opened, their estate shall be administered but also the rules governing their succession, whether they were dictated by the deceased themselves or they are dictated by the law, must be executed. On the other hand, when there are multiple heirs, the inheritance must be divided. **214**

These three tasks can be performed by three different persons or authorities: the executor (*albacea*), ([83]) the partitioner (*contador-partidor*), and the administrator. But they can also be performed by one of them or by the heirs themselves. **215**

([82]) Regarding this particular notarial function, Spain communicated to the Commission the condition of authority of notaries in the terms of art 3(2) in fine of the Succession Regulation.

([83]) For a historical background of this institution in Spanish law, see Fernández Egea (n 74) n 178.

1. *Administration and execution*

216 In Spanish succession law, the *albacea* (executor) is the person, designated by the testator, to execute their will (eg, complying with the established legacies). If no executor has been designated in the will, heirs assume this executive function and are thus called 'legitimate executors'. (84)

217 The regulation of the role of the executor can be found in arts 892–911 CC. One or more persons can be designated as such, even legal entities can assume this role. The designation can be universal or particular if the execution only refers to a particular aspect of the will. The testator may establish a remuneration for the executor, but it is not necessary (art 908 CC).

218 As stated earlier, their main functions are to fulfil and execute the testator's will. Consequently, the testator can detail the executor's function in the will, and even include administration and partition functions (art 901 CC). If, on the contrary, no particular functions had been detailed by the testator, arts 902 and 903 CC contain a list of legal functions executors may have. If the executor finds it necessary to dispose of goods that comprise the estate, they must obtain judicial authorisation. This authorisation may be granted according to a non-contentious proceeding governed by a judge (art 91.1.4 and 4 LJV).

219 The role of executor is a voluntary role to assume. There is a presumption of acceptance if the designated executor does not excuse themselves within six days after they knew of their designation (art 898 CC). Acceptance does not have to take place before a notary, but an interested party in the succession can compel the designated executor to accept or excuse themselves from the role before a notary (art 66.3 LN). If the designated executor does not accept the role or renounces it without just ground after having accepted it, they will lose any dispositions the testator made in their favour (arts 899 and 900 CC). The renunciation has to take place before a notary or LAJ (arts 91.1.1 LJV and 66.1.a LN), who shall assess whether the alleged ground is just or not. There is not a legal list of grounds, so these professionals have a decision-making role when evaluating this circumstance. (85) If the cause is found to be unjust, the executor also loses the right to whatever goods or rights the

(84) Actually, the figure of the *albacea* was introduced to guarantee the execution of the will in those cases where no heirs were designated, they had repudiated the inheritance or they could not agree on execution matters. Thus, the law allows for the testator to name one person they trust to execute their will: ibid 180.

(85) Ibid 187.

testator left them. The LAJ or notary also cites the heirs and other interested parties in the succession, who may judicially challenge the renunciation. (86)

220 Execution is subject to a time period within which it should be completed. The testator can set a time limit, and, unless otherwise specified, the law sets a period of one year (arts 904 and 906 CC). This time can be extended, when justified, by, again, the LAJ or the notary (arts 91.1.1 LJV and 66.1.a LN). In any case, their appointment expires when they fulfil their function, or it is impossible to execute it. The executor is accountable towards the heirs (art 907 CC). They can be held accountable in a non-contentious proceeding of which a judge is competent (art 91.1.3 and 4 LJV).

221 The appointment of an administrator as such is only required under Spanish law under certain circumstances: when there is no proof of the existence of a will, nor of ascendants, descendants or a spouse or partner, nor of collateral relatives within the fourth degree, or when those persons are minor children. This appointment shall be judicial according to arts 790ff LEC.

222 There are also certain rules regarding the administration of the estate in particular situations. The first is during the time before it has been accepted (*herencia yacente*) and it is thus undivided. Designated heirs have a provisional duty to conserve and administer the estate, which does not imply acceptance (art 999.4 CC). A judicial administrator may also be appointed at this moment, according to art 792 LEC. The second situation may arise when there are multiple heirs, and the estate has not yet been divided. In this situation, the rules regarding the administration of the ordinary community apply (see arts 395, 397 and 398 CC), unless the appointment of a judicial administrator is necessary.

2. *Partition*

223 Partition of the estate entails transforming the abstract shares of the co-heirs into specific goods or rights. Thus, it extinguishes the community of heirs and every one of them receives the adjudicated goods as their exclusive property (art 1068 CC). If the deceased was married, prior to partition, it is necessary to carry out the liquidation of the property regime of the spouses.

224 The testator may give instructions as to how to proceed with the division (they can even do it themselves in the will, in accordance with art 1056 CC) but four distinct steps or phases can be identified in the process:

---

(86) Josep Ferrer Riba, 'La Ejecución Del Testamento y El Albaceazgo' in Judith Resina Resina and María del Carmen Gete-Alonso y Calera (eds), *Tratado de derecho de sucesiones: código civil y normativa civil autonómica: Aragón, Baleares, Cataluña, Galicia, Navarra, País Vasco* (2nd edn, Thomson Reuters 2016) 700.

1. An inventory has to be drawn up.
2. Rights and goods have to be valued.
3. The estate needs to be liquidated, ie, debts and expenses have to be paid.
4. Division of the estate into quotas and assignment of goods into the payment of these quotas. This needs to occur respecting a qualitative principle of equality among heirs (art 1061 CC), except when partition had already been done by the testator.

225 Thus, beyond the division by the testator themselves, partition can be achieved by a particular partitioner appointed by the testator in their will pursuant to art 1057 CC. This person cannot be a co-heir and the particular partition they perform will have the same validity as the one done by the testator, that is, it does not require any confirmation. Heirs can also jointly by consensus proceed to partition, pursuant to art 1058 CC. This type of partition is said to have a contractual nature and does not require a particular form. However, it is usually recorded in a public deed for evidentiary purposes so the resulting rights from partition can be registered when appropriate.

226 If partition had not been regulated by the testator or they had not appointed a partitioner and the co-heirs cannot reach the necessary consensus, partition has to be conducted by an external professional. Their appointment had been traditionally judicial, but in 2015, a non-contentious proceeding was introduced in order to favour its de-judicialisation. (87) Co-heirs whose quotas represent at least 50% of the value of the estate can request that an LAJ or a notary appoint an expert partitioner according to arts 92.1.a LJV and 66.1.b LN, respectively. All other co-heirs and interested parties in the succession must be summoned and a professional is appointed according to the appointment rules for experts (arts 339ff LEC if the proceedings are conducted before an LAJ, and art 50 LN if the proceedings are notarial). The partition decided by this professional must be accepted by all heirs. Alternatively, the LAJ or notary may approve the partition (arts 92.1.c LJV and 66.1.d LN) if they consider it was performed adequately. (88) Notaries and LAJ also deal with the possible renunciation of the partitioner and the

(87) Fernández Egea (n 74) 196.

(88) This is a function that some consider jurisdictional: ibid 214; Francisco-Manuel Mariño Pardo, 'El Contador Partidor Dativo: El Artículo 1057. 2 Del Código Civil' (Iuris Prudente) <http://www.iurisprudente.com/2020/06/el-contador-partidor-dativo-el-articulo.html>. This author considers that even though this notarial function was not included in the Spanish communication of relevant authorities in the sense of art 3(2) SR to the European Commission, the international jurisdiction rules contained in the Regulation should be applicable to them.

extension of their given time, in similar terms as those described regarding the executor.

Finally, a partitioner can be judicially appointed pursuant to art 1059 CC. **227** Courts appoint an expert to perform the partition according to the rules of arts 782ff LEC if none of the other options is available and at least one co-heir requests it.

Partition can be judicially declared null and void if any essential requisite was **228** not fulfilled during its performance. A co-heir can also claim its rescission/termination if they consider that the estate was divided in such a way that their assigned portion is unfairly small (art 1074 CC). This is also a judicial action that has a statute of limitations of four years (art 1076 CC). The other co-heirs may choose between compensating this harm or applying for a new partition (art 1077 CC).

D. *Certificates of succession*

In Spanish law, there are no national certificates of succession as such. **229** However, in application of the Succession Regulation (SR), authorities can issue the European Certificate of Succession.

1. *National proceedings to prove the status of heir*

Since there are no national succession certificates, there are alternative ways **230** to prove the status of heir that are contingent on whether the deceased's succession is testamentary or intestate.

In any case, the first document that is needed is the death certificate issued **231** by the Civil Registry. (89) Once 15 days have passed since the death of the deceased, the alleged heir can consult the General Registry of Last Wills (art 10 RLN) to find out whether the deceased made any testament and which is the last valid one. (90) This registry will issue a certificate.

In the event that a will is present, this register will display the date of the **232** most recent will, any preceding wills, and the official notarial documents in which the mentioned will was documented. Thus, the alleged heir may ask for an authorised copy that proves their status. This registry is not publicly available and can only be accessed by individuals who can demonstrate a legitimate interest in the inheritance following the testator's death. Additionally, it can be accessed during the testator's lifetime by the testator them-

(89) The application can be made online at <https://sede.mjusticia.gob.es/en/tramites/certificado-defuncion>.

(90) The application can be made online at <https://www.mjusticia.gob.es/es/ciudadania/tramites/certificado-actos-ultima>.

selves, their authorised representative, or by court order in the case of incapacity.

233 If there is no will, there needs to be a notarial declaration of intestate heirs (arts 55–56 LN). (91) Its goal is to establish who the heirs are according to the legal criteria for intestate succession.

234 Anybody with a legitimate interest (a condition to be determined by the notary) can initiate these proceedings before a competent notary to act in the place where the deceased had their last residence, where the majority of their estate is, or in the place where they died, at the choice of the applicant. They may also choose a notary in a district adjoining the above. In the absence of all of the above, the notary of the applicant's place of residence shall be competent. There is doubt in the legal and academic community on whether notaries are bound by the jurisdiction rules in the Succession Regulation in cross-border cases. Spain communicated to the Commission their authority regarding this matter in the terms of art 3.2 in fine of the Succession Regulation, (92) but some state their doubts about whether they truly perform a jurisdictional function according to the ECJ's criteria. (93)

235 In any case, it is mandatory for at least two witnesses to participate in the proceedings. They can be relatives of the deceased with no direct interest in the succession. The notary must also try to summon any other interested party in the succession. If they cannot identify any relative and/or potential heir, they shall publicise the proceedings in the Spanish Official Gazette (*Boletín Oficial del Estado*) for one month so any interested party can make any declarations or oppose the proceedings. The resulting notarial statement (*acta notarial*) will declare the relatives of the deceased that are to be considered their intestate heirs. This does not preclude unsummoned interested parties or those adversely affected by the declaration to seek a different one in a judicial proceeding.

2. *European Certificate of Succession*

236 According to art 64 SR, European Certificates of Successions are issued both by courts and notaries in Spain (see Final Disposition 26.11-17 LEC).

237 The proceedings may be initiated by the presentation of the form described in art 65.2 SR. The certificate is issued by a notary when the whole succession

---

(91) This is the case, also, in other circumstances that cause the opening of the intestate succession, such as after the judicial declaration of invalidity of a testament.

(92) This information can be found at: <https://e-justice.europa.eu/380/EN/succession?SPAIN&member=1>.

(93) Albert Font Segura, 'La Declaració d'hereus Intestats Pel Notari Espanyol En Aplicació Del Reglament (UE) 650/2012 En Matèria de Successions' (2020) 21 Revista Catalana de Dret Privat 195, 211.

has been dealt with by this kind of authority. On the contrary, it is judicially issued in those cases in which the succession has been a judicial matter. Thus, the certificate is a providencia issued by the same court and according to the rules of art 67 SR.

238 Judicial certificates can be rectified according to the procedural rules of art 267.1-4 LOPJ. They can be modified or annulled according to the procedural rules regarding the *reposición* challenge. If the certificate is denied, the judicial decision will adopt the form of an *auto*, which can be challenged through a *reposición* challenge. Notaries can also rectify, modify, or annul a certificate issued by them. A challenge to the notarial decisions regarding the certificate has a judicial nature and proceeds in accordance with the rules of the verbal proceeding by the JPI of the place of residence of the notary.

IV. Status of natural persons

239 This field of law has profoundly changed in the past five years in the Spanish legal system and the changes have involved an important step towards de-judicialisation. The Civil Registry and notaries play a significant role in these matters, in which the use of traditional courts is residual and limited to cases of controversy or cases involving children.

A. *Gender recognition*

240 In Spain, legal gender recognition has been an extra-judicial procedure since its initial regulation in 2007. (94) Prior to this, the Spanish legal system did not have any provisions on this matter, and individuals desiring to change their legal gender had to turn to courts. However, no specific proceeding or substantial requirements were outlined.

241 The Spanish Supreme Court delivered its first decision on this matter in its judgment of 2 July 1987, (95) asserting that the correction of the legal gender of a transgender woman was grounded in rights related to her personality. However, the decision unequivocally imposed the requirement of undergoing gender reassignment surgery, as well as the alignment of the applicant's physical and social appearance with a traditionally feminine role. These criteria were reiterated in subsequent rulings, confirming 'the predominant role of psychological gender over biological gender' in accordance with the

(94) This first regulation was established in Law 3/2007, of March 15, regulating the rectification before the Civil Registry of the mention of a person's sex (hereinafter, Law 3/2007). The Law can be accessed, in Spanish, at <https://www.boe.es/buscar/act.php?id=BOE-A-2007-5585>.

(95) ECLI:ES:TS:1987:4665.

free development of personality as stipulated in art 10 of the Spanish Constitution.

242 Decades later, Law 3/2007 marked a shift towards an administrative procedure before the Civil Registry. The stipulations in its art 4 mandated a diagnosis of gender dysphoria and evidence of specific bodily changes, primarily resulting from hormonal therapy. Thus, a medical or psychological professional had to diagnose gender dysphoria, confirming the ongoing mismatch between the initially recorded gender and the individual's gender identity. Simultaneously, the diagnosis had to rule out any personality disorders causing this incongruence. Secondly, the applicant needed to demonstrate a minimum of two years of medical treatment aimed at aligning their physical characteristics with those associated with the claimed gender. Beyond the human rights concerns for transgender individuals, the law introduced legal ambiguity. It failed to define the standard, predefined, appearance for each gender recognised by Spanish law, creating uncertainty about who conformed to the legal criteria; that is about who did or did not look like a woman or a man. (96) In essence, Law 3/2007 conceptualised legal gender in a pathologising and binary way.

243 Recently, amidst controversy, (97) Law 4/2023, of 28 February, aimed at achieving real and effective equality for transgender individuals and ensuring the rights of the LGTBI community (hereinafter: Law 4/2023), (98) has abolished the previously established requirements. Instead, it has introduced a legal gender recognition proceeding based on the principle of self-determination. Consequently, a person's own declaration of intent is now sufficient to proceed to the change in their legal gender.

244 However, in principle, and in alignment with the previous regulation, only individuals with Spanish nationality can access this proceeding (art 43 of Law 4/2023). The only noteworthy change and flexibility in this regard is outlined in art 50, allowing for the correction of the gender entry and a change of name in documents issued by Spanish authorities for 'foreign individuals who can demonstrate the legal or de facto impossibility of carrying out the correction [...] in their country of origin.' In such cases, the competent authority will request the Ministry of Foreign Affairs, European Union, and Cooperation to gather available information from the relevant Spanish

---

(96) Katrina Belsué Guillorme, 'La Legislación En Torno a La Transexualidad En España: Avances, Debilidades y Paradojas' (2012) 19 Feminismo/s p 222.

(97) On this idea, see: Ruth M Mestre i Mestre, 'Trans Justice Fights Trans Moral Panic' [2022] The Age of Human Rights Journal 59.

(98) The law, in Spanish, can be accessed at <https://www.boe.es/buscar/act.php?id=BOE-A-2023-5366&p=20230301&tn=1#a5-2>.

diplomatic representation regarding the existence of these impediments. The Ministry has the obligation to communicate the available information to the requesting authority within a maximum period of one month.

245 In terms of age, the new regulation expands upon the previous one, which only allowed individuals aged 18 or older to access this registry proceeding. However, it does not do so in the manner prescribed by the Constitutional Court in 2018 when it deemed this age limitation unconstitutional. The Court asserted that any individual under legal age with 'sufficient maturity' and in a 'stable transgender situation' should be able to access the gender registry modification proceeding. (99) Taking a different approach, Law 4/2023, now establishes a tiered system. General authorisation is granted from the age of 16: individuals under 18 but over 16 can initiate the process in their own name without the need for representation. Conversely, those under 16 but over 14 must be represented by their parents, and in the case of disagreement, a legal representative must be appointed for the child.

246 The proceeding outlined in art 44 of Law 4/2023 remains registry-based and consists of four phases. Firstly, the individual must submit a request to the person in charge at any Civil Registry Office of their choice. Upon receiving the request, the Civil Registry is required to schedule an initial appearance for the applicant. This second phase comprises three distinct stages. In the first meeting, the applicant must express their dissatisfaction with their current legal gender and their request for correction. Subsequent to this initial meeting, the person in charge at the CR provides information to the applicant regarding the correction proceeding and its effects. Following this information, the applicant must reaffirm their initial expression of intent. Thirdly, the person in charge at the CR is required to schedule another meeting for the applicant to reiterate their intent within a maximum period of three months. If the reaffirmation takes place, the final stage involves the issuance of a resolution by the person in charge at the CR within a maximum period of one month from the second meeting. No evidence needs to be provided, nor any other person besides the applicant needs to be heard. The CR can only refuse the registration of the change if the person lacks the capacity to form or express their will or if they are attempting to commit legal fraud. (100)

---

(99) Spanish Constitutional Court Decision no 99/2019, of July 18, ECLI-:ES:TC:2019:99.

(100) An attempted legal fraud was precisely the reason for refusing the change in the case of the decision of the Civil Registry of Las Palmas no 1045/2023 of September 18. In the case, a man requested to modify their legal gender to female in order to enjoy some positive action measures in their job. An analysis of this and other similar decisions can be found in

247 While the general proceeding outlined is administratively registry-based, the law envisions non-contentious proceedings in certain cases where greater State control is deemed necessary.

248 On the one hand, a distinct legal gender modification proceeding is established for individuals between the ages of 12 and 14. Section one of the Final Disposition 13 of Law 4/2023 introduced arts 26bisff LJV, which establish a judicial procedure for changing the legal gender for children in this age range. In this process, the judicial authority must 'verify the necessary maturity of the child and the stability of their intent to rectify their gender entry in the registry.' To achieve this, the applicant must provide any documentary or testimonial evidence demonstrating that they 'have consistently been dissatisfied [...] with the gender mentioned in their birth registration.' Importantly, the judicial resolution in these cases cannot be contingent on medical reports or prior adherence to bodily modifications. At the same time, as children under the age of 12 are not allowed to access the legal gender recognition procedure, Spanish law provides them with the possibility to change their name due to reasons of 'sexual identity' (art 48 Law 4/2023). Consequently, all their documentation must be adapted to this change and every private and public authority must treat them according to their desired gender (art 51 Law 4/2023).

249 Furthermore, the law foresees another non-contentious proceeding for those adults seeking gender registry correction for the third time. [101] The individual seeking correction must express before the judge their intent to 'reverse' their previous modification (arts 26sexiesff LJV). Additionally, they must submit any evidence they deem necessary to prove some circumstances that are not specified. It is surprising in this context that there is no explicit prohibition, as seen in the general framework or the regulations for cases involving individuals over the age of 12, against the requirements of medical or psychological reports or bodily modifications.

250 Regardless of the proceeding used for the modification of legal gender, the outcome will be an entry (*inscripción*) in the Civil Registry with constitutive

---

Arnau Nonell I Rodríguez and Laura Esteve Alguacil, 'A Un Año de Su Vigencia: Análisis de La Ley Española 4/2023, de 28 de Febrero, Para La Igualdad Real y Efectiva de Las Personas Trans y Para La Garantía de Los Derechos de Las Personas LGTBI' (2024) 3 Revista IusGénero América Latina <https://revistaiusgenero.com/index.php/igal/article/view/63>.

[101] Article 47 of Law 4/2023 regulates, for the first time in Spanish law, the possibility of changing one's legal gender more than once, referred to as 'reversibility'. In the case of the first 'reversal', ie, a second modification of legal gender, the law foresees the same registry procedure as in the initial correction. However, this is not the case for subsequent modifications.

effects (arts 39 and 91 LRC). (102) This entry allows the interested party to subsequently update the gender field on their documentation, primarily their National Identity Card (DNI) and their passport (art 49 Law 4/2023).

251 Lastly, it is worth noting that the Spanish legal system continues to recognise only two legal genders: male and female. Although earlier versions of the Law had included exploring the possibility of acknowledging a third gender-marker, this was discarded in the final version. (103) However, it has recently become public that a foreign non-binary citizen obtained a judicial decision that forces the Spanish administration to recognise their third gender in their Spanish documents as it is stated in their German passport. (104) This seems to have opened the door for foreign residents in Spain to have their non-binary gender identity recognised while nationals are still forced into binary gender categories. (105)

B. *Name changes*

252 In Spain, the name of a person has three elements (art 50.2 LRC): one personal name (*nombre*) and two family surnames written in a particular order (*apellidos*).

253 Regarding surnames, each parent transmits their first family name to their children. In this way, each surname of a person is given by a parent. Until recently, the surname given by the father was, by default, given first in order and thus, the full name of a person was composed of:

a personal name + their father's first surname + their mother's first surname.

254 Nowadays, this order has to be decided by both parents at the moment of birth. If they cannot agree upon this, the officer of the Civil Registry must decide based on the child's best interests (art 49.2.III LRC). If a person only

(102) Law 4/2023 stipulates that its effects are *ex nunc* and includes specific provisions regarding circumstances related to biological gender and the regulation of gender-based violence (art 46 Law 4/2023).

(103) As of today, to avoid gender binary, Law 4/2023 only provides for the suspension of legal gender determination during the first year of life for intersex new-borns (art 73 Law 4/2023).

(104) See News Desk, 'German national becomes first person in Spain to have non-binary status on ID' (Spain in English, 5 May 2023) <https://www.spainenglish.com/2023/05/05/german-national-spain-non-binary-status-id/> and Javier Ramajo, 'Sexo 'X indefinido': la Policía inscribe a la primera persona extranjera no binaria' (sevillaelDiario.es, 1 January 2024) <https://www.eldiario.es/sevilla/sexo-x-indefinido-policia-inscribe-primera-persona-extranjera-no-binaria_1_10781486.html>.

(105) Javier Ramajo, 'España habilitará la tercera casilla de sexo "indefinido" para personas no binarias en la documentación de extranjeros' (elDiario.es, 17 January 2024) <https://www.eldiario.es/andalucia/espana-habilitara-tercera-casilla-sexo-indefinido-personas-no-binarias-documentacion-extranjeros_1_10823498.html>.

has one filiation relationship determined, their two surnames are the same as those of the parent, who can decide their order (art 49.2.IV LRC). Surnames are not affected by marriage according to Spanish law. Thus, people generally keep the same surnames all their lives. However, certain changes to the surnames can be made during a person's lifetime. (106)

255 Article 53 LRC regulates those minor changes a person can request to the Civil Registry merely by a declaration of intent. These are (a) changing the order, (b) minor linguistic modifications or their translation into other co-official languages, (c) matching the parent's surname modification, (107) and (d) keeping the original surnames after a change in the filiation of a person.

256 Article 54 LRC, on the contrary, regulates the possibility to change the surnames in a more significant manner. These changes require a proper administrative proceeding before the Civil Registry. The procedure, thus, requires that the requested surname is *de facto* being used by the applicant, and legitimately belongs to the applicant (generally meaning that it belongs to their ancestry). However, the resulting two surnames (the ones that have been *de facto* used) cannot belong to the same family line. That is, they cannot both come from the same parent's ancestors.

257 Regarding the personal name, this can only be changed through an administrative proceeding before the Civil Registry if the applicant proves that they already commonly use this name (art 52 LRC). (108) Additionally, the new name must respect the general limitations established for names as regulated in art 51 LRC: (a) a person can only have two simple (single) names or a composed one, (b) the names cannot be contrary to the person's dignity or make their identification confusing, and (c) the person cannot hold the same name as one of their siblings with identical surnames, except if they have died.

258 Even though the regime explained above is the general name change regime, the modification of legal gender can also entail, or not, the choice of a new name. The previous legal gender recognition law, Law 3/2007, made the choice of a new name compulsory after a legal gender modification (art 2.1). Taking into account art 54 of the previous Civil Registry Law, (109) it was impossible for names to be confusing regarding the gender of a person. This

---

(106) Legitimation to personally request these changes is set at 16 years old (art 57 LRC).

(107) According to art 57 LRC, the change of a person's names affects all their descendants.

(108) Again, people 16 or older can personally apply for this change.

(109) Law of July 8, 1957, on the Civil Registry.

obligation to change the personal name and the prohibition of confusing names regarding sex was abolished with the passing of the two new laws. Additionally, art 44.4.II of Law 4/2023 now makes it optional for the applicant to choose a new name in the same legal gender modification proceeding.

259 Regardless of which proceeding is followed, the change of name or surname is recorded in an entry in the Civil Registry, which has constitutive effects (art 57 LRC).

C. *Support of adults with disabilities*

260 The Spanish legal system has undergone a profound reform in the matter of the support of adults with disabilities. Law 8/2021 modified the Civil Code and other laws in order to adapt the system to the UN Convention on the Rights of Persons with Disabilities (hereinafter: Convention of New York). The new system is not focused on protection but on the promotion of the autonomy of every person. Thus, the concept of best interests of the person with disabilities has been removed as a principle and it is the will and wishes of the person that have to prevail in every decision that affects them (art 249 CC). Also, substitution and representation in decision-making is framed as an exceptional last resort (art 249.3 CC), even in judicial support measures (art 269 CC). This change of paradigm is aimed at adults with cognitive, intellectual, or sensory disabilities that may hinder their full and effective participation in society on an equal basis with others. Underage children are still subject to parental responsibilities that have an important protective nature, even if certain advances are being developed in order to promote the autonomy of mature children.

261 The new system also entails important advances in de-judicialisation. Unlike the previous incapacitation system, judicial proceedings and measures are now designed to be subsidiary and accessory to informal arrangements and voluntary measures constituted through a notarial proceeding (art 255.5 CC).

262 The types of support for adults can be divided into three groups, among which the legal system establishes an order of preference. The first is the voluntary formal system, in which support measures are designed with the person with disabilities themselves and given legal force through a notarial procedure. If no voluntary measures are found, the law recognises the possibility for an informal support system to be set in place: *de facto* guardianship (*guarda de hecho*). In case neither of the previous types of measures are in place or they are not adequate or sufficient to guarantee the social and legal participation of the person with disabilities, the law foresees a judicial system of support: *curatela*.

1. *System of voluntary formal support measures*

263 According to art 255 CC, any person of full age or an emancipated minor in anticipation or appreciation of the concurrence of circumstances that may hinder the exercise of their legal capacity on an equal footing with others may foresee or agree in a public deed to the support measures relating to their person or property. The person can be a person with disabilities at the moment of formalisation of the instrument. A notary has to evaluate whether the person has sufficient capacity to understand the meaning of the support measures. (110)

264 Voluntary support measures are essentially atypical. (111) That is, there are not prescribed legal forms for them, as they are envisioned as ad hoc instruments for each particular person and their circumstances. (112) They may establish the regime of action, the extent of the powers of the person or persons who are to provide them with support, or the manner of exercise of the support. They may also include dispositions regarding any appropriate control measures or bodies, safeguards to prevent abuse, conflicts of interest or undue influence, and the mechanisms and deadlines for reviewing the support measures, in order to ensure that the will, wishes and preferences of the supported person are respected.

265 The main legal instruments that can be used to formalise these voluntary measures are mandate contracts (*mandatos*) (113) and/or a unilateral legal act similar to powers of attorney (*poderes preventivos*). (114) Both are formalised in a public deed by a notary and were first introduced in the Spanish legal system as a way to foresee one's future disability by Law 41/2003 (introduction in art 1732 CC). (115) They can relate to a present and future situation of the person (art 256 CC) or exclusively a possible future situation (art 257 CC). In this case, they must establish a way to determine the time of their entry into force. Unless determined otherwise, the rules applicable to *curatela*

---

(110) María Jesús Moro Almaraz, 'Artículos 256–262' in María Paz García Rubio, María Jesús Moro Almaraz and Ignacio Varela Castro (eds), *Comentario articulado a la reforma civil y procesal en materia de discapacidad* (Thomson Reuters-Civitas) 269, 277.

(111) Almudena Castro-Girona Martínez, 'Artículo 255' in María Paz García Rubio, María Jesús Moro Almaraz and Ignacio Varela Castro (eds), *Comentario articulado a la reforma civil y procesal en materia de discapacidad* (Thomson Reuters-Civitas) 262.

(112) Moro Almaraz (n 110) 280–281.

(113) The general regulation of this type of contracts can be found in arts 1709ff CC.

(114) Moro Almaraz (n 110) 271.

(115) Its use has rapidly increased. From 498 in 2008 to 1,354 in 2021, according to the data of the Centro de Información Estadística del Notariado, available at: <https://www.notariado.org/liferay/web/cien/estadisticas-al-completo>.

regulate all matters not provided for in the voluntary instrument (art 259 CC).

266 In principle, powers and mandates subsist even if other voluntary or judicial measures are established (art 258.1 CC). They can be automatically terminated by operation of the voluntarily established causes in the particular instrument (art 258.3 CC); or in the case of separation, divorce or annulment, when the person invested with powers was the spouse of the person with disabilities, unless expressed otherwise (art 258.2 CC). Additionally, they can be judicially terminated if the person with powers is subject to any legal cause for removal (arts 258.4 and 278 CC). This judicial procedure can be initiated by any person with standing to apply for a judicial measure of support (116) or the carer, if there was one.

267 The authorising notary shall, *ex officio* and without delay, communicate the public document containing the support measures to the Civil Registry, which will enter it in the individual's file in the registry.

2. *Informal support measures*

a) *Guarda de hecho*

268 The Spanish Supreme Court has defined this concept as the situation in which 'a person assumes the functions and duties of the protection of a minor child or an "incapacitated" adult without a specific legal duty'. (117)

269 The Law of 24 October 1983 introduced the concept of *guardia de hecho* as the recognition of a transitory situation. Pursuant to Law 8/2021, this is now designed to be a proper, and the most common, institution of support for adult persons. (118) It operates *ex lege*, automatically, once a person assumes the care and support of another with disabilities for whom efficient voluntary or judicial support measures have not been established (art 263 CC). This *de facto* assumption of care can be accredited by a notarial act (*acta de notoriedad*).

270 The person who assumes this care has the right to the reimbursement of expenses and compensation for any harm caused to them during the exercise of their functions, of which the estate of the person cared for is responsible (art 266 CC).

---

(116) See para 277.

(117) See the Spanish Supreme Court decision of October 27, 2014, ECLI-:ES:TS:2014:4243.

(118) Antonia Nieto Alonso, 'Artículo 263' in María Paz García Rubio, María Jesús Moro Almaraz and Ignacio Varela Castro (eds), *Comentario articulado a la reforma civil y procesal en materia de discapacidad* (Thomson Reuters-Civitas) 295.

b) *Judicial control*

271 This situation, even if it is of automatic operation, is subject to certain judicial control of its exercise.

272 First of all, art 265 CC establishes that the judicial authority may at any time, *ex officio*, at the request of the public prosecutor or at the request of any interested party, require the carer to report on their actions (art 52 LJV). In this respect, any adequate safeguards may be established through a non-contentious procedure according to art 87 LJV. The competent authority is the JPI of the place of residence of the person with disabilities.

273 Additionally, there are certain decisions regarding the person with disabilities that require representation. (119) In this sense, art 264 CC establishes that the *de facto* carer will need to seek judicial authorisation to represent the person with disabilities whom they are taking care of. This does not imply that the carer generally has representation powers regarding the person with disabilities, but rather they have authorisation as regards a particular act

(119) These are listed in art 287 CC and are:

1. To carry out acts of personal or family significance when the person concerned is unable to do so themselves, except for the legal provisions on internment, informed consent in the field of health or other special laws.

2. To dispose of or encumber real estate, commercial or industrial establishments, assets, or rights of special personal or family significance, movable property of extraordinary value, precious objects and securities not listed on official markets of the person with support measures, to lease real estate for an initial term exceeding six years, or to enter into contracts or perform acts of a dispositive nature that are subject to registration. The sale of pre-emptive subscription rights on shares is exempted. The disposal of the assets mentioned in this paragraph shall be carried out by direct sale unless the Court considers that disposal by judicial auction is necessary in order to better and fully guarantee the rights and interests of the holder.

3. To dispose free of charge of assets or rights of the person with support measures, except for those that are of little economic relevance and lack special personal or family significance.

4. To waive rights, as well as to settle or submit to arbitration issues relating to the interests of the person under guardianship, except those of little economic significance. Judicial authorisation shall not be required for consumer arbitration.

5. Accepting any inheritance without the benefit of inventory or repudiating the inheritance or gifts.

6. To make extraordinary expenditures on the assets of the person they are supporting.

7. File a lawsuit on behalf of the person they are supporting, except in urgent or small claims cases. Judicial authorisation shall not be required when the person with a disability requests a review of the judicial decision in which the support had previously been determined.

8. To give and take money on loan and to provide a guarantee or surety.

9. To enter into life insurance, life annuity and other similar contracts, when these require investments or contributions of an extraordinary amount.

granted through a non-contentious procedure (art 52.3 LV). Judicial authorisation to act as a representative may be granted after verification of its necessity, under the terms and with the appropriate requirements to the circumstances of the case. The authorisation may comprise one or more acts necessary for the performance of the support function and must be exercised in accordance with the will, wishes, and preferences of the person with disabilities. The judicial authority personally interviews the person with disabilities and may request an expert report to fully ascertain their situation. It may also summon to the hearing as many persons as it deems necessary depending on the act for which authorisation is requested.

c) *Extinction*

274 According to art 267 CC, the *guarda de hecho* is to be terminated in different situations.

275 First of all, it terminates when the reasons for which it was granted cease to exist. That is, when the person does not need support in order to fully participate in society. Also, when they decide to organise their provision of support in another manner, that is, when they adopt a voluntary measure that is incompatible with the *guarda de hecho*. The carer can also terminate their position. In this case, they first inform the public administration in the respective Autonomous Community entrusted with the functions of promoting the autonomy and assistance of persons with disabilities. Finally, it can also be judicially terminated at the request of the public prosecutor or whoever is interested in providing support for the person under *guarda de hecho* if judicial authority deems it appropriate.

3. *Judicial support measures*

276 According to art 269 CC, subsidiarily to both previous systems, courts can establish a curatorship (*curatela*). Its scope has to be proportional to the needs of the person with disabilities, respecting their maximum degree of autonomy and always tending to their will, wishes, and preferences. In case the person with disabilities had not voluntarily designated a carer, art 276 CC includes a preferential order for the judge to observe. More than one carer may be appointed (art 277 CC).

277 Judicial support measures can be established through a non-contentious (arts 42ff LV) or a contentious proceeding if opposition was raised during the non-contentious proceeding (arts 748.1 and 756.1 LEC). The person with disabilities themselves, their spouse or partner, their descendants, ascendants, or siblings, as well as the public prosecutor may initiate these proceedings (arts 42bis.a.3 LJV and 757 LEC).

278 The carer has a right to remuneration and to the compensation of their expenses (art 281 CC). They can excuse themselves from their functions (arts 279 and 280 CC), in a non-contentious proceeding (art 50 LJV). According to art 282 CC, the carer shall be obliged to maintain personal contact with the person they are to support and to perform the duties entrusted to them with due diligence. The carer endeavours to enable the person with disabilities to develop their own decision-making process. Entrusting the carer with the power of representation occurs only in exceptional cases and the acts that require it are detailed in the judicial decision (art 269 CC).

279 Article 268 CC establishes that the conditions of the curatorship shall be reviewed every three years (which can be extended to up to six years if the judge considers this to be justified). In any case, any relevant change of circumstances can provoke their judicial review (art 757.1 LEC).

280 The judicially established curatorship may include any safeguards and control mechanisms that the judge deems necessary, both when establishing the curatorship for the first time or after having received information about the exercise by the carer after being judicially requested (art 270 CC). There are some legal safeguards put in place such as: (a) certain limitations regarding who can be a curator (art 275 CC); (b) the possibility to constitute an economic guarantee by the curator to ensure the fulfilment of their duties (art 284 CC); (c) the possibility to remove a curator (art 278 CC), according to a non-contentious proceeding (art 49 LJV); (d) the obligation to form an inventory of the person's estate if the carer has been granted representative powers (arts 285 and 286 CC, and 47 LJV); and (e) the need to obtain judicial authorisation regarding certain decisions a carer with representation powers may make (arts 287 and 290 CC).

281 The judicial support measure can also be a 'self-curatorship' (arts 271–274 CC), that is, when the person, anticipating a possible development of disabilities, themselves choose who they want the person that provides them support to be and under which circumstances and/or conditions. The judge can only disregard these voluntary determinations if there are grave circumstances unknown to the person.

282 The curatorship terminates upon the death of the person who needed the support or when it is no longer needed, or a different measure is established. This second situation requires a judicial decision and a judicial process of accountability (arts 292 CC and 51.4 LJV).

V. Conclusions

283 Even if courts still play a major role, especially in matters regarding children, Spanish law provides a good example of increasing de-judicialisation in family and succession law matters.

The year 2015 likely marked the onset of this trend by profoundly developing non-contentious proceedings and by transferring many functions to non-judicial agents such as the LAJ and notaries. However, this was not an isolated occurrence. Recently, in 2021, the care and support system for adults with disabilities was profoundly changed both in its conception and reigning principles, as well as regarding its procedural aspects. Support measures are nowadays mainly established extra-judicially. The latest reform in matters of legal gender recognition also show a firm commitment to extra-judicial proceedings and support for administrative or non-contentious proceedings. **284**

SWEDEN

by *Laima Vaigė* (*)

I. Introduction

A. *Certain key principles*

The Swedish legal system is built on the principle of openness and accessibility of public documents. (1) Parties are given broad autonomy to act on their own in certain areas that are traditionally considered private matters. These two principles, the principle of publicity and the principle of party autonomy, are significant in the areas discussed in this text. **1**

Access to first-instance courts is ensured. People have the right to legal aid in, inter alia, family and succession disputes, provided that a certain income threshold is not exceeded. (2) Disputes between private parties are dealt with by the general courts. Administrative courts may also deal with such cases, for instance when they relate to matters of civil status registration. There are no specialised family courts. Specialised courts in Sweden include administrative courts, rent and tenancy tribunals, land and environment courts, migration courts, and the patent and market courts.

There are no Latin notaries in Sweden. The Swedish word *notarie* means a law clerk; (3) the law clerks work at courts. Furthermore, a notarius publicus is yet another profession; they are appointed by County Administrative Board (*Länsstyreslse*) and provide other functions in Sweden than notaries in certain other European Union (EU) Member States.

Besides courts, child welfare committees (*socialnämnd*) (4) are significant in family law, while the Tax Agency (*Skatteverket*) has an important role to play **2**

(*) Associate Professor, Senior lecturer in private international law at Uppsala University. I want to extend my sincere thanks to Marie Linton for their comments on this report, and Maarit Jänterä-Jareborg for discussions on the topics covered in this text. All remaining mistakes are my own.

(1) According to the Freedom of Press Act, which is an Act of constitutional importance in Sweden: 'To encourage the free exchange of opinion and availability of comprehensive information, every Swedish citizen shall be entitled to have free access to official documents.' Freedom of the Press Act (1949:105), Chapter 2 Sec 1.

(2) The annual income must not exceed 260,000 Swedish Krona (SEK), in accordance with Sec 6 of the Legal Aid Act (1996:1619).

(3) Notarienämnden is a Law Clerks Board, and it is not independent but works in connection with the Swedish National Courts Administration.

(4) Alternative translation to a 'social welfare committee', found in the Glossary for National Courts (2019), is a 'social welfare board', or simply 'social services', terms sometimes

in issues related to civil status registry. As reported in this chapter, decisions of the Tax Agency are not considered constitutive, ie, they do not establish a certain legal status or a legal relationship in a similar way as a court decision does. In contrast, decisions of courts, social welfare committees, special estate administrators, estate distributors, chief-guardians, property distributors, and the Enforcement Agency are constitutive and, where necessary, enforceable.

3 Sweden does not have extrajudicial divorce and it is not considered to have 'authentic instruments' in the areas of neither parental responsibility (5) nor succession, (6) as discussed further in this report. Instead, in preparatory works (government proposals) and legal literature, consider the decisions of non-judicial institutions are considered comparable/equivalent to court decisions, provided that the decision-making institutions are impartial and independent, and the decisions are constitutive and irrefutable.

B. *On legal sources*

4 Sweden is an example of a civil law system and a dualist legal system that treats international law and domestic law as separate. Transposition of international law into the domestic system is required. Sweden ratified the UN Convention on the Rights of the Child (the CRC) in 1990, and it had been considered as fully incorporated, but later on, a political decision was taken to strengthen the position of this Treaty in Sweden even further. Since 1 January 2020, the entire text of the CRC is officially incorporated in the Swedish legal system, (7) which means that the CRC is directly applicable law, in its entirety. This legal change has been rather hard to grasp for private-law lawyers, considering that the CRC is not very specific. In short, it has served as a nudge (or one of many reasons) for an ongoing review of legal acts on parenthood and parental responsibility, and changes in private international law, to be discussed further in this report.

5 In general, it is difficult to find translations of Swedish legal acts in English. Databases on legislation and case-law are in Swedish. Unofficial translations

---

used in literature. They are responsible for individual and family care across all ages (excluding financial assistance).

(5) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023, available via JUNO database), Commentary on the Brussels IIb Regulation, Art 46.

(6) Heinz Peter Mansel, 'Acceptance of Authentic Instruments' in Alfonso-Luis Calvo Caravaca, Angelo Davi, Heinz Peter Mansel (eds), *The EU Succession Regulation* (Cambridge 2016) Commentary on Art 59, p 638, para 13.

(7) The United Nations Convention on the Rights of the Child Act (2018:1197).

of some statutes to English can be found on the websites of the Ministry of Justice, (8) and the Commission of European Family Law (CEFL). (9) Only the Swedish texts are original and binding, translations are not 'official' in the full sense of the word. There are many discrepancies in translations. Unless otherwise specified, this national report will be using the Swedish/English glossary developed for the Swedish courts (this text uses the version from 2019). (10) The Swedish terms are provided in parallel to English translations, when considered important.

6 Important statutes or legislative changes are preceded by legal inquiries, ie, detailed documents, published in the Swedish Government Official Reports (*Statens Offentliga Utredningar*, hereinafter: SOU), which include background information and legal analysis. More important still are the Government proposals (hereinafter: Prop). Within the hierarchy of legal sources, the Government proposals should be seen as authoritative in matters of interpretation. They are relied on by courts and consulted by legal practitioners. This paper will also refer to SOUs that are less authoritative, but still useful to English readers, because they always include a short summary in English, useful for international readers.

7 The role of precedent (*prejudikat*) from the Supreme Court is also significant. Although it is considered controversial whether precedents are legally binding as a source of law, (11) they are generally followed by courts in Sweden. Precedents are published in the NJA (*Nytt Juridiskt Arkiv*) series. Courts in Sweden sometimes refer to legal literature and more often to commentaries on statutes. Sweden does not have a constitutional court. An *ex ante* examination of draft legislative proposals is undertaken by the Council of Legislation (*Lagrådet*), which includes justices from the Supreme Court and Supreme Administrative Court. However, the opinions of the Council of Legislation are only advisory and are not always followed by the legislator. (12) The suggestions in legal inquiries (the SOUs) are also not necessarily followed in Government proposals.

---

(8) Ministry of Justice, Swedish Statutes in Translation (2015), <https://www.government.se/government-policy/judicial-system/swedish-statutes-in-translation---judicial-system/> accessed 12 June 2025.

(9) CEFL, Sweden: Parental Responsibilities, <https://ceflonline.net/wp-content/uploads/Sweden-Parental-Responsibilities-Legislation.pdf> accessed 22 June 2025.

(10) Swedish/English Glossary of the Swedish Courts (Sveriges domstolar 2019), <https://www.domstol.se/globalassets/filer/gemensamt-innehall/for-professionella-aktorer/svensk-engelsk_ordlista_2019.pdf> accessed 25 June 2025.

(11) Christina Ramberg, 'Prejudikat som rättskälla' (2017) SvJT s 773.

(12) In fact, in the last decade, the government has proposed various legal changes that ran counter to the suggestions of *Lagrådet*.

8 Specific sources of substantive family law and private international law shall be discussed further in separate chapters. Here, two pieces of legislation must be mentioned, which are of significant relevance for judicial procedures: the Code of Judicial Procedure (*Rättegångsbalk*, 1942:740) and the Court Matters Act (*Lag om domstolsärenden*, 1996:242). The Court Matters Act provides that when a decision is appealed to the court of appeal (*hovrätten*) or the Supreme Court (*Högsta domstolen*), a leave to appeal is needed. (13)

C. *Contents of foreign law*

9 The Code of Judicial Procedure entrenches the principle that any evidence can be submitted to the court, regardless of how it was obtained. (14) The court is free to determine the evidentiary value of the submitted information. From an administrative law perspective, authorities have the duty to ensure that the matter is sufficiently investigated, (15) which may require all necessary information, regardless of whether it is obtained abroad or relates to foreign law concepts.

10 Furthermore, a principle that a party shall invoke foreign law if it needs to be considered is also implied in the Code of Judicial Procedure. (16) There have been cases where a party in dispositive cases (ie, in those that can be settled by agreement between the parties) has argued that foreign law should have been applied instead of Swedish law, but has only done so on appeal, and the higher courts have treated this as an unacceptable change of claim. (17) The party might need to provide information on the contents of the foreign law. (18) There have been no legislative changes in this part of the Code of Judicial Procedure. Since 1995, however, Sweden has been a member of the EU, which has adopted a number of Regulations in this area. The rules of private international law contained in the EU Regulations are directly applicable and binding, and Swedish courts therefore apply the choice-of-law rules contained in the Regulations, and subsequently foreign law, if necessary, even in dispositive cases, without a specific request from a party. In other words, if foreign law is applied as a result of EU Regulations, it should be applied *ex officio* as a result of the direct applicability of EU Regulations.

---

(13) Court Matters Act (1996:242), Sec 39–40.

(14) Code of Judicial Procedure, Chapter 35 Sec 1.

(15) Administrative Act (2017:408), Sec 23.

(16) Code of Judicial Procedure, Chapter 17 Sec 3 para 2.

(17) Maarit Jänterä-Jareborg, *Svensk domstol och utländsk rätt. En internationell privat- och processrättslig studie* (iUstus 1997) 168.

(18) Code of Judicial Procedure, Chapter 35 Sec 2.

D. *Declaratory judgments and declarations*

According to the Code of Judicial Procedure, it is possible to apply to the court to determine whether a certain legal relationship exists, by means of a request for a declaratory judgment (*fastställelseyrkande*). (19) This applies even in family and succession law. It is also significant that Chapter 41 of the Code of Judicial Procedure includes provisions on Preservation of Evidence for the Future: **11**

Anyone desiring to take and preserve evidence for the future shall apply to the court. The application shall state the fact expected to be established by the evidence, the nature of the evidence, the grounds claimed by the applicant in support of the proposed taking of evidence and, if possible, the other persons whose interest may be at stake. (20)

This applies, among other things, to various declarations in family and succession matters. With some exceptions, this will not be discussed separately under each following chapter. Usually, the provisions in Chapter 41 of the Code of Judicial Procedure relate to preserving the evidence for future court proceedings, but it can also be that a declaration helps to avoid a court proceeding. Furthermore, when a certain institution acts as a court (that is, undertakes independent and compulsory decision-making), the declarations can be submitted to that institution, for instance, a special estate administrator, estate distributor or executor of the will. (21) **12**

E. *Definition of 'court'*

There is no straightforward definition of 'court' that applies to all judicial and extra-judicial authorities in Sweden. The website of the Swedish National Court Administration (*Domstolsverket*) lists only general and specialised courts. (22) The Code of Judicial Procedure contains provisions on the criteria applicable to 'decisions' and 'judgments' in judicial procedures. (23) Furthermore, conditions for adopting a 'decision' by an administrative **13**

(19) Code of Judicial procedure, Chapter 13 Sec 2.

(20) Ibid, Chapter 41 Sec 2. The text in English is available here: Swedish Government, Code of Judicial Procedure, <https://www.government.se/contentassets/a1be9e99a5c64d1bb93a96ce5d517e9c/the-swedish-code-of-judicial-procedure-ds-1998_65.pdf> accessed 24 June 2025.

(21) Internationella rättsförhållanden rörande arv (International legal relationships regarding succession), SOU 2014:25, p 99.

(22) Sveriges Domstolar (Courts in Sweden), <https://www.domstol.se/hitta-domstol/> accessed 31 May 2025.

(23) Code of Judicial Procedure, Chapter 17.

authority, its contents and the procedure of appeal are defined in the Administrative Act. (24)

14 The analysis of whether a particular institution can be considered a court in cross-border family and succession law can be found in legal commentaries, preparatory works, and/or the SOUs. The said analysis is most relevant for this research, and it is referenced further in relevant parts of this report.

15 In legal literature, discussions on the definition of 'court' focused mostly on EU public law (25) or on the definition of the so-called Foreign Intelligence Court (*Försvarsunderrättelsedomstolen*) as a 'tribunal' from the perspective of the European Convention on Human Rights (ECHR). (26) Competences of this institution were later analysed by the Grand Chamber of the European Court of Human Rights (ECtHR). (27) The ECtHR has found deficiencies in the current regulation in Sweden (violation of the right to private life under Article 8 of the Convention); (28) a reform is underway. The ECtHR has also established certain functional criteria for the definition of a court.

16 Although the definitions of court differ somewhat in national law, EU law, and under the ECHR, it might be claimed that the criteria of impartiality and independence are also important in the field of private international law. The said requirements have been among the reasons for certain reforms in Sweden, to be discussed further in this report. (29)

F. *Recognition and enforcement*

17 Recognition and enforcement of foreign judgments generally require a clear legal basis in Swedish law. (30) If a foreign judgment is recognised in Sweden, it has legal force/binding effect here. In general, recognition means that the case cannot be tried afresh by Swedish courts (*negativ rättskraft*), and if the foreign judgment is invoked in new proceedings in Sweden, concerning another issue, the Swedish judgment can be founded on the foreign judgment (*positiv rättskraft*).

---

(24) Administrative Act (2017:408), Sec 28–49.

(25) Dissertation was defended in 2010 on the concept of the court under EU law, but private international law was not included in the analysis. Henrik Matz, *Begreppet domstol i EU-rätten* (Uppsala University 2010).

(26) Several papers were published, calling for a functional definition of the concept of a 'court' in Sweden, focusing entirely on the Foreign Intelligence Court.

(27) *Centrum för Rättvisa v Sweden* App no 35252/08 (ECtHR, 25 May 2021).

(28) Ibid, para 368.

(29) For instance, in international succession, a special estate administrator is appointed, and a requirement of impartiality applies to this person. In contrast, in purely national scenarios, a party to the estate might be appointed as estate administrator.

(30) Enforcement Code (1981:774), Chapter 3 Sec 2.

Enforcement can take place in Sweden after a foreign judgment has been declared enforceable by the competent exequatur authority. The only enforcement authority in Sweden is the Enforcement Agency (*Kronofogden*), and the Agency will enforce the foreign judgment under the Enforcement Code in the same manner as a Swedish judgment that has become legally binding. In some cases, when EU Regulations apply, foreign judgments can be enforced more or less directly –without the need for a declaration of enforceability – by a simple application to the Swedish Enforcement Agency. **18**

II. Family law

The main statutes in substantive family law are: the Marriage Code (*Äktenskapsbalk*, 1987:230), the Act on Registered Partnerships (*Lag om registrerat partnerskap*, 1994:1117), the Act on Cohabitation (Sambolag, 2003:376), and the Children and Parents Code (*Föräldrabalk*, 1949:381). Since 2009, marriage is available to same-sex couples, but the Act on Registered Partnerships continues to apply to couples who did not convert their registered partnerships into a marriage. A registered partnership has the same legal effects as a marriage in family law, hence it will not be discussed separately, unless it is considered necessary to point out differences. Cohabitation does not need to be registered and applies to a couple living together, provided that neither of them is married or in a registered partnership. **19**

In addition to courts, social services (*socialtjänst*) to the family are very important in family law matters. The main institution under the Act on Social Services (2001:453) (31) and other related legislation is the *socialnämnd* (social welfare committee). It plays a key role in family law issues such as adoption, paternity and parenthood, custody, residence, and rights of access. Furthermore, the Tax Agency has been responsible for civil registration in Sweden since 1991, in accordance with the Population Registry Act (*Folkbokföringslag*, 1991:481). For many centuries until then, the Church of Sweden was responsible for the registration of personal status events. Since the 1990s, the Church of Sweden has primarily served a religious function in society. (32) **20**

In private international law of the family, these sources of domestic law are most relevant: the Act (1904:26, p 1) on Certain International Legal Relationships concerning Marriage and Guardianship, the Act (1990:272) on **21**

(31) Act on Social Services (2001:453).

(32) It is still socially and perhaps even politically significant. Although the King of Sweden is no longer the head of the Church of Sweden, he must still be a member of the Church of Sweden, according to the constitutional Act of Succession (1810:0926).

Certain International Questions relating to the Property of Married and Unmarried Couples, the Act (2019:234) on Certain International Questions relating to the Property of Married and Unmarried Couples, the Act (1985:367) on Parenthood in International Situations, and the Act (2018:1289) on Adoption in International Situations.

22 Sweden participates in most of the EU PIL regulations in this area. It does not participate in the Rome III Regulation, which may lead to the application of a divorce law that does not ensure the right to divorce, without any substantive conditions or requirements. A so-called Nordic exception applies to Sweden under the Brussels IIb Regulation; (33) the Convention of 6 February 1931 Containing Certain Provisions of Private International Law Regarding Marriage, Adoption and Guardianship, with final Protocol, 126 LNTS 121, applies in relation to Denmark, Finland, Iceland, Norway and Sweden. From the perspective of the Brussels IIb Regulation, it is relevant that the said Convention has precedence over the Regulation between Sweden and Finland. (34)

A. *Divorce and legal separation*

1. *Right to divorce*

23 The Marriage Code (1987:230) provides for the right to divorce, (35) and the competent authority is the district court (*tingsrätt*) in the place where either of the spouses are habitually resident. (36) Chapter 5 Section 1 of the Marriage Code provides for the right to divorce in the case of joint application of both spouses, and Section 2 provides the right to divorce to a single spouse. If both spouses want to end their marriage, a reflection period may apply, (37) and in case only one spouse applies, the reflection period applies. If neither of the spouses are habitually resident in Sweden, the Stockholm district court has jurisdiction. (38)

24 The application can be submitted electronically. The fee for submitting the divorce application, by both spouses or one spouse, is 900 Swedish Krona

(33) Art 94 (2) of the Regulation.

(34) More on sources of private international law in Sweden, in English, see Michael Hellner, 'Sweden' in Jürgen Basedow et al (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 2535–2548.

(35) Marriage Code (1987: 230), Chapter 5 Sec 1 and 2.

(36) Ibid, Chapter 14 Sec 4.

(37) If both spouses agree to divorce, the reflection period applies only when there is a child (children) under 16, residing with the divorcing spouse who has custody over said child. The second possibility is that both spouses ask for a reflection period.

(38) Marriage Code (1987: 230), Chapter 14 Sec 4.

(SEK). ([39]) The reflection period, if it applies, is not very long. After six months have lapsed, and either of the spouses confirm their wish to divorce, the district court adopts a decision on divorce. ([40])

25 Since 1974, there has been no institute of legal separation or annulment of marriages in Sweden. If the spouses had lived separately for at least two years, each spouse has the right to divorce without any reflection period. ([41]) If the marriage is bigamous, likely to have been forced, or was entered into prior to the age of 18, or if the spouses are closely related (full siblings, parents, children), a divorce can be obtained without a reflection period, after an application of either of the spouses, or a public prosecutor. ([42]) After recent reforms in private international law in Sweden, such marriages concluded abroad should not be recognised in Sweden, as a principle. ([43])

2. *Ancillary matters*

26 The Marriage Code provides that if the court has jurisdiction to deal with divorce, the court may deal with ancillary matters. ([44]) However, there is no duty to resolve all the issues during the divorce proceedings. Similarly, the rules in Act 1904 are formulated to give discretion to courts to deal with parental responsibility issues, but do not require them to do so. ([45])

27 According to the Marriage Code, courts dealing with a divorce case cannot deal with issues of parental responsibility if there is a dispute between the parents and the applicant did not participate in an obligatory information meeting (*informationssamtal*). This new requirement applies from 1 March 2022. ([46]) The information meeting does not cost anything, and it is regulated by the Children and Parents Code, ([47]) the Social Services Act ([48]) and the Act (2021:530) on Information Meeting. The social welfare committee in the municipality of the child's habitual residence has the responsibility to organise the meeting when the parents are not in agreement. ([49]) The social

---

([39]) Swedish Courts, information on divorce and matrimonial property division (in Swedish), <https://www.domstol.se/amnen/familj/skilsmassa-och-bodelning/skilsmassa/ansok-gemensamt-om-skilsmassa-blankett/> accessed 1 June 2025.

([40]) Marriage Code (1987: 230), Chapter 5 Sec 3.

([41]) Ibid, Chapter 14 Sec 4.

([42]) Ibid, Chapter 5 Sec 5.

([43]) Act (1904:26), Chapter 1 Sec 8.

([44]) Marriage Code (1987: 230), Chapter 14 Sec 5.

([45]) Act (1904:26, p 1), Chapter 3 Sec 6.

([46]) Marriage Code (1987: 230), Chapter 14 Sec 5.

([47]) Children and Parents Code (1949:381), Chapter 6 Sec 17 c.

([48]) Act (2001:453) on Social Services, Chapter 5 Sec 3 a.

([49]) Act on Information Meeting, Sec 2.

welfare committee then issues a certificate (*intyg*, also translated as statement) that confirms that the meeting took place. (50) The parents can use the said document for a one-year period, in order to initiate the court proceedings. The parents are also offered the possibility to have cooperation talks (*samarbetssamtal*) (51) but are free to refuse it, while the information meeting is not negotiable, in order for the court to be able to deal with parental matters.

3. *Jurisdiction in cross-border cases*

28

Act (1904:26, p 1) on Certain International Legal Relationships Concerning Marriage and Guardianship applies in cross-border cases, when the Brussels IIb Regulation is not applicable, and on certain issues that the Regulation does not regulate. Chapter 3 Section 2 provides that the Swedish court has jurisdiction in cross-border divorce cases if both spouses are Swedish nationals, (52) the applicant is a Swedish national and has a habitual residence (*hemvist*) in the State or previously had a habitual residence in Sweden as an adult, (53) if the applicant does not have Swedish nationality but has been habitually resident in Sweden for at least one year, (54) if the defendant has a habitual residence in Sweden, (55) or an issue arises about the marriage invalidity when the marriage was registered by the Swedish authority, (56) and in other cases, provided that there are special circumstances (*särskilda skäl*) to hear the case in Sweden. The latter applies if either of the spouses is a Swedish national or the applicant cannot raise the claim in the State of nationality or habitual residence (*forum necessitatis*). Regarding registered partnerships, the Swedish courts always have jurisdiction to dissolve registered partnerships concluded under Swedish law (57) (that is, concluded prior to 2009), regardless of the nationality or habitual residence of the partners. If the Swedish court has jurisdiction under Brussels IIb or the Act of 1904, Swedish law applies to matters of divorce. (58)

---

(50) Ibid, Sec 8.
(51) In accordance with the Act on Social Services, Chapter 5, Sec 3 para 1.
(52) Ibid, Chapter 3 Sec 2 para 1.
(53) Ibid, Chapter 3 Sec 2 para 2.
(54) Ibid, Chapter 3 Sec 2 para 3.
(55) Ibid, Chapter 3 Sec 2 para 4.
(56) Ibid, Chapter 3 Sec 2 para 5.
(57) Act on Registered Partnerships, Chapter 2 Sec 4.
(58) Act (1904:26), Chapter 3 Sec 4.

Act (1904:26, p 1) on Certain International Legal Relationships concerning Marriage and Guardianship does not provide a clear *lis pendens* rule, but Chapter 3 Section 11 includes a rule, which states that if divorce proceedings between the same parties are pending abroad, the Swedish court may decide to stay the proceedings if it can be assumed that the decision is going to have legal force in Sweden. According to Chapter 3 Section 7 of the Act (1904:26, p 1), a court decision that is adopted in a foreign State will have legal effect in Sweden ([59]) if the spouses were habitually resident or nationals of that State or there was another important reason for the foreign court to take on jurisdiction. **29**

Once the Swedish court adopts a decision on divorce, which becomes final, it shall immediately notify the Tax Agency. ([60]) This is also applicable to situations when the Swedish court is addressed with an application under Article 30 of the Brussels IIb Regulation that allows the recognition of a decision adopted in another Member State to be challenged. **30**

4. *Cross-border recognition of divorces*

As a main rule, court decisions issued abroad do not acquire legal effect in Sweden, unless there is a legal basis ([61]) for it; such court decisions that lack a legal basis may only have an evidentiary value in new proceedings in Sweden. There are many different rules on cross-border recognition of divorces and separations in Sweden, as summarised in the table below. **31**

Table 1. Rules applicable to cross-border recognition of divorces in Sweden

Applicable instrument	**Applies in relation to decisions on divorce that come from:**
Brussels IIb Regulation	EU Member States (but not Finland and Denmark)
Ordinance (1931:429) on Certain International Legal Relationships Concerning Marriage, Adoption and Guardianship	Nordic States (has precedence over Brussels IIb Regulation, when it comes to Finland)
Act (1936:79) on the Recognition and Enforcement of Judgments Delivered in Switzerland	Switzerland

([59]) The formulation is an older one, *skall gälla i riket*, a direct translation being that the decision 'shall apply' in Sweden.

([60]) Ordinance (1983:490) on the Obligation of the Court to Provide Information on Divorce, Sec 3 a para 2.

([61]) For instance, rules in a relevant EU Regulation, or an international convention to which Sweden is a contracting party.

Act (1973:943) on the Recognition of Certain Foreign Divorces and Legal Separations	States that also are Contracting Parties to the Hague Convention of 1 June 1970 on the recognition of divorces and legal separations (978 UNTS 399)
Act (1904:26, p 1) on Certain International Legal Relationships Concerning Marriage and Guardianship	Other States

32 In addition to these rules, there are also many supplementary rules, for instance, in relation to the Hague Convention, there is the Ordinance (1975:634) on the application of the Act (1973:943), and there is the Act (2022:948) with rules complementing the Brussels IIb Regulation.

33 When a decision on divorce is issued in another Member State, it is recognised in Sweden in accordance with the Brussels IIb Regulation, regardless of whether it was adopted by a court, notary or civil registry; what matters is that it is a positive decision, and that it is a final decision. Decisions not to grant divorce are not recognisable. (62)

34 It is not clear how the dissolutions of polygamous marriages would be treated in Sweden, because they are considered unknown legal institutes in the European context. (63) Regarding dissolutions of registered partnerships, the Act (1904:26, p 1) on Certain International Legal Relationships Concerning Marriage and Guardianship applies (see above in para 28).

35 The Tax Agency does not register a legal separation in the registry, but regarding foreign annulments of marriages, the Tax Agency usually registers them as divorces. (64) Moreover, it must be stressed that entries in the population registry are not constitutive as such, and do not have legally binding effects on the courts in Sweden. For instance, the Tax Agency may enter the divorce into a population registry, but if a dispute arises, the court may still decide that the divorce should not be recognised in another context, for instance, while resolving a dispute on inheritance. Decisions on divorce validity that are taken in the context of prejudicial question, such as inheritance disputes, also do not oblige courts in other contexts.

B. *Parenthood*

36 The Children and Parents Code contains a mix of rules that are very modern,

(62) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Commentary on Art 30 of the Brussels IIb Regulation.

(63) Ibid.

(64) Tax Agency, legal guideliness on divorce (in Swedish), Rättslig Väggledning, Äktenskapsskilnad (Skatteverket 2024). <https://www4.skatteverket.se/rattsligvagledning/edition/2024.6/330284.html> accessed 24 May 2025.

and rules that have remained unchanged since the 1970s. The Code currently provides for three different forms of parenthood:

— Fatherhood applies to cis-gender men (=men who never transitioned from women to men) and also trans fathers (=men who transitioned).
— Motherhood applies to cis-gender women and trans mothers.
— Parenthood applies only to cis-gender women that are partners of the mother giving birth.

In other words, the word 'parents' is reserved only for lesbian cis-gender women in the current Code, whereas all other people with children are either 'mothers' or 'fathers'. No more than two individuals can be recognised as the legal parents of a child in Sweden. The Children and Parents Code is under political discussion, (65) and one of the possible suggestions is to make it gender-neutral. **37**

1. *Substantive law on fatherhood*

a) *Presumption of fatherhood and its contestation*

The man who is married to the mother of the child at the time the child is born is presumed to be the father. (66) The same presumption applies after the man's death for a reasonable time period. The presumption can be contested if it has been established that the mother had a sexual relationship with another man. (67) In that case, the rebuttal of the presumption of *ipso iure* fatherhood can be joined together with the establishment of fatherhood of another man. Contesting *ipso iure* fatherhood is also possible if the genetic data shows another man is the father, and in circumstances where the child was conceived prior to marriage, and it is likely that the mother and her subsequent husband were not together. (68) **38**

There is also an alternative possibility to contest the presumption of *ipso iure* fatherhood. It was initially intended to apply to situations where the mother, the husband, and the actual father of the child all agree on the fatherhood of that person. The procedure is that the husband, the wife (gestational mother), and the father must all acknowledge it in writing, and the social welfare committee must also confirm that the formal requirements were **39**

(65) Alla tiders föräldraskap – ett stärkt skydd för barns familjeliv (Parenthood of all times – a stronger protection for the child's family life). SOU 2022:38.
(66) Children and Parents Code, Chapter 1 Sec 1.
(67) Ibid, Chapter 1 Sec 2 para 1.
(68) Ibid, Chapter 1 Sec 2 para 2 and para 3.

fulfilled, before the *ipso iure* presumption is rebutted. (69) Since August 2022, the provision also applies to the establishment of parenthood and motherhood.

b) *Acknowledgement of fatherhood*

40 If *ipso iure* fatherhood does not apply, or the presumption has been rebutted, the fatherhood can be established by acknowledgement or court order. (70) A written acknowledgement of fatherhood is usually submitted to the social welfare committee in person. (71) The social welfare committee and the mother (or the person with custody of the child) must agree with and confirm this acknowledgement in written form. The committee can only proceed if the man is actually the father. When fatherhood of a child older than 18 years of age is acknowledged, the father acknowledges his fatherhood in writing, witnessed by two persons, and the child over 18 must confirm the acknowledgement. (72)

41 After the amendments in 2021, the digitalisation of the acknowledgement is underway: it is possible to confirm the parenthood digitally during the first 14 days after the birth of the child. In order to avoid uncertainties, it is also provided that acknowledgements that are faulty can be declared as such by a court. (73)

c) *Judicial establishment of fatherhood*

42 The fatherhood can also be confirmed by court decision if it is proven via a genetic test, or it has been established that the man had sexual relations with the gestational mother at the time when the child was conceived, and it is likely he is the father, or when his sperm was used and it is likely that the child was conceived in this manner. (74) It must be stressed that if the Act (2006:351) on Genetic Integrity was complied with, sperm donors cannot be established as fathers. (75) If the Act was not followed and a private sperm donor was used, the fatherhood of the sperm donor can be established, in theory (the social welfare committee would need to be involved, because a probative father does not have legal standing).

---

(69) Ibid, Chapter 1 Sec 2 para 2.
(70) Ibid, Chapter 1 Sec 3.
(71) Ibid, Chapter 1 Sec 4.
(72) Ibid, Chapter 1 Sec 4.
(73) Children and Parents Code, Chapter 1 Sec 4 b.
(74) Ibid, Chapter 1 Sec 5.
(75) Ibid, Chapter 1 Sec 5, last sentence, referring to the Act (2006:351) on Genetic Integrity.

Consent (*samtycke*) of the intended father to the assisted reproduction treatment is also legally significant. If the husband or a cohabiting partner (*sambo*) agrees with the treatment, and the child is born after this treatment, he shall be regarded as the father of the child. (76) If the sperm of another man is used, the Act on Genetic Integrity must be complied with. **43**

It must be stressed that under the Children and Parents Code, a probative father does not have independent legal standing to address the court with the claim that he is the father. It is the social welfare committee, or the child (or the mother on the child's behalf if she has custody), who have the right to address the court, applying to establish fatherhood. (77) If the man is convinced that he is the father of the child, but the mother is not willing to confirm this, and the social welfare committee does not initiate the legal process, there is very little that the person can do. The social welfare committee, however, has the duty to act in the best interests of the child. It could be argued that establishing the fatherhood is the right thing to do if there are grounds to think that the person is the father. **44**

2. *Motherhood*

a) *The* mater est *principle*

For a long time, the principle *mater est quam gestatio demonstrate* or simply *mater est* was not explicitly included in any Swedish statute, but applied as an unwritten norm in Sweden. Legal regulations started to change with the introduction of the possibility of egg donations, in vitro fertilisation (IVF) and, since 2019, of double-donations, which totally removed the idea that the child has to be genetically connected to at least one of the parents. The rule on establishment of motherhood in the Children and Parents Code, however, has not changed since 2003. It currently provides that a woman who gives birth to a child conceived after an egg donation and IVF is the mother of the child. (78) This is a simple rule for the establishment of motherhood without courts. **45**

There are no explicit rules on the contestation of motherhood once it is included in the registry, but in the commentary to the Children and Parents **46**

(76) Ibid, Chapter 1 Sec 8.

(77) Ibid, Chapter 3 Sec 5. In the case of a negative declaration, also the legal father may submit a claim contesting his paternity. In addition, a legal representative ('good man') of a child may also initiate the legal process, but this only applies in restricted situations.

(78) Ibid, Chapter 1 Sec 7.

Code, (79) there is a suggestion that courts may be involved to contest motherhood. This could be done with the application of Chapter 13 Section 2 in the Code of Judicial Procedure. The said provision provides that a court can establish whether a certain legal relationship exists (*fastställelseyrkande*, an application for a declaratory judgment). For instance, in this area of law, it could be a negative declaration of motherhood (motherhood does not exist). (80) The social welfare committee could have legal standing to address the court with an application for a negative declaratory judgment, as suggested by its special role in relation to the child's best interests. The child (children) could also apply for such a contestation.

b) *Surrogacy*

47 In general, surrogacy is not regulated in Sweden, (81) and should not have legal effects in Sweden, but case-law establishes certain exceptions. In 2019, the Supreme Court of Sweden decided to recognise court decisions from the USA and accepted the status of the intended mother as the mother of the child in question. (82) The Supreme Court did not provide for a general right to cross-border recognition in this area, however. The main considerations in such circumstances are the best interests of the child, the fact that the child has no legal parents in Sweden, as well as the impossibility (or great difficulties) to establish the parental status by adoption. (83) Further discussion of recognition in such situations can be found in section II.3.4 of this report (Parenthood in Cross-Border Situations).

---

(79) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Commentary on the Children and Parents Code, Chapter 1 Sec 7.

(80) Negative declaratory judgments on fatherhood and motherhood are possible under Chapter 13 Sec 2 in the Code of Judicial Procedure, as established by the Supreme Court in NJA 2007 s 684.

(81) Olika vägar till föräldraskap (Different Paths to Parenthood), SOU 2016:11.

(82) NJA 2019 s 504 (court decision from California) and NJA 2019 s 969 (court decision from Arkansas).

(83) It must be mentioned that in the case NJA 2019 s 504, the parents were not married, and the intended mother was not genetically related to the child, while the father was opposed to the adoption after their separation. In the Arkansas case, NJA 2019 s 969, the possibility of adoption in theory existed, but the Supreme Court still decided to recognise the court judgment, because it was not evident that the single mother would be confirmed as an adopting parent.

3. *Queering fatherhood, motherhood and parenthood*

a) *Trans fatherhood and motherhood*

48 In Sweden, only two legal genders are available, male and female. For a very long time, trans people were required to undergo sterilisation before an official transition, (84) but currently, the law accepts the fact that trans people can have children. Since 2019, if the birth-giving person is a man, he shall be regarded as the father of the child. (85) At the same time, rules applicable to mothers and motherhood in the Children and Parents Code also apply, which means that if the birth-giving man is married, his spouse shall automatically have custody too. On 1 January 2022, rules were also introduced on presumptions of fatherhood and motherhood, and a contestation of such presumptions, in situations where one or both of the spouses have changed their legal gender. (86)

b) *Lesbian parenthood in substantive family law*

49 If the person who gives birth to a child is a cis-gender woman (a woman who did not transition) married to another cis-gender woman, her spouse is registered as a parent. The presumption of parenthood for married women was established on 1 January 2022. (87) This is the same presumption that applies to married different-sex couples, but in the case of female couples, the assisted reproduction treatment always needs to be used to get pregnant, (88) hence the consent under the Act of Genetic Integrity is of particular importance. Even the registered partner of a cohabitee of the birth-giving mother can be considered a parent, provided that the Act on Genetic Integrity was complied with and consent to treatment is provided. (89) If women used a private donor, the presumption does not apply, and then an acknowledgement or court decision is required. (90) In case of acknowledgement, the same procedure applies, as described above, see

---

(84) The requirement of sterilisation prior to changing legal gender was only abolished in 2013. See nos 136–139 in this report on gender recognition in Sweden.

(85) Children and Parents Code, Chapter 1 Sec 11.

(86) In Sweden, or based on foreign decision, in accordance with Act (1972:119) on Recognition of Legal Gender in certain cases, Sec 3 a.

(87) Children and Parents Code, Chapter 1 Sec 9 para 1.

(88) Recall that special rules, Sec 10–14, apply to trans persons. Sec 9 is applicable only to families of cis-gender women.

(89) Children and Parents Code, Chapter 1 Sec 9 para 2.

(90) Ibid, Chapter 1 Sec 9 para 3.

section II.2.1 (b) in this report. The parenthood presumption of the woman married to the birth-giving mother is rebuttable in court. (91)

4. *Parenthood in cross-border situations*

50 Act (1985:367) provides for a set of rules applicable to cross-border situations. On 1 August 2022, amendments of the Act (1985:367) on Parenthood in International Situations (previously, the Act on Fatherhood in International Situations) came into force. The Government Proposal (92) and SOU (93) on new rules in international situations concerning parenthood and adoption include a short summary of the changes and the reasons for the amendments.

a) *Presumptions in international situations*

51 A new paragraph in the Act (1985:367) on Parenthood in International Situations provides that a woman who was married or has been married to the child's mother will be considered the parent of the child if that is provided by the law of the child's habitual residence, or, if that law does not provide for parenthood of another woman, by the law of the child's nationality at birth. If the child acquires a habitual residence in Sweden at birth, Swedish law applies to the issue of parenthood. (94) The new paragraph is formulated on the basis of the previous rule on the presumption of fatherhood in international situations. (95)

b) *Acknowledgement in international situations*

52 Swedish law applies to the establishment of paternity or parenthood by acknowledgement. (96) With regard to constitutive declarations made in this area, the social welfare committee acts as a court. Furthermore, it is the social welfare committee that examines the issue of legal effects of foreign acknowledgements of parenthood. (97) Courts are not usually involved, although it is

---

(91) Ibid, Chapter 1 Sec 9 a.

(92) Prop 2021/22:188. Jämlika regler om föräldraskap i internationella situationer (Equal rules on parenthood in international situations).

(93) Nya regler om utländska föräldraskap och adoption i vissa fall (New rules for foreign parenthood and adoption in certain situations), SOU 2021:56. For a reader in English, there is a brief summary available at pp 19–26. SOU 2021:56.

(94) Act (1985:367) on Parenthood in International Situations, Sec 2 a.

(95) Ibid, Sec 2.

(96) Ibid, Sec 3.

(97) Ibid, Sec 8.

possible to ask for a declaratory judgment under Chapter 13, Section 2 of the Code of Judicial Procedure. Only declarations that are constitutive come under the Act (1985:367); the Act does not apply to extra-judicial declarations that have purely evidentiary power. (98)

53 An ongoing court procedure in another Nordic State will be an obstacle for the social welfare committee to confirm the acknowledgement of the fatherhood or parenthood in Sweden. (99) There are no such provisions in respect of court procedures in other countries. However, if adopted, the court decision on parenthood will have to be recognised in Sweden, unless there are grounds for non-recognition. These grounds include, inter alia, an establishment of the fatherhood by acknowledgement in Sweden prior to the commencement of the court proceedings abroad. (100) This means that the social welfare committee has a reason to be cautious (101) regarding court proceedings already ongoing abroad, because the refusal grounds are limited and if a court decision is issued, it has to be recognised.

54 In contrast, proceedings in non-judicial institutions are not a reason to wait with the confirmation of acknowledgement in Sweden. If the confirmation of acknowledgement of fatherhood or parenthood abroad is delivered first, the social welfare committee will have to recognise it. (102)

55 Since 2019, a man habitually resident in Sweden can acknowledge his fatherhood in respect of a child born via surrogacy, provided that he is the genetic father and the child otherwise does not have any legal parents in Sweden. (103) The social welfare committee must agree with the father's acknowledgement of paternity, and the decision establishing such a man's fatherhood is taken by a court. There has been some criticism that the Swedish rules on establishing parenthood are not equally just to men and women, in particular when surrogacy abroad is concerned. (104) A possibility of establishing motherhood (or parenthood) of an intended mother via acknowledgement, even when her egg was used abroad, is not mentioned in

---

(98) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Commentary on Act (1985:367), Sec 8.

(99) Act (1979:1001) on Recognition of Nordic Decisions concerning Paternity and Certain Other Types of Parentage, Sec 4 para 2.

(100) Act (1985:367) on Parenthood in International Situations, Sec 7, para 2, sub-para 4.

(101) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Commentary on Act (1985:367), Sec 3.

(102) Act (1985:367) on Parenthood in International Situations, Sec 8, para 3, sub-para 2.

(103) Ibid, Sec 3 a.

(104) Maarit Jänterä-Jareborg, 'Surrogatmoderskap och genus – särskilt ur tilltänkt morsperspektiv' in *Livsfellesskap, Rettsfelleskap. Festskrift till Tone Sverdrup 70 år* (Gyndendal 2021) 264–277.

the Act. The only possibility for her would be to rely on the case-law of 2019, which allows recognition of foreign decisions establishing the status of the intended mothers. (105) The current legislation could be reviewed in the future. (106)

c) *International jurisdiction and applicable law*

56 In the case of a judicial establishment of paternity or parenthood by a woman who was married or is married (or cohabits) with the child's mother, the Swedish court has jurisdiction if the child has a habitual residence in Sweden, or if the defendant(s) has(have) a habitual residence in Sweden, or in other cases, when due to a substantial connection to Sweden, there is a special reason to hear the case in Sweden. (107) Both proceedings on the contestation of fatherhood (or parenthood of a woman) and the establishment of fatherhood (or parenthood of a woman) can come under this provision. Cases concerning the contestation and establishment of parenthood can be joined, and are to be examined jointly, even if only one of them is appealed. (108)

d) *Recognition of foreign decisions*

57 As previously mentioned, the main principle is that a foreign decision can only be recognised in Sweden if there is a legal basis for recognition. In the area of parenthood, there is a recent exception, from the case-law of the Swedish Supreme Court, relating to the cross-border recognition of court decisions on the establishment of motherhood of the intended mother after a surrogacy arrangement. The decisions are largely influenced by the ECtHR case-law in this area. (109) There is no explicit legal basis for recognition of an intended mother's status in Sweden, because the Act on Parenthood in International Situations does not apply to intended mothers but, in order to protect the right to private life of the child born via surrogacy, an exception was made in the said case-law.

58 In accordance with the Act on Parenthood in International Situations, foreign court decisions are recognised, provided that they were adopted in

---

(105) NJA 2019 s 504 (recognition of a court decision from California in Sweden), where the intended mother could not adopt because the father subsequently objected, and NJA 2019 s 969 (recognition of a court decision from Arkansas in Sweden), where the intended mother was a single mother.

(106) Alla tiders föräldraskap (Parenthood of all times), SOU 2022:38. In English, see the summary on pp 57–86.

(107) Act (1985:367), Sec 4.

(108) Ibid, Sec 5 a.

(109) See discussion of the case-law in Laima Vaige, 'Recognition of a status acquired abroad: Sweden' (2023) 15 Cuadernos de Derecho Transnacional 1108–1120.

the State of the party's habitual residence, or nationality, or there is another relevant connection to that foreign State. (110) Court decisions in this context mean court decisions that establish fatherhood or parenthood (with regard to women) or declare the presumptions of fatherhood or parenthood rebutted. They also include court decisions which declare the acknowledgement of fatherhood or parenthood invalid.

59 Court decisions can be refused recognition under the Act on Parenthood in International Situations if they were adopted by default and the defendant did not know about the proceedings, or the decision conflicts with the court decision adopted in Sweden, or it conflicts with another foreign court decision, adopted in proceedings that commenced earlier than the other foreign decision. A decision can also be refused recognition if the court decision conflicts with the establishment of fatherhood by acknowledgement in Sweden, provided that it was established prior to the commencement of the foreign court proceedings. Recognition can further be refused if the court proceedings on fatherhood are pending in Sweden, or if court proceedings on fatherhood or parenthood are pending abroad, and they started earlier than the second court proceedings. (111) Finally, the *ordre public* exception can also be used to refuse recognition of a court decision. (112)

60 Decisions of foreign authorities establishing parenthood are also recognisable, (113) provided that the foreign authorities had competence in the matter. The law applicable to their formal validity is the *lex loci actus*. (114) Only constitutive (*rättskapande*) decisions are recognised if they establish fatherhood or parenthood. Decisions that have solely evidentiary value are not covered by the legislation and are not recognisable. (115)

61 Decisions by foreign authorities are refused recognition if they conflict with a court decision in Sweden in situations where proceedings commenced prior to the establishment of parenthood. They are also refused recognition if they conflict with an earlier Swedish establishment of fatherhood or parenthood via acknowledgement. Furthermore, decisions of non-judicial authorities cannot be recognised if there are pending court proceedings on fatherhood or parenthood, either in Sweden or abroad, provided that these court proceedings commenced prior to the decision by the foreign authority.

---

(110) Act (1985:367), Sec 7 para 1.
(111) Act (1985:367), Sec 7 para 2.
(112) Ibid, Sec 12.
(113) Act (1985:367), Sec 8 para 1.
(114) Ibid, Sec 8 para 2.
(115) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Commentary on the Act 1985:367, Sec 8.

The decisions cannot be recognised if they are evidently incorrect. (116) The *ordre public* exception can also be used to refuse recognition of a non-judicial authority. (117)

e) *Lis pendens*

62 Swedish courts refuse jurisdiction on fatherhood or parenthood (in respect of female couples) if there is an identical case pending abroad. Courts can also stay the proceedings to wait for a foreign court decision. Courts in Sweden may nevertheless assume jurisdiction if there are special reasons for doing so. (118) For instance, Swedish courts may consider that there is a risk that the foreign court decision will not be recognised in Sweden, or that the foreign court proceedings could continue for a very long time. (119)

63 If the issues on fatherhood (or parenthood of a woman) are pending before a non-judicial foreign authority, that is not a reason to refuse jurisdiction or stay the court proceedings in Sweden. However, if court proceedings on fatherhood (or parenthood of a woman) are ongoing abroad, the Swedish social welfare committee should not confirm the acknowledgement of fatherhood or parenthood. (120)

5. *Adoption*

a) *Substantive rules on adoption*

64 Rules on adoption have been reviewed recently, in consideration of the full incorporation of the CRC in Sweden. (121) Children may only be adopted if that is in their best interests (122) and after a careful examination of the suitability of the person(s) adopting by the social welfare committee. (123) Consent of the child over 12 years of age is necessary, (124) and the views of a younger child are also taken into consideration. (125) Since 2018, adoption has also been possible for cohabiting couples. The age of the adopting person

(116) Act (1985:367), Sec 8 para 3.
(117) Ibid, Sec 12.
(118) Ibid, Sec 10.
(119) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Ccommentary on the Act 1985:367, Sec 10.
(120) Act (1985:367), Sec 10 a.
(121) Prop 2017/18:121 Modernare adoptionsregler (Modernising adoption rules).
(122) Children and Parents Code, Chapter 4 Sec 1.
(123) Ibid, Chapter 4 Sec 2.
(124) Children and Parents Code, Chapter 4 Sec 7.
(125) Ibid, Chapter 4 Sec 3 para 2.

has been lowered to 18. (126) The social welfare committee has a duty to inform the child about adoption, prior to the consent or hearing their views. (127) Furthermore, the adoptive parents have a duty to inform the child about the adoption. (128) As a general rule, spouses and cohabitants can only adopt jointly, (129) and this is considered a full adoption that severs the link with previous parents. A spouse or a cohabitant may also adopt the partner's child, with the partner's consent. (130) As a general rule, the informed consent by a parent who has custody is necessary. (131) An adult can only be adopted if there is a special reason (132) due to the personal relationship between the adoptee and adopting person, for instance, the applicant has actually raised the child who is now an adult to be adopted. (133)

Decisions on adoption are taken by courts. In the case of the adoption of a **65**
child, the court orders a full investigation, and the social welfare committee is responsible for organising the process of adoption, and appointing the investigator, while the court sets the time limits and orders the investigation itself. (134) Full investigation is not required in cases of adult adoption.

b) *Adoption in international situations*

International adoption has been decreasing in numbers, for instance, 992 **66**
children came to Sweden via adoption in 2004, in contrast, only 73 children in 2023, and the media reports the 'beginning of the end for international adoption' (135) because Denmark and Norway are stopping international adoptions from many countries. SOU on international adoption was presented on 2 June 2025, and also takes the same direction. (136)

The inquiry into Sweden's international adoption practices (SOU 2025:61) proposes several actions. It calls for a formal public apology to adopted individuals and their families, acknowledging the harm that has occurred. It also proposes the establishment of a national resource centre for adopted

(126) Ibid, Chapter 4 Sec 5.
(127) Children and Parents Code, Chapter 4 Sec 3 para 1.
(128) Ibid, Chapter 4 Sec 23.
(129) Ibid, Chapter 4 Sec 6 para 1.
(130) Ibid, Chapter 4 Sec 6 para 2.
(131) Ibid, Chapter 4 Sec 8.
(132) Ibid, Chapter 4 Sec 4 para 1.
(133) Ibid, Chapter 4 Sec 4 para 2.
(134) Ibid, Chapter 4 Sec 14.
(135) SVT television, (SVT news, 18 January 2024), <https://www.svt.se/nyheter/inrikes/verkar-vara-borjan-pa-slutet-for-internationell-adoption> accessed 20 June 2025.
(136) Sveriges internationella adoptionsverksamhet: Lärdomar och vägen framåt (Sweden's international adoption practices: lessons learned and the way forward). SOU 2025:61.

persons and adoption-related issues, aimed at providing adoption-specific support. Furthermore, the inquiry recommends that adopted individuals be entitled to financial assistance for travel to their country of origin. It advocates for the gradual discontinuation of the practice of mediating intercountry adoptions to Sweden. However, it maintains that cross-border adoptions should still be permitted in cases where there is a personal relationship between the applicant and the child. In such cases, the State should assume greater responsibility to ensure that the adoption is in the best interests of the child and that the process is legally sound. It remains to see if the government follows the inquiry.

67 According to the present rules on the Act (2018:1289) on Adoption in International Situations, habitual residence is the key principle. Swedish courts have jurisdiction if the child/person to be adopted is habitually resident in Sweden, or the applicant(s) has (have) a habitual residence in Sweden, or there are other special reasons for the jurisdiction of Swedish courts, due to a connection to Sweden. (137) Swedish law applies to applications to adopt. (138)

68 A foreign adoption is recognised in Sweden as a general rule, provided that the foreign authority had a corresponding jurisdiction to those jurisdictional rules as applicable in Sweden (so-called indirect jurisdiction). (139) The decisions of competent courts and other competent foreign authorities are recognised automatically, 'directly by force of law' (*ipso iure*). (140)

69 A special requirement applies to international adoptions. The requirement applies if the adopted child is a Swedish national or habitually resident in Sweden, (141) or the adoptive parent is habitually resident in Sweden at the time of the adoption. (142) In that case, permission to receive the child for adoption from the Swedish Family Law and Parental Support Authority (*Myndigheten för familjerätt och föräldraskapsstöd*, MFoF) must be acquired. The said requirement is connected to the Intercountry Adoption Intermediation Act (1997:191), and the purpose is to ensure that the adoptive parents use authorised adoption intermediators as envisaged by the Act or received permission from the Family Law and Parental Support Authority. If this requirement is applicable but was not complied with, the international

---

(137) Act (2018:1289) Sec 2.

(138) Ibid, Sec 3.

(139) Ibid Sec 4.

(140) Maarit Jänterä-Jareborg, Anna Singer, 'Sweden: New Rules on adoption, assisted fertilization and on the recognition of foreign child marriages' (2019) 18 FamRZ 1510.

(141) Act (2018:1289), Sec 6.

(142) Act (2018:1289) Sec 5.

adoption can still be recognised by the MFoF, (143) unless it conflicts with the Swedish *ordre public*. (144) Once recognised, the adoption has full legal effects. (145) This means that even 'weak' adoption decisions could be recognised, and weak adoptions are 'upgraded' to strong adoptions under the Swedish rules. (146)

70 Even decisions on adoption that do not fully correspond to the Swedish idea on adoption (ie, partial adoption) are recognised according to this Act. However, *kafalah*, (147) which is considered closer to guardianship, is not recognised under the Act. Furthermore, Act (2018:1289), just as its predecessor (Act of 1931), does not apply to foreign cancellations of adoption or foreign declaratory judgments that the adoption was invalid. If the MFoF refuses to recognise a foreign decision on adoption, it can be appealed to the general administrative court. (148) Permission to appeal is required when addressing the Administrative Court of Appeal (*Kammarrätt*). (149)

71 Furthermore, rules in the Act (1971:796) on International Legal Relations Concerning Adoption are still relevant, because they apply to adoption decisions taken prior to the coming into force of the Act of 2018. The older adoption decisions are recognised if the decision was made in the State where the applicant(s) had their habitual residence or of which they held the nationality. If the child adopted was a Swedish national or habitually resident in Sweden, permission of the MFoF is necessary. (150)

72 There is also the Act (1997:191) consequent on Sweden's Accession to the Hague Adoption Convention, which ensures that the adoption decision taken abroad in the Contracting State to the Convention shall be recognised in Sweden. MFoF is a central authority under the Convention, (151) and the application to adopt under the Convention and its incorporating Act is submitted to the social welfare committee in the municipality of the appli-

---

(143) Act (2018:1289), Sec 7.

(144) Ibid, Sec 8.

(145) Act (2018:1289), Sec 10.

(146) Note, however, that the Act of 2018 applies only where the Hague Convention does not. The Hague Convention, in contrast, requires to respect the remaining family connections of 'weak' adoptions, and imposes certain conditions for conversion of adoptions to 'stronger' legal effects (Art 27).

(147) Kafalah can be described as 'an alternative family care option for children outside of parental care practiced by Muslims around the world' (p 4), in *An Introduction to Kafalah* (UNICEF ESARO 2023).

(148) Act (2018:1289) Sec 9 para 1.

(149) Ibid, Sec 9 para 2.

(150) Act (1971:796) Sec 3.

(151) Act (1997:191) Sec 2.

cant. (152) On application of the adoptive parent(s), a general court may convert a partial adoption to full adoption (Article 27 of the Convention), (153) provided that the conditions in the Convention are fulfilled.

6. *Parental responsibility*

73 In the area of parental responsibility, the social welfare committees have a great role to play in providing services to the family and making sure the families thrive, and when needed, stepping up to intervene to protect the best interests of the child. Social welfare committees have competence to issue decisions in this area. Furthermore, it has been suggested that the role of Swedish courts could decrease in this area:

> it can be questioned whether court decisions are at all relevant in instances other than when one parent is deemed unfit and should not have custody responsibility. (154)

74 Hence, it is suggested that the scope of social services should increase, and the social welfare committees should play an even more significant role. Furthermore, mediation appointed by courts is neither usual nor frequent in Sweden, but that could also develop in the future. (155)

a) *Substantive family law on parental responsibility*

75 The general idea in the Children and Parents Code is that both parents should have joint custody of children under the age of 18. Furthermore, courts can also appoint one or two legal custodian(s), for instance, when custody is transferred to foster parents, when the child comes to Sweden as an unaccompanied migrant, and in urgent situations. (156) Married parents have joint custody over the child automatically. If parents are not married, the birth-giving mother has sole custody. (157) After a divorce, the general

---

(152) Ibid, Sec 3.

(153) Ibid, Sec 5.

(154) Anna Singer, 'Out-of-Court Custody Dispute Resolution in Sweden – A Journey Without Destination', in Anna Kaldal, Agnes Hellner, Titti Mattsson (eds), *Children in Custody Disputes: Matching Legal Proceedings to Problems* (Palgrave Macmillan 2023) 143.

(155) Anna Singer, 'Out-of-Court Custody Dispute Resolution in Sweden – A Journey Without Destination', in Anna Kaldal, Agnes Hellner, Titti Mattsson (eds), *Children in Custody Disputes: Matching Legal Proceedings to Problems* (Palgrave Macmillan 2023) 140. Anna Singer refers to data from 2014 that showed that mediation was used in only 1% to 3% of custody cases in Sweden.

(156) Children and Parents Code, Chapter 6 Sec 2 para 1 and Sec 8.

(157) Ibid, Chapter 6 Sec 3 para 1.

rule is to retain the joint custody of the parents, ([158]) unless a court decides otherwise. From 1 March 2022, in a divorce case, the court cannot address issues of parental responsibility if there is a dispute between the parents and the applicant did not attend a mandatory information meeting (*informationssamtal*). ([159])

76 Conversion of sole custody of the mother to joint custody of both parents is undertaken by a court, ([160]) on application of both parents and in harmony with the best interests of the child. If the child is registered in Sweden, it can also be achieved by an application to the social welfare committee, together with an establishment of fatherhood or parenthood by acknowledgement, or to the Tax Agency, provided that there was no prior court decision on custody, in Sweden or abroad. ([161]) The joint custody applies from the moment it is registered at the Tax Agency. If the joint custody is registered at the Tax Agency by joint application of unmarried parents, it should not be treated in the same way as a court decision.

77 Amendments to parental custody can be made either through court proceedings or by mutual agreement. A court adopts a decision on custody on the application of both parents or one parent. In divorce cases, the court may decide that sole custody shall apply without a special application if joint custody is not in the best interests of the child. ([162])

78 The parents may also enter into a written agreement about custody, which is confirmed by the social welfare committee, provided that the agreement is in the best interests of the child. ([163]) After court decisions on custody, the parents may agree otherwise later, and a prior agreement may also be amended. The agreement, when confirmed by the social welfare committee, is of the same legal value as a court judgment, which means that it is enforceable. ([164])

79 The agreement is subject to the general grounds on (in)validity of contracts under the Contracts Act (1915:218), which is applied by analogy also in family law. ([165]) The social welfare committee must either confirm the agreement or refuse to confirm it, but it cannot modify the contents of the agreement.

([158]) Ibid, Chapter 6 Sec 3 para 2.

([159]) Chapter 14 Sec 5 of the Marriage Code.

([160]) Children and Parents Code, Chapter 6 Sec 4 para 1.

([161]) Ibid, Chapter 6 Sec 4 para 2, subparas 1 and 2.

([162]) Ibid, Chapter 6 Sec 5 para 3.

([163]) Ibid, Chapter 6 Sec 6.

([164]) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Commentary on the Children and Parents Code, Chapter 6 Sec 6.

([165]) In particular, Sec 28–32 of the Contracts Act on (1915:218).

80 The Code of Judicial Procedure includes a provision that requires the court to clarify the possibilities of reaching a solution through party consensus at the beginning of court proceedings. (166) This provision also applies to custody cases. In addition, as mentioned above, to hear both the divorce and custody dispute simultaneously, it is necessary to provide a certificate that shows the spouses participated in the mandatory information meeting at the social welfare committee. (167)

81 If a parent or both parents cause harm to a child's health or development, the court may also remove parental custody. If both parents are deemed unfit for custody, the court may appoint a special custodian or two to replace the parental custody. (168) In such instances, it is the social welfare committee that applies to the court. Furthermore, if the child has been living in foster care, the court may transfer parental custody to the foster parent(s) who take(s) care of the child, (169) upon application of the social welfare committee.

82 In cases of joint custody, if one of the parents prevents the other from exercising custody, the court may grant sole custody to the non-intervening parent, (170) or remove custody from both parents and appoint custodian(s). This is done upon application of the social welfare committee. If this issue arises during divorce proceedings, the court does not require a separate application but may decide on the matter *ex officio*.

b) *Private international law*

83 At the outset, international jurisdiction is determined by the Brussels IIb Regulation. In cases where the Brussels IIb Regulation does not apply, and the Hague Convention of 1996 cannot be applied either, residual Swedish competence needs to be determined according to the Act (1904:26, p 1) on Certain International Legal Relationships concerning Marriage and Guardianship. Swedish courts have jurisdiction to decide on the issue of custody in connection to divorce cases. (171) If the child resides in Sweden (a weaker connection than that of habitual residence), the applicable law is always

---

Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Commentary on Chapter 6 Sec 6.

(166) Code of Judicial Procedure, Chapter 42 Sec 6.

(167) Chapter 14 Sec 5 of the Marriage Code.

(168) Children and Parents Code, Chapter 6 Sec 7.

(169) Ibid, Chapter 6 Sec 8.

(170) Ibid, Chapter 6 Sec 8 a.

(171) Ibid, Chapter 3 § 6.

Swedish law. (172) In this area, the issues of international jurisdiction and applicable law are examined *ex officio* by Swedish courts.

84 Decisions adopted by the social welfare committee, when it approves the agreement on custody between the parents, are considered as decisions adopted by 'courts' under the Brussels IIb Regulation, Article 2.2.1. (173) Furthermore, 'chief-guardians' (*överförmyndare*) are municipal institutions entrusted with issues of care, and when a chief-guardian adopts decisions on the protection of children (guardianship), they are covered by the same provision in the Brussels IIb Regulation. (174)

85 It can be discussed whether the registry of parents as joint custodians by the Tax Agency falls under the scope of the Brussels IIb Regulation. It has been suggested that this is not the case in the Swedish commentary on the Regulation; instead, registry of joint custody at the Tax Agency should be seen as an 'agreement' under Article 2.2.3 of the Brussels IIb Regulation. (175)

86 Regarding the *lis pendens* rule under the Brussels IIb Regulation, it should not be relevant whether the court or another comparable institution based their jurisdiction on the EU Regulation or residual rules; it is only relevant that the matter is pending in another EU Member State. It could be considered that the court is 'seised' (Article 17) when the social welfare committee decides that the child needs to be taken away from their family due to a danger to the health of the child. In the meantime, the mandatory information meeting at the social welfare committee is not a part of the proceedings and is not comparable to mandatory conciliation procedure (Recital 35 of the Brussels IIb Regulation). (176)

87 Regarding recognition of decisions on parental responsibility adopted in other EU Member States, they are also recognised as provided for in the Brussels IIb Regulation. One can also start new proceedings regarding custody or access rights if the family circumstances have changed.

88 Furthermore, the Act (2022:948) includes a set of complementary rules on the procedure for the refusal of recognition (Article 40) and enforcement (Article 59) in the Brussels IIb Regulation. (177) Applications in such cases

---

(172) Ibid, Chapter 3 § 6.

(173) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Commentary on the Brussels IIb Regulation, Art 2.2.1.

(174) Ibid.

(175) Ibid, Commentary on the Brussels IIb Regulation, to Art 2.2.3.

(176) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Commentary on the Brussels IIb Regulation, Art 20.

(177) In particular, Sec 7–9 are related to Arts 40 and 59 in the Regulation.

are submitted to a district court. (178) A decision adopted in a Member State is enforced under chapter 21 of the Children and Parents Code, and district courts are the competent institution, provided that the enforcement procedure (Article 51 of the Brussels IIb Regulation) is related to the child's person (custody, access rights, residence, return of the child). (179) If enforcement relates only to litigation costs or the protection of the child's property, the competent institution is the Swedish Enforcement Agency (*Kronofogden*) under the Enforcement Code (*Utsökningsbalken*). (180) According to Swedish law, the child cannot be a party to the execution procedure; a parent, an appointed custodian, or a comparable institution to the Swedish social welfare committee is considered a party for the purposes of Articles 51 or 56 of the Brussels IIb Regulation. (181) If there is no equivalent to the foreign decision in the Swedish legal system, the decision is enforced as a judgment. (182)

89 Certificates based on Article 36 can be issued by a court or a social welfare committee, when it issues a decision confirming the agreement on custody. (183) The certificate may also be rectified under Article 37. A decision on rectification cannot be appealed. (184) In Swedish law, there are, in principle, no equivalents to 'authentic instruments' (Article 2.2.2., Articles 64–68 in the Brussels IIb Regulation) or 'agreements' (Article 2.2.3 and Articles 64–68 in the Brussels IIb Regulation), with perhaps only one exception, the application to the Swedish Tax Agency by both parents to register their joint custody in respect of a child. (185) This last possibility has been discussed in theory, but the question is not clear. It has been suggested that there is no authority in Sweden that can issue a certificate mentioned in Article 66 (1) of the Brussels IIb Regulation. (186)

---

(178) Act (2022:948) Sec 7 para 2.

(179) Ibid, Sec 6 para 1.

(180) Act (2022:948) Sec 6 para 2. Enforcement Code (1981:774), Chapter 1 Sec 3 and Chapter 2 Sec 1.

(181) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Commentary on the Brussels IIb Regulation, Art 56.

(182) Act (2022:948) Sec 6 para 2, last sentence.

(183) Ibid, commentary to Art 36.

(184) Act (2022:948) Sec 10.

(185) Gösta Walin, Staffan Vängby, Anna Singer, Maarit Jänterä-Jareborg, *Föräldrabalken* (Norstedts Juridik 2023) Commentary on the Brussels IIb Regulation, Art 46.

(186) Ibid.

7. *Matrimonial property regimes*

a) *Substantive law on matrimonial property*

90 Deferred community of property is the legal matrimonial property regime under the Marriage Code. (187) It means that each spouse owns their property during the marriage, (188) both property acquired prior to the marriage and during the marriage, and the net value of the property is divided equally upon the division of property. (189) Community of property hence becomes the reality once the property is divided, usually after divorce, or after the death of one spouse. Division can also happen during marriage or much later after divorce. Legal matrimonial property can be wholly or partly derogated from in the form of an agreement. (190) However, a marriage contract (*äktenskapsförord*) does not create an alternative legal regime applicable to the property of spouses, but the spouses simply point out which property is marital, and which is separate.

91 Registered partnerships can no longer be concluded (see no 18 in this report), but those that exist, have identical economic consequences as marriages. (191) Regarding cohabitation, the family home and similar property may be subject to a division of property, (192) the rules are similarly framed to those on matrimonial property, but the concept of community of property (*giftorättsgods*) is not used. Differently from marriage, property that cohabiting couples had prior to the relationship is not divided. Succession by law after the death of the cohabiting partner is not possible. Cohabiting couples may also enter into agreements. (193) The statute of limitations is one year from the end of the relationship. (194) There are no statute of limitations in respect of spouses.

92 The matrimonial property regime (deferred community property) is established via registration of marriage at the registry of the Tax Agency. If the parties enter an agreement (*äktenskapsförord*), it can be concluded at any time during the marriage, or prior to it.

93 Before 2011, marriage contracts were registered at district courts, but currently, written and signed agreements are registered at the Tax

---

(187) Marriage Code, Chapter 7 Sec 1.
(188) Marriage Code, Chapter 1 Sec 3.
(189) Ibid, Chapter 10 Sec 1.
(190) Ibid, Chapter 7 Sec 3.
(191) Act on Registered Partnerships, Chapter 3 Sec 1 Sec
(192) Cohabitation Act, Sec 3 and Sec 8 para 1.
(193) Ibid, Sec 9.
(194) Ibid, Sec 8 para 2.

Agency. (195) It costs 275 SEK to register one marital agreement. (196) The Tax Agency also registers gifts between spouses. (197) If the gift is immovable property, the Land Survey (*Lantmäteriet*) must also be informed in order to change the information in the registry. (198) The Tax Agency also has to be informed when a division of matrimonial property is going to take place. (199) The decision of the Tax Agency regarding the registration may be appealed to district courts. (200)

94 If the spouses cannot agree about the division of matrimonial property, a spouse or both spouses can submit a claim to the district court, asking to appoint a property distributor (*bodelningsförrättare*). (201) The spouse(s) may suggest a property distributor, or several. (202) These are usually lawyers specialised in this area, who act impartially. They are responsible for setting the time and place of the execution procedure in the division of the matrimonial property. (203) They strive towards consensus, but if consensus is impossible, yet the dispute is 'not an object of a court dispute', they can divide the matrimonial property (204) in a compulsory manner. Although the parties have a possibility to propose a property distributor, their impartiality is ensured by the court appointment and court-entrusted tasks. In practice, these are always independent decision-makers with no interests in the matter. (205)

95 The decision (original or certified copy) is served to the spouses as soon as possible. (206) If a spouse is not satisfied with the division of matrimonial property, they may apply to the district court that appointed the property

---

(195) Marriage Code, Chapter 7 Sec 3 para 3.

(196) Tax Agency, information on registration of marriage contract (in Swedish) <https://skatteverket.se/privat/folkbokforing/aktenskapochpartnerskap/aktenskapsregistret/aktenskapsforord.4.8639d413207905e9480002503.html> accessed 20 June 2025.

(197) Marriage Code, Chapter 16 Sec 2.

(198) Land Code, Jordabalk (1970:994), Chapter 20. This applies to ownership rights, not to rights to use the property in cooperative housing associations.

(199) Marriage Code, Chapter 9 Sec 1 para 2.

(200) Ibid, Chapter 16 Sec 5.

(201) Ibid, Chapter 17 Sec 1 para 1.

(202) In the Swedish/English Glossary for courts (2019), the suggested translation is 'estate executioner' but I used here 'property distributor' instead, as used in the literature, for instance, Maarit Jänterä-Jareborg, 'Rights of Property upon Divorce in Swedish Conflict of Laws, with Special Reference to Party Choice of Law', in N.V. Lowe, Gillian Douglas (eds), *Families Across Frontiers* (Brill 1996) 793–807.

(203) Marriage Code, Chapter 17 Sec 6, para 1.

(204) Ibid, Chapter 17 Sec 6 para 2.

(205) SOU 2019:90, p 265.

(206) Marriage Code, Chapter 17 Sec 8, para 1.

distributor. (207) If the decision of the property distributor is not contested within four weeks, the dissatisfied spouse must accept the outcome. The Code of Judicial Procedure applies to further appeals. (208) Regarding cohabiting couples, property division is also undertaken by a property distributor, and in case one cohabitee is dissatisfied, an appeal can also be submitted to the district court. (209)

b) *Matrimonial property in cross-border situations*

96 Sweden participates in the EU Matrimonial Property Regulation and EU Registered Partnerships' Consequences Regulation. The Act (1990:272) on Certain International Questions relating to the Property of Married and Unmarried Couples has been replaced by these Regulations, but the rules on applicable law in this Swedish autonomous Act are still relevant if the relationship was concluded prior to the entry into force of the Regulations. In accordance with the preparatory works, from the perspective of private international law, matrimonial property distributors are considered as courts. The same can be said about the Enforcement Agency when it deals with payment orders in this area, and special estate administrators, when they distribute matrimonial property after death. (210)

97 Furthermore, the Act (2019:234) on Certain International Questions relating to the Property of Married and Unmarried Couples supplements the EU Regulations and contains some relevant rules. The Act (2019:234) allows the Swedish court to consider court proceedings pending in third States. (211) Proceedings may continue if there are 'special reasons'. The same applies in respect of cohabiting partners' property. (212)

98 Since the EU Matrimonial Regulation and Registered Partnership Regulation came into force, the Tax Agency must register the agreements on choice-of-law regarding these property relationships. (213) The role of the Tax Agency, however, is limited. It is not comparable to 'courts' in this area. (214) In contrast, preparatory works show that estate administrators, who distribute

(207) Marriage Code, Chapter 17 Sec 8, para 2.

(208) Ibid, Chapter 17 Sec 9.

(209) Cohabitation Act, Sec 26.

(210) Prop 2018/19:50 Makars och sambors förmögenhetsförhållanden i internationella situationer (Property relations of spouses and cohabitants in international situations), p 42.

(211) Act (2019:234), Chapter 4 Sec 2. Previously, the Act (1990:272), Sec 15.

(212) Ibid, Chapter 5 Sec 4.

(213) Act (2019:234), Chapter 6 Sec 1.

(214) SOU 2017:90, Makars, registrerade partners och sambors förmögenhetsförhållanden i internationella situationer (Property relations of spouses, registered partners, and cohabitants in international situations), p 264.

matrimonial property after the death of a spouse, and property distributors are considered as 'courts' under the EU Regulations. (215) In addition, in cases of payment orders or enforcement (summary proceedings) related to matrimonial property or property relationships between registered partners, the Swedish Enforcement Agency can also be regarded as a court within the meaning of the Regulations. (216) In various scenarios, the Enforcement Agency exercises judicial functions and guarantees impartiality and the hearing of the defendant. (217) The decisions of the Enforcement Agency can be appealed to district courts.

99 In situations where EU Regulations do not apply, the result can be modified in accordance with the Marriage Code, even if foreign law applies to matrimonial property relations. (218) A spouse can also request the application of Swedish law to the distribution procedure, even though foreign law applies to matrimonial property relations. (219) This means that a property distributor can be appointed, as described above, if the parties are not in agreement. These are independent persons who make decisions that are compulsory, like court decisions, if the parties do not contest them, and they should be seen as courts. (220).

III. Succession law

A. *Legal sources and institutions involved*

100 Regarding Swedish substantive law, the Inheritance Code (1958:637) is most relevant. Certain rules are also found in the Children and Parents Code, the Marriage Code, as well as in other Acts. In private international law, the Act (1937:81) on Conflict of Laws regarding Succession was superseded by the EU Succession Regulation, which does not leave room for national rules. Nevertheless, the Succession Regulation is supplemented by the Act (2015:417) on Inheritance in International Situations, which also has a broader function. It incorporates the Nordic rules on international succession (relevant where, for instance, decisions on succession are taken in Norway) and offers rules applicable for recognition and enforcement of decisions issued in countries outside the EU.

---

(215) Prop 2018/19:50, p 42.
(216) Ibid, p 44.
(217) Act (1990:746) on Payment Orders and Judicial Assistance, Sec 25.
(218) Act (1990:272), Sec 10.
(219) Act (1990:272), Sec 6.
(220) SOU 2017:90, p 265. Prop 2018/19:50, p 42.

Inheritance matters in Sweden are traditionally considered private and rules in the Inheritance Code are treated as dispositive (comparable to contract law). The parties can ignore the mandatory share and divide the estate as they wish between themselves. In case there is a will, the parties can accept it, although the will ignores the rules of the Inheritance Code, in order to respect the wishes of the deceased. Only when a conflict arises does the court apply the rules in substantive law. In the case of conflict, the parties' declarations (for instance, a waiver of the right to succession) will be important. **101**

Besides courts, an important institution in this area is the Tax Agency, which registers the estate inventory deed. Administrative courts may subsequently be addressed on the issue of registration. General courts may hear disputes between private parties in this matter. (221) Furthermore, upon application of a party to the estate, the courts may appoint an estate administrator (*boutredningsman*), (222) in international cases, a special estate administrator, and a distributor of the estate (*skiftesman*). (223) If there is an executor of the will, they usually act as an estate administrator or a distributor of the estate. These stakeholders can also adopt decisions on inheritance that have legal effects in this area. **102**

B. *Brief description of procedure*

When somebody dies in Sweden, the death is registered with the Tax Agency, (224) which strikes the deceased off the population registry if they were a resident. (225) Two documents are usually issued by a medical doctor who has seen the body: (226) one document stating the death itself (*dödsbevis*), which is sent to the Tax Agency, and another document stating the reasons for death (*dödsorsaksintyg*), (227) which is sent to the National Board of Health and Welfare (*Socialstyrelsen*). When the death is registered, heirs will need a document that shows the person has died, which the parties can request from the Tax Agency (*dödsfallsintyg*). **103**

---

(221) Code on Judicial Procedure, Chapter 10 Sec 9 para 1. Inheritance Code 18 Sec 1 b.

(222) Inheritance Code, Chapter 19 Sec 1.

(223) Ibid, Chapter 23 Sec 5 para 1.

(224) Population Act (1991:481), Sec 1.

(225) Ibid, Sec 19.

(226) Usually, it is the doctor that issues these documents, unless a person dies in a natural catastrophe or is missing. In such cases, they may be declared dead by the Tax Agency in accordance with the Act (2005:130) on Declarations of Death.

(227) Rules on these documents can be found in the Funeral Act (1990:1144), Chapter 4 Sec 2.

104 The parties to the estate usually administer the estate together, before it is distributed. ([228]) First, the parties to the estate – or someone who represents them – need to make sure that all the debts and assets are discovered. Then, the estate inventory (*bouppteckning*) has to be drawn up, and a deed is created in which all the relevant information is clarified: matrimonial property, debts, and assets. If the matrimonial property division needs to take place, it is part of the estate inventory. The assets that remain afterwards are considered as 'property left' (*kvarlåtenskap*, also translated as the deceased person's estate), which is distributed between the heirs (*arvskifte*). ([229])

105 In uncomplicated cases, the parties can themselves register the estate inventory deed at the Tax Agency. The Tax Agency assumes that the information in the estate inventory is correct, unless there is any particular reason to assume otherwise. For instance, if new assets or liabilities or other inaccuracies are discovered in the estate inventory, a supplementary estate inventory should be submitted. If parties consider it necessary, the assistance of an estate administrator (*bouppteckningsman*) or several (in international cases, a special estate administrator) is requested. The estate administrators represent the estate in any disputes that may arise, pay the estate's debts with the remaining assets, administer the estate until the process is completed, try to reach an agreement with the creditors, and if the assets are not sufficient to cover liabilities, file for bankruptcy, close the estate and, finally, if there has been a division of matrimonial property or succession, hand over the assets.

106 The parties can also apply for the appointment of an estate distributor (*skifteman*), who will set a value and distribute the inheritance, draw up a document on the distribution of the inheritance to be served to all parties. The estate distributor usually tries to reach an agreement between the parties, but if it is not possible, they will adopt a compulsory decision on the distribution of the estate.

107 An application for the appointment of an estate administrator or estate distributor can be submitted online to the district court; such an application costs 900 SEK. ([230]) If dissatisfied with the distribution decisions, the parties may reapply to the district court.

([228]) Inheritance Code, Chapter 18 Sec 1.

([229]) Margareta Brattström, Anna Singer, *Rätt Arv. Fördelning av Kvarlåtenskap* (iUstus 2023) 162.

([230]) The website of the Swedish courts, information on death and estate inventory (in Swedish), <https://www.domstol.se/amnen/familj/dodsfall-och-arv/boutredning-och-arvskifte/#:~:text=g%C3%B6r%20en%20skiftesman%3F-,Vad%20g%C3%B6r%20en%20skiftesman%3F,st%C3%A5nd%20en%20%C3%B6verenskommelse%20mellan%20d%C3%B6dsbodel%C3%A4garna> accessed on 25 June 2025.

C. *Devolution of the estate*

1. *Succession by law*

108 If the marriage is dissolved by the death of a spouse, the entire estate of the deceased goes to the surviving spouse, (231) and the joint children of the spouses only inherit after the death of the surviving spouse. If the deceased had children who are not joint children of the spouses, the surviving spouse does not inherit the entire estate and a division of the property must take place. The surviving spouse may request that the matrimonial property is not to be divided in that case, or, alternatively, ask that only a part of it be divided. (232) This means that the surviving spouse will have a chance to keep their property, as if it was not a part of their matrimonial property, but their own separate property, a similar effect to a marriage contract. (233)

109 An heir (*arvinge*) may give up their right to succession completely or transfer their part in the estate to somebody else. It is not regulated in what form a person may waive their right to succession after the death. (234) Prior to death, an heir may enter into an agreement with a testator and give up their right to succession. (235) In this case, the heir cannot decide about the transfer of their right but simply is no longer considered an heir. Meanwhile, children and grandchildren are direct heirs (*bröstarvinge*) and can only waive their rights to an estate prior to death if compensation is provided. (236) It is significant that a child, or a vulnerable adult whose capacity is restricted in certain areas, cannot waive the right to an inheritance. (237) If a person has a guardian or a similar representative, it is the municipal chief-guardian (*överförmyndaren*) who must provide their consent to such waiver. (238)

110 In international cases, the declarations of acceptance or renunciation of an inheritance (by an heir), bequest (by a legatee) or a waiver of a compulsory share of the estate can be submitted to the district court within the framework of the existing rules on the preservation of evidence for the future

---

(231) Inheritance Code, Chapter 3 Sec 1 and 8.

(232) Marriage Code, Chapter 12 Sec 2.

(233) Maarit Jänterä-Jareborg, 'Marital Agreements and Private Autonomy in Sweden' in Jens M Scherpe (ed), *Marital Agreements in Comparative Perspective* (Bloomsbury 2012) 385.

(234) It is, however, possible, as explained in legal guidelines of the Tax Agency, Avsägelse av arv (waiver of inheritance) 2023.

(235) Inheritance Code, Chapter 17 Sec 2 para 1.

(236) Inheritance Code, Chapter 17 Sec 2 para 1.

(237) Ibid, Chapter 17 Sec 2 para 2.

(238) Children and Parents Code, Chapter 15 Sec 6.

in Chapter 41 of the Code of Judicial Procedure, (239) cited above in no 11 of this report. If there is a foreign element and the jurisdiction according to the EU Succession Regulation belongs to authorities in Sweden, but the applicable foreign law requires declarations to be made, for example, upon acceptance of the inheritance (or other types of declarations), these declarations may also be made to the special estate administrator. (240)

111 In Sweden, debts are not inherited but they are borne by the estate (*dödsbo*) as a legal person with rights and duties, hence the estate is responsible for the debts. (241) If the debts are greater than the assets, the estate is insolvent. (242) The estate can be a defendant in disputes (243) and is represented by the parties to the estate, with the exception of international cases, when a special estate administrator represents the estate.

112 Provided that the deceased had their habitual residence in Sweden, the estate inventory deed (*bouppteckning*) has to be drawn up within three months (244) and received by the Tax Agency for registration, within four months after death. (245) It can be a surviving spouse or the child of the deceased who undertakes the task of compiling the estate inventory, or a lawyer, or a funeral home. If there is a minimal inheritance, the social welfare committee can submit, within two months, an application of estate (*dödsboanmälan*) to the Tax Agency, which works in a similar way as the estate inventory deed. (246) The time period can also be extended by the Tax Agency. From the perspective of substantive Swedish law, an estate inventory is compulsory.

113 The Tax Agency registers the estate inventory deed, which then works as evidence and legitimation of the identity of the estate as a legal person. (247) The decision of the Tax Agency not to register an estate inventory deed, for instance, because it does not consider that the deceased had their habitual residence in Sweden, may be appealed to an administrative court. (248)

114 A special estate administrator is appointed in certain cross-border cases (see further below in no 129), whose decisions are considered to be comparable

---

(239) Prop 2014/15:105 Arv i internationella situationer (Succession in international situations), p 46.

(240) Internationella rättsförhållanden rörande arv (International legal relationships regarding succession), SOU 2014:25, p 126.

(241) Inheritance Code, Chapter 21.

(242) Ibid, Chapter 19 Sec 11.

(243) Inheritance Code, Chapter 18 Sec 1.

(244) Ibid, Chapter 20 Sec 1.

(245) Ibid, Chapter 20 Sec 8 para 1.

(246) Ibid, Chapter 20 Sec 8 a para 1.

(247) Ibid, Chapter 20 Sec 9 para 2.

(248) Inheritance Code, Chapter 20 Sec 11, and Inheritance Tax Act (1941:416), Sec 60 (the said Act is no longer in force, with an exception for procedural rules).

to those of a court. (249) The special administrator is independent and not a party to the estate; only such estate administrators may be considered as 'courts' under the EU Succession Regulation. (250) Estate inventories undertaken in other Member States may be submitted to the Tax Agency. (251) If a foreign non-judicial authority had already adopted a decision on issues comparable to the estate inventory and estate distribution, and the decision was legally binding (*vunnit laga kraft*), the decision cannot be reviewed, in accordance with Article 41 of the EU Succession Regulation. (252)

2. *Testamentary succession*

a) *Acceptance or contestation of the will*

115 As a general rule, a will has to be written and witnessed by two witnesses. (253) In Sweden, a will does not have to be registered in order to be valid. There has been some discussion that wills could be digitalised and registered by the Tax Agency in the future, albeit only voluntarily. A person who is bequeathed property in a valid will is called a legatee (*testamentstagare*). The will may provide who is going to be the executor of the will (*testamentsexekutor*), and that person will then represent the estate and act as an estate administrator and estate distributor. The executor of the will sends the will to all heirs, and if there is no executor, then the legatee does so. Heirs may accept the will or contest it (in relation to their part) within six months by applying to the district court. (254)

116 The will does not have to be registered at the time it is created, and it is very easy to revoke a will (orally, by destroying it, by writing a new will). After the death, both the will and the acceptance(s) of the will are registered in the estate inventory deed by the Tax Agency. The Swedish Inheritance Code is clear that the heirs, or an estate administrator, if appointed, must be served with the certified copy of the will. (255) Once received, the heirs may accept the will or contest it. If the heirs fail to contest it within six months, or after the district court recognises the will as valid, the will is considered valid.

117 Declarations on the renunciation of the rights under the will can also be

(249) Prop 2014/15:105, p 29–31.
(250) Ibid.
(251) SOU 2014:25, p 140.
(252) Administrative court (*förvaltningsrätten*) in Härnosand, 3 August 2023, (case No 4337-21).
(253) Inheritance Code, Chapter 10 Sec 1.
(254) Ibid, Chapter 14 Sec 5.
(255) Ibid, Chapter 18 Sec 1 a. Chapter 14 Sec 4.

submitted to a district court, (256) in accordance with the rule in the Code of Judicial Procedure that anyone wishing to take and preserve evidence for the future can apply to the court.

b) *Protection of the children and spouse*

118 If the surviving spouse writes a will that takes away the rights of the children of the previously deceased spouse, the will is invalid. (257) The children may also ask for an adjustment of the will at the district court, within six months after receiving the will. (258) If the testator was married, and the surviving spouse does not inherit in accordance with the will, the surviving spouse nevertheless has a right to a sum equivalent to four 'base amounts'. (259) The 'base amount' is established by the Government each year and it was 58,800 SEK for the year 2025, (260) which means that four base amounted to 235,200 SEK. The rule on 'four base amounts' applies without the need for the spouse to contest the will. A cohabiting partner has no right to inherit and may only inherit in accordance with a will.

c) *International situations*

119 The Act (2015:417) on Inheritance in International Situations applies to issues concerning the formal validity of wills, rather than the EU Succession Regulation. It provides that a will shall be considered valid in form if it fulfils the formal requirements of the law of the place where it was made or the place of habitual residence or nationality of the testator at the time of the will's making or at the time of their death. A will relating to immovable property is also considered valid in form if it fulfils the formal requirements of the law of the place where the property is situated. (261) This applies also to a revocation of a will. A revocation is also deemed to be valid in form if it fulfils the formal requirements of one of the laws under which the will was valid in form. The place where the testator was domiciled under the law of that place is also regarded as the testator's habitual residence. (262) These

(256) Code on Judicial Procedure, Chapter 41 Sec 2.

(257) Inheritance Code, Chapter 3 Sec 2 para 1. Anders Agell, Margareta Brattström, *Äktenskap, Samboende, Partnerskap* (iUstus 2018) 238.

(258) Inheritance Code, Chapter 7 Sec 3, para 1.

(259) Inheritance Code, Chapter 3 Sec 1 para 2.

(260) Government, information on 'prisbasbelopp' for the year 2025 (in Swedish). <https://www.regeringen.se/pressmeddelanden/2024/09/prisbasbelopp-for-2025-faststallt/> accessed on 22 June 2025.

(261) Act (2015:417), Chapter 2 Sec 3 para 2.

(262) Ibid, Chapter 2 Sec 3 para 3 and 4.

provisions are based on the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, of which Sweden is a party.

120 Where a party invokes a circumstance that could be relevant to determine the applicable law, such as the fact that a will was drawn up abroad, the court can give the party the opportunity to make a statement on the circumstance relied upon, which could lead to the application of foreign law. After being informed by the court on the relevance of a declaration that might lead to the application of foreign law, it is possible for the party to withdraw their plea. (263) In addition, it has been discussed in preparatory works whether Sweden can impose the requirement of an estate inventory in all cases where Sweden has jurisdiction, even if foreign law is applicable. (264) Preparatory works suggest that this should be possible, in principle. However, the Tax Agency was found to be correct to refuse registration of an estate inventory deed when the third-country law that was applicable by choice of the deceased did not include any rules on estate inventories whatsoever. (265) Only if the foreign law is applied and it provides for similar (comparable) rules to the Swedish rules on registration of the estate inventory is the estate inventory registered at the Swedish Tax Agency.

3. *Certificates of succession*

a) *Proving the position*

121 The position of the heir, legatee, and executor can be proven by the document issued by the Tax Agency, when the estate inventory is registered. (266) If the estate inventory deed is not yet registered, immediately after the registry of the death, the Tax Agency can issue a death statement that shows the family relationships (*dödsfallsintyg med släktutredning*) of the deceased. This is a public document that anyone can ask for, but it will be most useful for the parties to the estate, who will need it while dealing with banks, insurance companies, and in other situations. The document shows who was the spouse and the children of the deceased, and if a child of the deceased is dead too, the grandchildren can be listed. If the heir is a sibling, they will have to ask for an excerpt from the population registry instead, which shows their parents, in order to prove that the person was the sister or

(263) SOU 2014:25, p 123.
(264) SOU 2014:25, p 135 ff.
(265) Administrative court (*förvaltningsrätten*) in Växjö, 1 March 2022, (case No 1762-21). Here, the 'third country' was Denmark, from the perspective of the EU Succession Regulation.
(266) Inheritance Code, Chapter 20 Sec 9 para 2.

brother of the deceased. (267) Organisations such as a funeral home may order and obtain the death statement directly online, while private persons need to contact the Tax Agency.

122 Statements (*intyg*, also translated as 'certificates') should be distinguished from decisions (*beslut*) in administrative law. In order to adopt a decision, the Tax Agency must have a legal basis for it. The Administrative Act includes certain rules on decisions taken by the authorities: how they must be adopted, what they should include, how they can be modified, and the procedure for appealing decisions. (268) Meanwhile, a statement of death is simply information but that does not mean that it does not have evidentiary power. The Tax Agency has a duty to provide information within its disposition that helps parties to take advantage of their rights, (269) and the information on death is a public document within its disposition. (270)

b) *Recognition and enforcement in international situations*

123 The relevant regulation is provided in the EU Succession Regulation, the Act (2015:417) on Inheritance in International Situations, and Ordinance (2014:1518) on the competent court for the recognition and enforcement of foreign decisions in certain cases. In cross-border situations, if a foreign judgment is declared enforceable, it is enforced under the Enforcement Code (271) in the same way as a Swedish court decision that has entered into force would. (272)

124 An application for a foreign decision to be recognised or declared enforceable (*exequatur*) in Sweden under the EU Succession Regulation is made to a district court, (273) one of the twenty-four district courts the government provides. (274) If the defendant does not have a habitual residence in Sweden,

---

(267) Tax Agency, information on death and family relations (in Swedish) <https://skatteverket.se/privat/folkbokforing/narenanhorigdor/dodsfallsintygmedslaktutredning.4.233f91f71260075abe8800017118.html?q=d%C3%B6dsfallsintyg> accessed on 12 January 2024.

(268) Administrative Act (2017:408), Sec 28–49.

(269) More on the obligation of service, Ulrik von Essen, *Förvaltningsrättens grunder* (Norstedts Juridik 2022) 122–126.

(270) Registration Act (1991:481), Sec 1. Furthermore, see the fundamental Freedom of the Press Act (1949:105), Chapter 2 Sec 1, which provides that everyone shall have the right of access to public documents. The definition of a 'public document' is also described in the Freedom of the Press Act.

(271) Enforcement Code (1981:774).

(272) Act (2015:417), Chapter 2 Sec 12.

(273) Ibid, Chapter 2 Sec 9.

(274) Ordinance (2014:1518) on the competent court for the recognition and enforcement of foreign decisions in certain cases.

the Nacka district court in Stockholm is the competent court. An application for the amendment of the decision under the EU Succession Regulation is also made to the district court that issued the decision, (275) although there must be a different judge dealing with the case. (276)

125 If the decision is adopted in a State that is not a party to the Succession Regulation, it can be recognised under the Act (2015:417) on Inheritance in International Situations, provided that the decision was adopted in a State where the deceased had a habitual residence and there are no grounds to refuse recognition (277): a decision by default without proper service, a decision that conflicts with a Swedish decision, a decision which conflicts with a previously issued foreign decision that applies in Sweden, there are ongoing proceedings in Sweden that may lead to a conflicting decision, and finally, *ordre public*. (278)

c) *European Certificates*

126 According to the Act (2015:417), the Tax Agency is the competent authority to issue the European Certificate of Succession. (279) The decision of the Tax Agency regarding the European Certificate of Succession can be appealed to the district court in the place where the deceased had their habitual residence. If the deceased did not have a habitual residence in Sweden, the decision is appealed to the Stockholm district court. The Act (1996:242) on Court Matters is also applied to appeals unless the EU Succession Regulation provides otherwise. According to the Act on Court Matters, permission to appeal may be required. (280)

4. *Administration of estates*

a) *Estate administrator*

127 In general, parties to the estate administer the estate together, before it can be distributed. (281) If the parties to the estate so require, an estate administrator (*boutredningsman*) is appointed by the court. (282) In purely internal

(275) Act (2015:417), Chapter 2 Sec 10.
(276) Commentary by Emilia Hörnell to Act (2015:417) Chapter 2 Sec 10. JUNO database.
(277) Act (2015:417), Chapter 4 Sec 2.
(278) Ibid, Chapter 4 Sec 3.
(279) Ibid, Chapter 2 Sec 7.
(280) Act (1996:242) on Court Matters, Sec 39 para 2.
(281) Inheritance Code, Chapter 18 Sec 1.
(282) Ibid, Chapter 19 Sec 1.

situations, a party to the estate may be the estate administrator. (283) In international situations, as discussed above, the estate administrator is impartial and in the absolute majority of cases, it is a lawyer.

128 If there is an executor of the will, they act as the estate administrator, without a court decision. Before transferring immovable property and land, the estate administrator must receive the written consent of the parties to the estate. (284) This applies in such cases when decisions are taken by the estate administrator rather than prescribed in the will. Moreover, the court may also allow the estate administrator to transfer immovable property. (285) If the permission by court or written consents by all parties to the estate are not obtained, but the estate administrator still transfers immovable property, such a transfer is invalid, provided that the party to the estate contests the transfer within three months. (286) If they do not, the party has lost their possibility to claim.

b) *Special estate administrator in certain international cases*

129 It may happen that the deceased did not have a habitual residence in Sweden, but Swedish jurisdiction is still applicable, according to Article 22 or Article 7 of the EU Succession Regulation. In that case, the Act (2015:417) on Inheritance in International Situations envisages that a special estate administrator must be appointed, who must not be a party to the estate and in other ways should be impartial. (287) It is considered that impartiality is important in order for decisions of the special estate administrator to be recognisable as decisions in other EU Member States. (288)

130 It is also possible that Article 29 of the Succession Regulation applies and the party to the estate requests the appointment of an estate administrator in Sweden, although the applicable law to the succession as a whole is foreign law. In that case, a special estate administrator must be appointed under the Act (2015:417), and not a party to the estate, as is usual in purely national situations.

c) *Distributor of the estate*

131 Upon a party's request, the court can also appoint a distributor of the estate (*skiftesman*), (289) who has rather different functions. If there is an executor

(283) Ibid, Chapter 19 Sec 3 para 1.
(284) Ibid, Chapter 19 Sec 13.
(285) Ibid, Chapter 19 Sec 13 para 1.
(286) Ibid, Chapter 19 Sec 13 para 2.
(287) Act (2015:417), Chapter 2 Sec 2 para 1.
(288) Commentary by Emilia Hörnell to the Act (2015:417), Chapter 2 Sec 2 para 1.
(289) Inheritance Code, Chapter 23 Sec 5 para 1.

of the will, they act as a distributor of the estate, again without a special decision on that matter. (290) A party to the estate cannot be appointed as a distributor of the estate, who needs to be impartial. (291) The distributor of the estate does not always have to hear the parties to the estate; although they try to reach a consensus, (292) a compulsory distribution (*tvångskifte*) can also take place. (293) The estate distributor has the competence to take a position regarding disputes among the parties to the estate, ie, they must resolve them. (294) If the estate distributor makes a decision and the party involved is dissatisfied, they may contest the decision by raising a claim against other heirs within one month of the decision being issued. (295) If they do not, the right to a claim is lost.

d) *Consideration of pending processes*

If Swedish law is applicable, the Swedish authorities should consider the **132**
rights of a creditor, heir, or legatee in a similar administration of the deceased's estate in another State, in administration of the estate or the distribution of the inheritance in Sweden. (296) This provision is related to the principle of international harmony of decisions, and may, for example, be applicable if the deceased was domiciled in Sweden but was a citizen of a third State (State outside of the EU) that applies the law of nationality. If a choice of law has not been made in favour of the law of the State of nationality, the main rule in Article 21 of the EU Succession Regulation is that Swedish law applies to the entire inheritance, including assets in the third State. However, if there is a simultaneous administration of the inheritance in the third country, it may be necessary to take it into consideration. If the foreign proceedings have not been completed at the time of the Swedish administration of the estate or succession, the special estate administrator should, as far as is reasonable, await the outcome of these proceedings.

---

(290) Ibid, Chapter 23 Sec 5 para 2.

(291) Ibid, Chapter 23 Sec 5 para 3.

(292) Ibid, Chapter 23 Sec 2.

(293) Margareta Brattström, Anna Singer, *Rätt Arv. Fördelning av Kvarlåtenskap* (6th edn, iUstus 2023) 202–203.

(294) In comparison to the rules on the division of matrimonial property, Marriage Code, Chapter 17 Sec 6 para 2.

(295) Again, by analogy to the rules on matrimonial property division, Marriage Code, Chapter 17 Sec 7. Also see Margareta Brattström, Anna Singer, *Rätt Arv. Fördelning av Kvarlåtenskap* (6th edn, iUstus 2023) 203.

(296) Ibid, Chapter 2 Sec 6.

e) *Necessary measures in international cases*

133 If there is property in Sweden but a Swedish court or other authority does not have the international jurisdiction to decide on the succession, the social welfare committee, if necessary, may take the necessary measures. In this case, the death is notified to the social welfare committee by the person who has the property in their care. The social welfare committee transfers the property to the person authorised to receive it. (297) If the social welfare committee for practical reasons cannot do it, it reports the death to the district court, which orders that the property be placed under the administration of a special administrator until it can be handed over to the person authorised to receive it. (298) If the property is of little value, the social welfare committee may, instead of reporting the death to the district court, transfer the property to a relative of the deceased or to the foreign authority of the State of which the deceased was a national. (299)

IV. Status of natural persons

A. *Names*

134 The competent institution, besides courts entrusted with judicial review, is the Swedish Tax Agency (*Skatteverket*), which registers names in national matters and also registers names acquired abroad. (300) The name acquired abroad is recognised, provided that there was a connection to the decision-making EU Member State (or Switzerland), in the form of a habitual residence, nationality or another strong connection. (301) This rule does not apply to changes of names for reasons other than a change of civil status or family status, eg, purely administrative changes of names. The rule also does not apply if the name is offensive or for another reason inappropriate. Moreover, the nationality principle remains applicable to Swedish nationals wherever they live, with the exception of Swedish nationals having their habitual residence in Denmark, Finland or Norway. In cases of adoption, and when somebody loses a name, it is the court that adopts the decision on names, and no separate application needs to be filed. (302) If the party is not satisfied with the decision of the Tax Agency, a refusal to register the new

(297) Act (2015:417), Chapter 2 Sec 5 para 1.
(298) Ibid, Chapter 2 Sec 5 para 2.
(299) Ibid, Chapter 2 Sec 5 para 3.
(300) Act (2016:1013) on Personal Names, Sec 36.
(301) Ibid, Sec 30.
(302) Act (2016:1013) on Personal Names, Sec 8, Sec 22, Sec 36.

name, it can be appealed to administrative court, in accordance with the usual administrative procedure.

135 When a person submits an application for a change of name to the Tax Agency, it is binding, but at the same time, the person may also change their mind. If the person changed their mind, that is also binding. In one case decided by the Supreme Administrative Court, (303) a woman applied to change her surname, the Tax Agency adopted a decision to grant the application, but the woman then called and said she no longer wanted to change her name. The Tax Agency refused to change their decision or to change her name back, because as a divorcee, she could not take the name of a former husband. The Supreme Administrative Court held that the decision of the Tax Agency is a decision against the applicant, when the applicant has changed their mind, as provided for in Administrative Act, (304) which means it was possible to appeal it.

B. *Gender recognition*

136 The Swedish law on gender recognition dates back to the 1970s and it has been under review during the writing of this report. (305) The Swedish Parliament voted in favour of changes in April of 2024. The Act (1972:119) concerning Recognition of Legal Gender in Certain Cases (Legal Gender Recognition Act), which is discussed next, was replaced as of 1 July 2025. It must be mentioned that legal changes in this area have been debated for decades; (306) more than ten legal investigations took place. The new regulation is further described in paragraph 139 of this report.

137 The medical and legal perspectives on gender recognition were somewhat separated in the Legal Gender Recognition Act of 1972. Trans persons did not have to undergo surgeries to change their legal gender (legal gender recognition), but gender affirmative surgeries were not possible, unless the legal gender has been changed already. It was possible to apply for both gender affirmative surgery and a change of legal gender (legal gender recognition) in the same form, (307) addressed to the key authority, the National Board of Health and Welfare (*Socialstyrelse*). A person could

---

(303) Supreme Administrative Court, 2015, ref 73.

(304) Administrative Act (1986:223), Sec 22, as applicable in 2015.

(305) RFSL, Questions and Answers about the New Legal Gender Recognition Act (in Swedish), <https://www.rfsu.se/vad-vi-gor/i-sverige/fragor-vi-jobbar-med/familjepolitik/fragor-och-svar-om-ny-konstillhorighetslag/> accessed 12 December 2023.

(306) Juridiskt kön och medicinsk könskorrigering (Legal gender and medical confirmation of gender), SOU 2014:91.

(307) National Board of Health and Welfare (Socialstyrelse), Form on Gender Recognition (in Swedish), <https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/

change the legal gender that was recorded in the population registry if, for a long time, they had felt that they belonged to a different gender than the one assigned, and if it had to be assumed that they would continue to live with this gender in the future, and they had reached the age of 18. (308) In practice, this meant that a diagnosis of transsexualism and medical contact of at least two years was needed in order to get the permission to change the legal gender from the legal team of the National Board of Health and Welfare. (309) In 2013, the Legal Gender Recognition Act of 1972 was amended to abolish the requirement of sterilisation of trans persons prior to a change of a legal gender.

138 In accordance with the 1972 Act, for any gender reaffirming surgeries or to change a legal gender in the population registry, one needed to be 18. (310) In order to remove gonads, a person needed to be over 23 to apply for permission, unless there are extraordinary reasons (*synnerliga skäl*). (311) However, considering that the transition process has been reported to take years in Sweden, custodians of children could fill in the said form in advance, and in respect of a child older than 12, their consent had to be provided. (312) The applications to *Socialstyrelse* (313) could only be submitted by persons registered in Sweden. (314) They cannot be in a registered partnership. (315) Decisions of the National Board of Health and Welfare could be appealed to an administrative court. (316) An appeal to a court of higher instance requires permission to appeal. (317) A judgment or a decision on the change of a legal gender which was issued by a foreign court or authority and which is legally binding (*vunnit laga kraft*) is valid in Sweden if the person has a nationality of that State or had a habitual residence in that State when the decision was issued. (318)

139 Two new Acts came into force in July of 2025 and replace the Legal Gender

---

dokument-webb/blankett/blankett-ansokan-om-fastställande-av-konstillhorighet.pdf> accessed 7 September 2024.

(308) Legal Gender Recognition Act of 1972, Sec 1.

(309) Transformering, Changing the Legal Gender (in Swedish), <https://transformering.se/vardhalsa/transvard/andra-juridiskt-kon> accessed 27 May 2025.

(310) RFSL, Legal Gender Recognition Act (in Swedish), <https://www.rfsl.se/verksamhet/trans/konstillhorighetslagen/> accessed 24 June 2025.

(311) Legal Gender Recognition Act of 1972, Sec 4 a.

(312) Legal Gender Recognition Act of 1972, Sec 2 para 1 and 2.

(313) Legal Gender Recognition Act of 1972, Sec 5.

(314) Ibid, Sec 3 para 1.

(315) Legal Gender Recognition Act of 1972, Sec 3 para 2.

(316) Ibid, Sec 6 para 1.

(317) Ibid, Sec 6 para 2.

(318) Ibid, Sec 3a.

Recognition Act of 1972. (319) One Act (2024:238) focuses on recognition of legal gender in certain cases, and another (2024:237) on gender reaffirming surgeries. Regarding legal gender recognition, male and female genders still remain, without a possibility to register a non-binary gender. The age limit for legal gender recognition is lowered somewhat, from 18 to 16 years of age. It is also possible to apply for it from the age of 12, with the consent of the parent or guardian. No diagnosis of transsexualism or gender dysphoria will be required, and a simple medical statement (*intyg*) will be sufficient. In the second Law, which concerns gender reaffirming surgeries, the main change is that permission from the legal team of the National Board of Health and Welfare is no longer required. Instead, this is going to be a medical decision, to be taken by healthcare providers. The National Board of Health and Welfare has prepared a new package of know-how for the healthcare providers, to be available together with the new rules. (320)

According to section 9 of the Act (2024:238), judgments or decisions confirming a person's gender, issued by a foreign court or authority and after they became legally binding (*fått laga kraft*), are valid in Sweden if the person was a national or habitual resident of that country at the time it was issued. The Tax Agency has not yet explained how non-binary identities from abroad, eg Germany, will be registered in Sweden.

C. *Protection of adults*

140 Regarding a person who needs help in taking decisions due to sickness, mental health or other health problems, a court may appoint a guardian (*god man*, also translated as a special representative). (321) Usually a person's consent is needed in confirming decisions, unless the person cannot provide it due to their health. (322)

141 If a person has weakened or no legal capacity in a certain area, for instance, to take care of their property, the court may appoint an administrator (*förvaltare*). (323) This is even applicable when a person has an addiction. (324) The administrator alone takes care of the property and adopts decisions for

(319) SFS 2024: 239.

(320) The National Board of Health and Welfare's Regulations (HSLF-FS 2025:9) on Applications for Legal Gender Recognition in Certain Cases.

(321) Children and Parents Code, Chapter 11 Sec 4 para 1.

(322) Ibid, Chapter 11 Sec 4 para 2.

(323) Ibid, Chapter 11 Sec 7.

(324) As established by the Supreme Court in NJA 2019, s 837.

the person. (325) There is also a possibility of an *ex lege* representation by family members (*anhörigbehörighet*), which is only restricted to daily issues. (326)

142 Furthermore, since 2017, the Act (2017:310) on Continuing Powers of Attorney has been applicable in Sweden. It allows adults to sign continuing powers of attorney (*framtidsfullmakt*) and to appoint an agent (*fullmaktshavare*) once they can no longer take decisions. It is not quite clear what the relationship is between these competing forms of protection of vulnerable adults, but it could be understood from preparatory works and literature that if the person signs a continuing power of attorney, there will be no need to appoint a guardian or an administrator. (327) The formal requirements for signing a continuing power of attorney are the same as for a will. (328) The continuing power of attorney can always be revoked, (329) in accordance with the Act (1915:218) on Contracts and other Legal Transactions in the area of Obligations. (330) This Act also applies to the actions of the representative in relation to third parties. (331)

143 The person who is envisaged as the representative (agent) in the continuing power of attorney has the freedom to decide when they need to take over the decision-making, unless it was provided in the document that court approval is needed, or the agent requires it. (332) District courts at the place of registration of the vulnerable adult have jurisdiction to adopt such decisions, and if the person has no place of registry in Sweden, it is the place where the person is present, and if that does not apply either, it is the Stockholm district court that has jurisdiction. (333)

144 A court and a chief-guardian (*överförmyndare*) may take up the issue of protection of an adult *ex officio*, and as a result, appoint a guardian or an administrator. (334) The adult can also apply themselves, or those representing them. (335) When the guardian or administrator is no longer needed, the vulnerable adult, or the guardian/administrator applies to the chief-guardian

---

(325) Children and Parents Code, Chapter 11 Sec 9.

(326) Ibid, Chapter 17.

(327) Margareta Brattström, Anna Singer, 'Fullmakt för Framtiden' in Marie Linton and Mosa Sayed (eds), *Festskrift till Maarit Jänterä-Jareborg* (iUstus, 2022) 46.

(328) That is, they need to be written and witnessed by two witnesses. Act (2017:310), Sec 3 and 4.

(329) Act (2017:310), Sec 6.

(330) Ibid, Sec 8.

(331) Ibid, Sec 22–23.

(332) Ibid, Sec 9.

(333) Act (2017:310), Sec 11.

(334) Children and Parents Code, Chapter 11 Sec 15 para 3.

(335) Ibid, Chapter 11 Sec 15 para 1.

asking to end the appointment. The chief-guardian monitors the actions of the guardian and administrator. (336) If a certain contract is concluded by a guardian or administrator without the chief-guardian's consent, it is invalid (where such consent is needed, for instance, transfer of real estate or credit), (337) unless the chief-guardian approves it subsequently. The chief-guardian can decide that the continuing power of attorney cannot be used, entirely or partially, if the said agent acted against the interests of the vulnerable adult. Decisions of the chief-guardian may be appealed to the district court in accordance with the Act (1996:242) on Court Matters. (338)

V. Conclusions on the extra-judicial administration of justice in Sweden

145 In the case of dissolution of marriage, only the courts are competent in Sweden. There are no alternatives to courts, but the court is easily accessible, both in the procedural and in substantive sense. In a procedural sense, the access to a court is comfortable, cheap, and easy. Substantially, people are considered to have the right to divorce, no questions asked. A period of reflection applies only in certain cases and does not impede the right to divorce. The Swedish Tax Agency has the competence to register the marriage and also its dissolution, once it is pronounced by courts. Foreign dissolutions of divorces are recognised under Brussels IIb, with 'decisions' having a broad meaning in this area, or under other instruments, discussed above and illustrated in Table 1 (para 31).

146 In the case of parenthood, three statuses can be registered at the Swedish Tax Agency: motherhood, fatherhood, and parenthood. An important role is played by the social welfare committee in this process. From the perspective of private international law, it can be considered as an institution that adopts decisions comparable to court decisions. In the case of the adoption of minors, the social welfare committee and the Family Law and Parental Support Authority (MFOF) play a significant role. In the area of parental responsibility, social welfare committees can be considered as courts when they confirm a custodial agreement of parents. The chief-guardian can also be considered as a court. There are, in principle, no equivalents to the 'authentic instruments' or 'agreements' of the Brussels IIb Regulation in Sweden (see no 89).

147 In the case of matrimonial property, the Swedish Tax Agency registers marriage agreements, and the parties are left with much freedom on how they

(336) Ibid, Chapter 12 Sec 9.
(337) Ibid, Chapter 12 Sec 9.
(338) Act (2017:310), Sec 26.

want to divide the matrimonial property. If the spouses/cohabitees disagree as to the division, then courts appoint a property distributor, who will do their best to reach a consensus, but if it is not possible, can take mandatory decisions, comparable again to court decisions. The party not satisfied with the decisions of the matrimonial property distributor may apply to court. If the matrimonial property is divided in relation to death, also a special estate administrator may act as a court. In addition, the Enforcement Agency is also considered to be a court in this area.

148 Similarly, in inheritance law, parties have great discretion regarding private agreements, but if needed, the court may appoint an estate administrator, in certain international cases, a special estate administrator, and an estate distributor. The special estate administrator and the estate distributor are both impartial authorities who adopt decisions mandatory to parties. They can also contest these decisions in court. Chief-guardians also adopt binding decisions in this area, when they decide regarding the right to inheritance of a child or a vulnerable adult. In accordance with the Swedish preparatory works and legal literature, the constitutive, mandatory decisions of special estate administrators, property distributors or chief-guardians are not considered 'authentic instruments' but instead, are seen as court decisions.

149 **Table 2.**
Extra-judicial administration of justice in cross-border family and succession matters in Sweden

Area	Competent institution
Parenthood Custody Adoption	Social welfare committee (*socialnämnd*)
Custody Protection of adults Protection of property of the child Succession	Chief-guardian (*överförmyndare*)
Matrimonial property, property relations	Property distributor (*bodelningsförrättare*)
Succession	Special estate administrator (*särskild boutredningsman*) Chief-guardian
Succession	Estate distributor (*skiftesman*)
Succession	Testamentary executor (*testamentsexekutor*)
Matrimonial property, property relations Protection of property of the child Litigation costs	Enforcement Agency (*Kronofogden*)

PART III
POLICY RECOMMENDATIONS

THE EXTRA-JUDICIAL ADMINISTRATION OF JUSTICE IN CROSS-BORDER FAMILY AND SUCCESSION MATTERS — POLICY RECOMMENDATIONS

by *Elena Bargelli, Nicola Chiricallo, Anatol Dutta, Paul Patreider, Elisa Stracqualursi, and François Trémosa*

The following Principles, authored by the Project Group, [1] are addressed to the European Union (EU) and the Member States in order to improve the extra-judicial administration of justice in family and succession matters, in particular, in cross-border cases. They are based on the comparative findings of the present Project, mainly on the country reports and a comparative report. [2] The Project was conducted under the auspices of the European Law Institute (between 2020 and 2025) and funded by the European Union (between 2023 and 2025).

The Principles correspond to the European Law Institute's Principles on the Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters. [3]

Principle 1 (Aim and scope)

The following Principles make policy recommendations for the European Union and the Member States regarding the extra-judicial administration of justice in family and succession matters. They should, in particular, improve the private international law instruments of the European Union and the national laws of the Member States when acts in family and succession matters are in at least one Member State reserved to courts, but fall in other Member States within the competences of other authorities or the parties themselves.

Comments

Principle 1 defines the aim and scope of these Principles, which contain policy recommendations for the European Union and the Member States. It describes the scenario to which the following Principles apply. **1**

The Principles only apply to acts in family and succession matters which are – currently or in the future – in at least one Member State reserved to courts, **2**

---

(1) Elena Bargelli, Nicola Chiricallo, Anatol Dutta, Paul Patreider, Elisa Stracqualursi, and François Trémosa.

(2) See Part I and II of this volume.

(3) See <https://europeanlawinstitute.eu/projects-publications/current-projects/current-projects/eli-principles-extra-judicial-administration-of-justice-in-cross-border-family-and-succession-matters/> accessed 1 June 2025.

while in other Member States fall within the competences of other authorities or the parties themselves. Currently, this situation – which is a result of a de-judicialisation trend (4) – arises in the European Union, for example, with regard to divorce and national certificates of succession. Whereas some Member States still provide that divorce requires court proceedings and a court decree dissolving the marital bond, (5) other Member States allow other authorities to dissolve a marriage (6) or even permit the spouses themselves to terminate their marriage by private declarations, with the involvement of certain authorities such as notaries or civil status registrars. (7) Another example of this scenario concerns certificates of succession, which allow a person to prove the position as an heir, legatee, executor, or administrator regarding the succession upon death with third party effects. Such certificates are issued in some Member States by courts after even potentially adversarial proceedings; (8) however, in other Member States, notaries or other authorities are competent to issue succession certificates. (9) Another example concerns the change of legal gender: in some Member States the recognition of a certain gender identity still requires a court decision; (10) other Member States allow a person to change a gender entry in the civil status registers by way of a unilateral declaration. (11)

3 The Project Group is of the opinion that in those scenarios, certain policy problems arise at the level of both the law of the Member States and the European Union which are addressed in the following Principles.

4 The term 'act' in family and succession matters is used deliberately in order to avoid terms already occupied and used by the terminology of the existing private international law instruments of the European Union, (12) partly with

---

(4) See for details *Dutta/Patreider*, Comparative Report, paras 1ff.

(5) *Dutta/Patreider*, Comparative Report, para 19.

(6) *Dutta/Patreider*, Comparative Report, para 201.

(7) *Dutta/Patreider*, Comparative Report, paras 20–24.

(8) *Dutta/Patreider*, Comparative Report, para 59.

(9) Ibid.

(10) *Dutta/Patreider*, Comparative Report, para 76.

(11) *Dutta/Patreider*, Comparative Report, paras 70f.

(12) In particular, the Brussels IIb Regulation (Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L178/1), the Hague Child Protection Convention (Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children), the Maintenance Regulation (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), the Hague Maintenance

overlapping and potentially different meanings, such as 'judgment', 'decision', 'authentic instrument' and 'agreement'. The term 'acts', on the other hand, should cover both public documents, authentic instruments, and agreements or, more generally: everything emanating from, drawn up, recorded by or resulting from the participation of an authority other than a court in one Member State but with effects and functions similar to those of a judicial decision according to the law of at least one other Member State. The definition of 'act' thus requires that an authority is involved to an at least minimum extent (eg by registering the act). The reference to matters falling within the competences of the 'parties themselves' alludes to situations in which the substance of a legal relationship in family and succession matters is governed by party autonomy, while the non-judicial authority is mainly involved in the formal review or registration of the party declaration or agreement (see also para 64).

5 Acts in family and succession matters which are extra-judicial according to the law of all Member States fall outside the scope of these Principles, for example, wills, the conclusion of marriage or a registered partnership, marital agreements, recognition of parenthood, etc. The specific policy issues addressed in these Principles do not arise if no Member State reserves the act to its courts under the law of that Member State.

6 The term 'authorities other than courts' also refers to legal professionals and not just to other public or administrative authorities. It can thus also refer to

---

Protocol (Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations), the Rome III Regulation (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), the Succession Regulation (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) and the Matrimonial Property Regulations for Spouses (Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L183/1) and Registered Partners (Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30) but also future instruments such as the planned Parenthood Regulation (Commission Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood' COM (2022) 695 final) and on the International Protection of Adults (Commission, 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults' COM (2023) 280 final).

notaries, lawyers, or other entities, acting in an official capacity and authorised under Member State law to participate in an act (see para 4 and below para 16) in family and succession matters. The term, however, also covers courts in the traditional sense when they do not exercise 'judicial functions'.

PRINCIPLE 2 (DE-JUDICIALISATION IN FAMILY AND SUCCESSION MATTERS – MORE CONSISTENCY)

As far as legal consequences of acts in family and succession matters depend on the will of the parties under the substantive law of the Member States, they should consider, for the sake of consistency, shifting competences from courts to other authorities or the parties themselves. In doing so, they should observe the minimum standards laid down in Principle 3.

Comments

7 The Project Group expresses in Principle 2 the opinion that Member States should consider shifting competences from courts to other authorities or the parties themselves, as far as legal consequences of acts in family and succession matters depend on the will of the parties under the substantive law of the Member State concerned. This is especially the case where party autonomy is already the guiding principle in family and succession law, with parties being free to determine certain situations as they see fit, and where courts have a passive role (for example, merely recording or receiving party declarations). The contractualisation of status matters is particularly present in family law but can also be detected in various matters related to succession law. Principle 2 is directed to the Member States' legislators. It should also apply to cases in which Member States intend to reform existing out-of-court procedures.

8 De-judicialisation frequently occurs in non-contentious matters. Cases of dispute generally continue to have to be solved by judicial authorities. (13) This is not questioned by Principle 2. Where all parties are, however, in agreement, and (procedural and substantive law) safeguards (for minimum standards, see Principle 3 or paras 14ff) can otherwise be guaranteed, the delegation of tasks to out-of-court actors should be considered.

Policy considerations

9 Court proceedings are not only expensive for the State and the parties: in family and succession matters, judicial proceedings might at times also lead parties to escalate the dispute. Hence, court proceedings should only be used

(13) *Dutta/Patreider*, Comparative Report, paras 26, 33f, 47, 86f, 92f.

cautiously if they are necessary, for example, to establish the facts of the case or determine disputes between the parties.

10 Court proceedings are, however, not required if the applicable substantive law links certain legal consequences in family and succession law mainly to the intentions of the parties. Rather, other authorities can – for example, when participating in the necessary formalities of the parties' declarations – assess whether the declarations of the parties are based on their true intentions. For example, in some Member States, notaries might be better trained to detect the true intentions of parties when formalising their declarations, at the same time providing them with the necessary legal information – tasks they are already entrusted with under the laws of most Member States. Hence, it would be much more consistent if Member States shift competences from courts to other authorities (specialised in receiving and recording party declarations) or the parties themselves as far as legal consequences of acts in family and succession matters depend on the will of the parties.

Example: consensual divorce

11 Against this background, especially Member States whose family law allows for consensual forms of divorce (14) should consider whether, in such instances, the divorce could be dealt with in proceedings other than court proceedings (based on the minimum standards laid down in Principle 3), especially if the spouses do not only agree on the dissolution of the marriage as such but also on the (financial) consequences of divorce.

12 As far as Member State law does not link parental responsibility to the marital status of the parents, such alternative forms of out-of-court divorce should – contrary to the solution in some Member States currently (15) – not be restricted to spouses without minor children. The divorce as such will not have any consequences for parental responsibility but rather only the separation of the – married or non-married – parents.

Minimum standards

13 When shifting competences from courts to other authorities or the parties themselves in family and succession matters, the Member States should consider ensuring certain minimum standards as laid down in Principle 3 (see paras 14ff below).

---

(14) Eg in Denmark, Estonia, France, Greece, Italy, Lithuania, Portugal, Romania, Slovenia, and Spain. See *Dutta/Patreider*, Comparative Report, paras 20–24.

(15) *Dutta/Patreider*, Comparative Report, para 23.

PRINCIPLE 3 (MINIMUM STANDARDS)

1. *Member States should guarantee minimum standards if authorities other than courts participate in an act in family and succession matters, thus strengthening mutual trust and safeguarding fundamental rights.*
2. *When shifting competences to other authorities or the parties themselves according to Principle 2, Member States should in particular ensure:*

(a) *that parties directly affected by an act in a family and succession matter are given the opportunity to take part in the proceedings and to express their views;*

(b) *that an act can be made subject to judicial review;*

(c) *that adequate mechanisms are put in place to ensure that an act is based on the genuine will of the parties and that their interests are fairly balanced;*

(d) *that only authorities that are qualified to receive and record party declarations participate in the act.*

Comments

14 Principle 3 is mainly addressed to the Member States (cf however para 32). At the core of the Principle is the idea that national legislators should ensure the respect of substantive and procedural standards when shifting competences to authorities other than courts (see Principle 2) or reforming existing non-judicial procedures. The aim is to build and strengthen mutual trust in matters concerning the extra-judicial administration of justice. The standards identified reflect fundamental substantive and procedural rights (Article 47 of the Charter of Fundamental Rights of the European Union [CFR]), with a focus on the rights of the child (Article 24 CFR, Article 12 UNCRC). As such, the proposed guidelines are already widely implemented throughout the EU. Furthermore, in single pieces of European Union legislation, substantive and procedural safeguards are required for an authority to be qualified as a court in family and succession matters. (16) Instead, no requirements are set by European Union regulations for authorities other than courts, apart from the need to respect the child's right to be heard (Articles 39 and 68 of the Brussels IIb Regulation, see paras 23ff). While existing standards primarily concern judicial procedures, they should also be adapted to scenarios in which justice is administered by authorities other than courts.

---

(16) See Article 2(2) of the Maintenance Regulation, Article 3(2) Succession Regulation, Articles 3(2) of the Matrimonial and Partnership Property Regulation(s): impartiality; the right of all parties to be heard; judicial review; similar force and effect as a decision of a judicial authority on the same matter. These requirements apply to any court, regardless of whether it has a judicial or non-judicial nature.

The term 'minimum standards' identifies a minimum level of safeguards, some of which are of a procedural nature, while others also have substantive meaning. Although most of them are already respected by many Member States even in extra-judicial procedures, all should eventually be complied with by each Member State. Member States should in any case be free to decide to introduce additional guarantees. **15**

The use of the term 'participate in an act in family and succession matters' ensures that the activities of non-judicial actors identified during the comparative phase of the Project are covered by the present Principles. 'Participating' refers to instances in which an act is issued by an authority other than a court but can also mean that the authority receives and records a declaration or agreement. It further includes cases in which an act is deposited with an authority, in which the authority facilitates an agreement between the parties or even takes an authoritative decision on their behalf under national law. In certain limited cases, the participation could thus also refer to the taking of a decision in a family and succession matter, even if contentious in nature. The term includes instances in which the authority assesses the declarations and agreements of the parties as to their substance but also cases in which the authority only checks the formalities that have to be met. What unifies the different ways of 'participating' is the need that the output of the participation has the same effects as the act of a judicial authority in at least one other Member State (see above the definition of 'act' under para 4). **16**

The need for minimum standards in the extra-judicial administration of justice (Principle 3(1))

Minimum standards are necessary to ensure that essential safeguards are also applied to the administration of justice in non-judicial contexts. They will also increase mutual trust between Member States. Indeed, Member States which receive foreign acts (hereinafter: Member State of destination) and are unfamiliar with out-of-court procedures in a particular matter should be able to rely on the fact that basic standards and fundamental rights have been respected by the Member State of origin when their authorities have been involved in an act relating to family and succession matters. **17**

If Member States receiving acts in family and succession matters from other Member States (see Principle 5) can trust in the fact that certain procedures were followed, and basic standards were complied with, they will be more inclined to extend the effects of that act to their territory, thus strengthening cooperation in civil matters. Implementing the proposed standards will therefore not only consolidate the mutual trust between Member States but **18**

further facilitate the extension of effects under Principle 5. This can further be facilitated by sharing comparative knowledge on non-judicial proceedings and by further clarifying which authorities are currently covered by existing definitions. This might, for example, follow from strengthening the rules requiring Member States to notify the European Commission of the authorities falling within the scope of the term 'court' in their respective jurisdiction. (17)

19 Mutual trust in this context should therefore be considered from the point of view of both the Member State of destination and the Member State of origin of an act in family and succession matters. Indeed, by complying with the standards set out in this Principle, the Member State of origin should be able to expect the effects of the act in which its authorities have participated to be extended to other jurisdictions without having to overcome disproportionate procedural hurdles. Furthermore, such Member State should be prepared to do the same in a similar scenario (reciprocity).

20 The present Principle seeks to ensure that Member States which receive acts in family and succession matters will not have to carry out checks concerning their compliance with the procedural and substantive standards set out under Principle 3(2).

Elements of minimum standards (Principle 3(2))

21 Principle 3(2) focuses on the following elements: the right to be heard (see paras 23ff), judicial review (see paras 33ff), ensuring a genuine will, balancing the interests of the parties (see paras 37ff), and qualification of authorities (see paras 44ff).

22 Impartiality is a further requirement that a court should possess according to Article 47(2) of the CFR and the *acquis* of the European Union in family and succession matters. (18) This is uncontroversially a requirement also for public authorities and notaries that participate in non-judicial acts, (19) as they are subject to the law and must apply it impartially and without bias.

---

(17) See Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444, para 47.

(18) Cf also European Law Institute, *Charter of Fundamental Constitutional Principles of a European Democracy* (European Law Institute 2024) 51ff (Principle 14: Judicial independence and impartiality).

(19) On the role of notaries as neutral advisors, see Jens Bormann and Philip M Bender, *Judge without lawsuit. The notary in civil law countries* (C.H.Beck 2024) 9, 33. On the impartial role of notaries see *Vlad*, Romania, para 36; *Karm*, Estonia, para 6; on impartiality of civil registrars, see *Teixeira Pedro*, Portugal, para 29. In a few jurisdictions, lawyers are required to assist the parties in drafting divorce agreements (see *Stracqualursi/Chiricallo*, Italy, paras 94ff). They are subject to the standards imposed by their professional codes (see the Code of Conduct for European Lawyers 2.1ff, in particular the principle on independence).

Impartiality of non-judicial authorities does not seem to be an issue in the surveyed jurisdictions.

The right to be heard (Principle 3(2)(a))

23 Parties directly affected by an act in a family and succession matter should be given an effective opportunity to take part in the proceedings and to express their views on the relevant subject matters (Principle 3(2)(a)). This presupposes that the parties have been informed about the proceedings and were given adequate means to participate in them (see also para 16).

24 'Parties directly affected' are the addressees of the effects of the act. Most non-judicial acts having the same legal effects as judicial decisions in the same matter presuppose the consent of the parties involved and are of a non-contentious nature. (20) Consequently, the parties whose consent is required for the act to take effect should, under Principle 3(2)(a), be granted the right to express their view personally (see below para 31) to the competent authority. In most jurisdictions, children above a certain age are currently required to express their consent in judicial and extra-judicial proceedings affecting their rights (adoption, establishment of parenthood, change of gender).

25 The right to be heard applies also to parties that – while not required to express their consent for the act to take effect – are nevertheless directly affected by it. This is typically the case for minors below the minimum age for consent, provided they are capable of making their own decisions (according to their age and maturity). (21) Matters relating to child custody are still under the control of the judicial authorities in most Member States, while in some others they have been de-judicialised in the case of parental agreement. (22) However, in some Member States, doubts arise as to the effectiveness of the implementation of the child's right to be heard. (23) The right to be heard must be granted also in proceedings affecting rights of adults in need of protection. (24)

---

(20) *Dutta/Patreider*, Comparative Report, paras 75, 80f.

(21) This is a general principle that applies to all matters relating to children (eg parenthood, adoption, establishment of parenthood, parental responsibility), be they judicial or non-judicial.

(22) *Dutta/Patreider*, Comparative Report, para 17.

(23) *Berre*, France, para 7; *Zervogianni*, Greece, para 83.

(24) In judicial proceedings see, for example, *Zervogianni*, Greece, para 182; *Stracqualursi/Chiricallo*, Italy, para 301; concerning judicial control over the *Guarda de hecho* in Spanish law, see *Esteve Alguacil*, Spain, para 273. Of course, the validity of a power of attorney requires the principal's consent (for example, see *Johanson*, Germany, para 207).

26 It is obvious that, if the proceeding is contentious and the authority is required to decide in a controversial matter, the right of the parties to participate and express their view *a fortiori* should be regarded as a minimum procedural standard. However, contentious non-judicial proceedings are quite rare. (25)

27 In situations involving children, hearing them, however, does not always constitute an absolute obligation. Nevertheless, the child's right to express their view should be guaranteed in cases in which, according to the circumstances, the involved authority holds it necessary to ensure the best interests of the child notwithstanding the parents' agreement on a matter affecting them. This might, for example, occur in matters related to parenthood and parental responsibility. (26)

28 The specific modalities in which parties (including children and vulnerable adults) are given an effective opportunity to participate in proceedings and to express their views should generally remain a matter of the law of the Member States, (27) which should, however, comply with the relevant European and international standards, (28) and adapt them to non-judicial proceedings.

29 In any event, the authority entrusted with these tasks should be qualified (see paras 44ff), *inter alia*, to hear the parties and to provide special safeguards for children and vulnerable adults (for example, the presence of a qualified professional during the hearing; a minimum age of the child; specific

---

(25) *Pedersen/Thøgersen*, Denmark, paras 43, 61–72 (disputed cases before the Family Law Agency); *Vaigė*, Sweden, para 21 (distribution of estates by executors of estates).

(26) For example, if an agreement on parental responsibility is manifestly contrary to the child's best interests (eg due to the deviation from the applicable default rules or best practices without any evident reason); if there is a gross disparity between the parents' maintenance obligations, having regard to their incomes and the arrangements on parental custody; if the child refuses to have contact with one parent; if proceedings on the violation of parental duties or domestic violence are pending or the agreement might not reflect the genuine will of at least one parent.

(27) See, Recital 39 Brussels IIb. See also Article 12, para 2 UNCRC, which affirms the child's right to be heard in both judicial and administrative proceedings in a manner consistent with the procedural rules of national law.

(28) While Article 12(2) UNCRC allows the hearing to be made either directly, or through a representative or an appropriate body, best practices are provided by Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010). See also, Wendy Schrama/Marilyn Freeman/Nicola Taylor/Marielle Bruning (eds), *International Handbook on Child Participation in Family Law* (Intersentia 2021); Anne Barlow and Jan Ewing (eds), *Children's Voices, Family Disputes and Child-Inclusive Mediation* (Bristol University Press 2024).

environments [out-of-court settings]; specific training for the authorities). This can lead to the involvement of non-legal experts. (29)

30 Should children's rights be involved in non-judicial proceedings, Member States should further consider giving the competent authority the power to examine the substance of the agreement in light of the best interests of the child. (30) Should the agreement not pass the test, the authority should refuse its participation in the act, and ensure the best interests of the children by summoning the parties and granting the hearing of all parties directly affected by the act. (31)

31 It is further believed that Principle 3(2)(a) might be best implemented if all parties personally appear, are heard and given the opportunity to express their views in front of the authority participating in the act, regardless of whether the non-judicial proceeding is contentious or not. In the case of consensual proceedings, requiring a personal appearance allows the authority to check the identity of the parties and better safeguard that an act is based on their genuine will and that their interests are fairly balanced (see paras 37ff). Currently, most (32) Member States already require interested parties to personally appear before the competent authorities in matters related to divorce, gender recognition and adult protection. (33)

32 In order to allow for an easier circulation of acts in family and succession matters, the European Union might also consider introducing specific fields or headings in the European certificates currently (or in the future) accompanying the respective acts for the purpose of the extension of their effects (see Principle 5 and paras 74ff). (34) This might avoid the need for an

---

(29) See *Stracqualursi/Chiricallo*, Italy, para 54.

(30) Currently the case in Italy and Portugal: *Stacqualursi/Chiricallo*, Italy, para 104; *Teixeira Pedro*, Portugal, para 23. No control in this regard is carried out in Denmark or France: *Pedersen/Thøgersen*, Denmark, para 34; *Berre*, France, para 8.

(31) Under Italian law, for example, parents are summoned in front of the President of the Tribunal if the Public Prosecutor holds the parents' agreement as inconsistent with the best interests of the children (see *Stracqualursi/Chiricallo*, Italy, para 104).

(32) Exception: the Danish divorce before the Family Law Agency in 'green' cases, see *Pedersen/Thøgersen*, Denmark, para 34. Doubts might further arise in France in case of notarial divoce: *Berre*, France, para 11.

(33) *Dutta/Patreider*, Comparative Report, paras 20ff.

(34) See currently Article 47(3)(b) of the Brussels IIb Regulation and Annexes III (Certificate concerning decisions in matters of parental responsibility, heading no 15), IV (Certificate concerning decisions ordering the return of a child to another Member State pursuant to the 1980 Hague Convention and any provisional, including protective measures taken in accordance with Article 27(5) of the Regulation accompanying them, heading no 16), V (Certificate concerning certain decisions granting rights of access, heading no 13), and VI (Certificate concerning certain decisions on the substance of rights of custody pursuant to

assessment by the authorities of the receiving Member State that could (potentially) be qualified as a *revision au fond* of the act.

Judicial review (Principle 3(2)(b))

33 When shifting competences to authorities other than courts, Member States should further ensure that acts in family and succession matters can be made subject to judicial review. Even if the areas affected by the de-judicialisation trend are mostly non-contentious in nature, parties should be given the opportunity to have acts reviewed in court. The possibility of accessing the traditional court system should, in the opinion of the Project Group, constitute a core right. This is in line with fundamental procedural standards (Article 47(1) CFR), further strengthens the mutual trust in non-judicial procedures and consequently facilitates the circulation of acts in family and succession matters across borders (see Principle 5). Court proceedings should remain a means of last resort and guarantee for the parties involved.

34 The right to an effective remedy ([35]) before a judicial authority is to be understood broadly. While the implementation should remain in the hands of the Member States, it should in any case entitle parties directly affected by an act in family and succession matters (see para 24) to unilaterally seize a court. The judicial authority should be able to examine the act as to its substance, and as to its compliance with formal or other procedural requirements provided for under national law. It should allow parties to challenge any act in family and succession matters. Member States should further consider making legal aid available to those lacking sufficient resources, insofar as such aid is necessary to ensure effective access to justice in non-judicial settings. ([36])

35 The term 'judicial review' implies the right to have recourse to a judicial authority in cases where the parties intend to challenge the act, arguing that it violated procedural or substantive rules provided for by domestic law. In addition, under national laws, a change of circumstances usually justifies a judicial review of family arrangements or personal choices in the case of supervening circumstances.

36 National laws remain competent to identify the parties entitled to unilaterally seize the judicial authority, the authority that has to be seized and the

---

Article 29(6) of the Regulation and entailing the return of the child, heading no 13) of the Regulation.

([35]) Cf also European Law Institute, *Charter of Fundamental Constitutional Principles of a European Democracy* (European Law Institute 2024) 46f (Principle 10: Right to a fair trial and an effective remedy).

([36]) Eg Article 47(3) CFR.

procedure that has to be followed. This means that an act might also be challenged by means of substantive remedies such as an annulment for vitiating factors, incapacity of the parties involved, the infringement of mandatory rules or public policy, etc. An open approach further accommodates the variety of review procedures currently in place in the Member States, (37) reflecting the different roles played by the intervention of the authority in the production of the legal effects of an act. Indeed, non-judicial acts can, in some Member States, be challenged by means of appeal, (38) while others apply substantive remedies. (39) Member States should in any case introduce clear substantive and procedural means of review and expressly specify the applicable remedies (see Principle 7 and paras 107ff).

Safeguarding a genuine will and balancing party interests (Principle 3(2)(c))

37 The delegation of tasks to authorities other than the courts should be accompanied by the introduction of appropriate mechanisms to ensure that an act in family and succession matters is based on the genuine will of the parties and that their interests are, as far as possible, fairly balanced.

38 In judicial proceedings, whether consensual or not, the respect of these mechanisms is generally safeguarded by the judicial authority itself, as well as by certain procedural standards, such as the personal appearance of the parties (see para 31), and their legal representation. (40) Similar standards should apply when justice is administered by authorities other than courts.

39 While parties do not necessarily need to be represented and defended when the effects of an act are closely linked to their consent or agreement, they may still need legal advice and assistance to ensure that they can express an informed will and to limit undue influence as far as possible. This is further ensured by requiring the authority to take into account the relevant circumstances of a case and to balance – as far as possible – the personal, economic and public interests at stake when intervening in family and succession matters.

---

(37) *Dutta/Patreider*, Comparative Report, paras 20ff. For judicial review procedures, see *Pedersen/Thøgersen*, Denmark, para 71; *Teixeira Pedro*, Portugal, para 29; *Vlad*, Romania, para 38. For the application of substantive remedies, see *Zervogianni*, Greece, para 20; *Bogdziewicz*, Lithuania, para 41; *Esteve Alguacil*, Spain, para 41.

(38) For example, in divorce matters, the civil registrars' acts can be appealed to the court of appeal under Portuguese law (*Teixeira Pedro*, Portugal, para 24); in Romania, acts of civil status officers can be appealed to the lowest court in Romania (*Vlad*, Romania, para 38); the decisions of the Danish Agency can also be appealed (*Pedersen/Thøgersen*, Denmark, para 39).

(39) See above n 37.

(40) Eg Article 47(2) CFR.

40 Should more than one party be directly affected by an act, Member States should consider involving legal professionals in a preliminary phase, or have the parties represented by lawyers. (41)

41 Member States could also consider introducing reflection periods when authorities receive declarations from parties. This would further ensure that an act reflects the genuine will of the parties. Analogous mechanisms are already in operation in a number of jurisdictions across several areas. (42)

42 It is up to Member States to decide on the specific measure to be put in place. In the view of the Project Group, the expression of the genuine will of the parties presupposes at least their informed consent. (43) In particular, parties directly affected by the act (see para 24) might have to be informed about: (a) the legal qualification of the authority and the way in which the proceedings are carried out under the applicable law; (b) the legal effects of the act under national law and the possibilities of having the act reviewed; and (c) the possibility of having the effects of the act extended to other Member States and enforced within the judicial area of the EU.

43 Assistance or advice by qualified professionals should also include the economic consequences of divorce and separation. (44) In order to ensure that these are based on the genuine will of the parties and that their interests are fairly balanced, Member States should consider making it an obligation for the parties to disclose their income and financial assets, subject to verification by the authority, where this is directly relevant to the act.

Qualified authorities (Principle 3(2)(d))

44 Member States should, as a matter of principle, entrust specially qualified authorities with the task of drafting, receiving, and recording party declarations. This does not, however, imply the establishment of specialised authorities in family and succession law; conversely, these may be authorities that

---

(41) A limited number of jurisdictions already require such assistance in divorce matters, see *Berre*, France, para 8; *Zervogianni*, Greece, para 18; *Stracqualursi/Chiricallo*, Italy, para 40; *Esteve Alguacil*, Spain, para 38. Others require notaries to give legal advice (see *Karm*, Estonia, para 8) or civil registrars to provide parties with necessary information (see *Teixeira Pedro*, Portugal, para 22).

(42) Divorce: *Stracqualursi/Chiricallo*, Italy, para 44; *Bogdziewicz*, Lithuania, para 33; *Vlad*, Romania, para 38. Gender recognition: *Pedersen/Thøgersen*, Denmark, para 150; *Johanson*, Germany, para 201; *Esteve Alguacil*, Spain, para 246.

(43) On the current role of notaries in translating between the legal and ordinary language, cf Jens Bormann and Philip M Bender, *Judge without lawsuit. The notary in civil law countries* (C.H.Beck 2024) 13.

(44) France, Greece, Italy, and Spain; notaries to give legal advice (for example, Estonia) or the civil registrars to give the necessary information (for example, Portugal).

also operate within other areas of law (for example, notaries). This is especially pertinent in cases where the legal consequences of acts pertaining to family and succession matters are based on the will of the parties concerned. This phenomenon can usually be observed in situations where the administration of justice becomes de-judicialised (see paras 7ff).

45 In instances where participation in an act demands additional legal or other competences, Member States are advised to deliberate on the pertinent requirements when determining the appropriate authority to involve. Specific tasks (eg, the hearing of children) may necessitate the involvement of judicial authorities or other professionals, whether they are legal or not (see para 29).

46 Member States should further consider the financial consequences of shifting competences to such qualified authorities. This does not only concern the costs for the parties but also potential financial gains for the State. Fees for services carried out by public authorities (other than courts) will benefit public finances more directly than those carried out by private or semi-official authorities.

Principle 4 (Jurisdiction)

The European Union should ensure that courts or other authorities of a Member State only participate in an act in family and succession matters which is in at least one Member State reserved to courts if that Member State has jurisdiction for the matter according to the relevant rules of the European Union.

Comments

47 Principle 4 addresses the European legislator when reforming the current, or adopting new, private international law instruments. The European Union should ensure that courts or other authorities of a Member State only participate (see above para 16) in an act in family and succession matters if that Member State has jurisdiction for the matter according to the relevant rules of the EU.

48 By following this Principle, the European legislator would ensure within its jurisdictional regimes that positive and negative conflicts are avoided in the administration of justice if one and the same act in family and succession matters is, at least in one Member State, reserved for the courts, while it falls in other Member States within the competences of other authorities or the parties themselves.

49 The rules on jurisdiction of the – current and future – private international law instruments of the European Union should consequently apply to courts

and other authorities alike. This Principle – if implemented by the European legislator – would require courts and other authorities to assess the jurisdiction of their Member State before participating in the acts entrusted to them under national law and would avoid parallel proceedings as well as incompatible acts from being performed in different Member States.

The current scope of the jurisdictional rules of the European Union: many uncertainties

50 It is far from clear in the private international law instruments of the European Union whether and, if so, to what extent the European rules on jurisdiction also cover the extra-judicial administration of justice in family and succession matters if certain acts fall, under Member State law, within the competences of other authorities or the parties themselves. Most of the European rules on jurisdiction state that certain 'courts' of a Member State have jurisdiction and determine this Member State on the basis of various connecting factors. The concept of a court under European private international law is therefore central, but it is considerably blurred with regard to its limits.

51 It is true that most of the relevant instruments contain legal definitions of 'court' for the purposes of the respective Regulation, and thus also for its rules on jurisdiction. ([45]) However, the definitions do not help with the question of the extent to which acts of non-judicial authorities or even private individuals are to be regarded as judicial activities that require jurisdiction of the respective Member State under the relevant instrument. For example, Article 3(2) of the Succession Regulation provides that a court can be any judicial authority and all other authorities and legal professionals with competence in matters of succession. This also includes notaries, for example. Yet, according to the legal definition, the prerequisite is that these

---

([45]) Cf Article 2(1) of the Brussels IIa Regulation, Article 2(2)(1) of the Brussels IIb Regulation, Article 2(2) of the Maintenance Regulation, Article 3(2) of the Rome III Regulation, Article 3(2) of the Succession Regulation, Article 3(2) of the Property Regulations for spouses and registered partners, Article 4(4) of the Parenthood Proposal, Article 3(6) of the Proposal on the International Protection of Adults. Different approaches were adopted. While the 'Europeanised' Hague instruments do not contain an express definition of 'court' or 'authority', some Regulations refer applicants to the understanding of the *lex fori* (Brussels IIb, Rome III). Others introduced more detailed and autonomous definitions, referencing certain key requirements to be met (Succession Regulation, Maintenance Regulation, Matrimonial/Partnership Property Regulation). The most recent Proposals, on the other hand, seem to have adopted slightly different approaches altogether (the Proposal on the International Protection of Adults, for example, no longer contains a reference to 'courts' but rather speaks of 'authorities').

actors 'exercise judicial functions', without specifying what the exercise of judicial functions would entail.

However, some indications can be derived from the case-law of the Court of Justice of the European Union as to the extent to which non-judicial actors are to be treated as courts for the purposes of the rules on jurisdiction in the enforcement of family and succession law. **52**

First of all, to the extent that they are parties to the relevant family or succession relationship, private individuals cannot be regarded as courts. This is the conclusion to be drawn from the Court of Justice's *Sahyouni* decision. (46) In that case, the Court of Justice made it clear that the Rome III Regulation does not apply to private divorces in which no State authorities are involved. (47) Although the Rome III Regulation does not govern jurisdiction in matrimonial matters, the Court of Justice emphasised that the concept of divorce in the European conflict rules of the Rome III Regulation, on the one hand, and in the jurisdiction rules of the old Brussels IIa Regulation, on the other hand, are the same, (48) so that the Brussels IIa Regulation (and seemingly also the jurisdiction rules of the new Brussels IIb Regulation) do not apply to purely private divorces. Of course, the question arises as to what extent private divorces with State involvement – regardless of what form this may take – are covered by the current European instruments. The Court of Justice did not comment unequivocally on this in *Sahyouni*. However, it later held in the *TB* decision that an Italian private divorce with the involvement of a civil status registrar (49) can be regarded as a judgment which has to be recognised as such under the Brussels IIa and IIb Regulations. (50) If the rules on recognition of a European private international law instrument are applicable to such private divorces before a registrar, then the rules on jurisdiction in that instrument should also apply, although the Court of Justice has not definitively decided this point so far. **53**

On the other hand, according to the case-law of the Court of Justice, the rules on jurisdiction for family and succession matters are applicable if an authority other than a court has decision-making power and can definitively specify the applicable family or succession law in the individual case. For example, in its first decision on the Brussels IIa Regulation – in the *C* case – the Court of Justice already indicated that the decision of a social services **54**

(46) Case C–372/16 *Soha Sahyouni v Raja Mamisch* [2017] ECLI:EU:C:2017:988.

(47) See para 39 of the decision: 'that the regulation covers exclusively divorces pronounced either by a national court or by, or under the supervision of, a public authority'.

(48) See, in particular, paras 40ff of the decision.

(49) *Stracqualursi/Chiricallo*, Italy, paras 34ff.

(50) Case C–646/20 *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB* [2022] ECLI:EU:C:2022:879.

committee of a Swedish municipality to take a child into care and place it with a foster family also falls within the scope of the Brussels IIa Regulation: (51) according to this ruling, youth welfare authorities should also be bound by the jurisdiction rules of the Regulation. A similar approach would therefore presumably be taken by the Court of Justice when authorities other than courts are involved in family and succession matters, for example, if dissolving a marriage in place of a formal court in divorce proceedings, as is the case in some Member States. (52)

55 Finally, the classification of notaries in the European jurisdiction rules for succession matters is somewhat unclear. In particular, the question arises as to what extent notaries are bound by European jurisdiction rules when issuing succession certificates based on Member State law. (53) The Court of Justice already made it clear in the *Oberle* decision that the granting of a certificate of succession under the law of a Member State is potentially a judicial activity. The German probate courts can only issue a certificate of succession under German law if the German courts also have jurisdiction for a matter of succession under Article 4ff of the Succession Regulation. (54) On the other hand, the Court of Justice has so far been rather reluctant to classify notaries issuing succession certificates as courts. In its decision in *WB*, for example, the Court of Justice emphasised that a Polish notary is not a court in such a scenario (55) and is therefore likely not bound by the rules on jurisdiction of the Succession Regulation. In its more recent decision in *E.E.*, the Court of Justice confirmed this classification in the abstract, (56) but left it to the referring court to decide whether Lithuanian notaries should not be treated as courts under the autonomous criteria when issuing a certificate of succession.

The need for a jurisdictional filter

56 In the view of the Project Group, from a policy perspective, there is a clear need for a jurisdictional filter for the enforcement of family and succession law by non-judicial actors if the relevant act in family and succession matters is in at least one Member State reserved to courts.

---

(51) Case C–435/06 *C* [2007] ECLI:EU:C:2007:714, para 33.

(52) *Dutta/Patreider*, Comparative Report, paras 19ff.

(53) The Court of Justice has already held that notaries do not act as courts when they are involved in the notarisation procedure, with regard to the right of the courts of the Member States to refer questions under Article 267 TFEU; see Case C–387/20 *OKR* [2021] ECLI:EU:C:2021:751; see also Principle 6.

(54) Case C–20/17 *Oberle* [2018] ECLI:EU:C:2018:485.

(55) Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444.

(56) Case C–80/19 *E.E.* [2020] ECLI:EU:C:2020:230.

57 First of all, a restriction of the rules on jurisdiction to the judicial enforcement of family and succession law by courts only would lead to contradictory results within the European Union – a situation that European Union law precisely seeks to prevent in the case of judicial enforcement by means of uniform rules on jurisdiction, including the *lis pendens* rules. This can be shown, for example, by the consequences of the Court of Justice's case-law on the classification of notaries in the issuing of succession certificates under national law in *WB* and *E.E.* (*supra* para 55). The effects of notarial succession certificates in Poland or Lithuania, for example, might be largely identical to the effects of a court-issued succession certificate in Germany; the Polish notarial certificates even partly exceed the effects of such a judicial succession certificate. (57) According to *Oberle*, the German probate courts are bound by the rules on jurisdiction of the Succession Regulation. In contrast, Polish or Lithuanian notaries, when issuing a certificate of succession according to *WB* or *E.E.*, may – at least as a matter of European Union law (58) – decide on the underlying succession matter without regard to the jurisdiction of the Polish or Lithuanian courts. As a result, contradictory succession certificates might be issued within the European Union.

58 A case would be the succession upon death of a Turkish national with a last habitual residence in Berlin, who also had assets in Poland or Lithuania. In this scenario, based on the Succession Regulation as interpreted in *Oberle*, *WB* and *E.E.*, both the German courts and the Polish or Lithuanian notaries could issue a certificate of succession. These certificates would probably contradict each other. If the testator has not made a choice of law (Article 22 of the Succession Regulation), Polish or Lithuanian notaries will apply German inheritance law to the succession in accordance with the deceased's last habitual residence in Germany (Article 21(1) of the Succession Regulation). In contrast, the German probate courts will, on the basis of Article 75(1) of the Succession Regulation, determine the applicable law to the succession on the basis of the bilateral German-Turkish Succession Convention (59) and, on this basis, will come to the conclusion that Turkish inheritance law is decisive (at least for the movable assets of the testator, cf Section 14(1) of the Convention). But even if such scenarios are disregarded,

---

(57) Cf the description of Polish law in Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444, paras 8ff; *Kamińska*, Poland, paras 72–74.

(58) Although Polish procedural law provides for a judicial filter, notaries can only issue a Polish succession certificate if Poland has international jurisdiction under the Succession Regulation, see *Kamińska*, Poland, para 79. In Lithuania such a provision is apparently lacking.

(59) Annex to Article 20 of the Consular Convention between the German Empire and the Republic of Turkey of 28 May 1929, RGBl 1930 II p 758.

in which old treaties of a Member State with a third State take precedence under Article 75(1) of the Succession Regulation, there is no guarantee that the results of a German probate court and a Polish or Lithuanian notary when deciding on the same case of succession will always match. For example, the habitual residence can be assessed differently, a will can be interpreted differently, or the statutory succession rule can be applied differently, to name just a few causes of contradictory results when assessing a succession upon death. If notaries are not also bound by the jurisdiction rules of the Succession Regulation, such contradictions are likely to arise.

59 The lack of a jurisdictional filter for the extra-judicial enforcement of family or succession law can also create incentives for undesirable forum shopping. If areas are not covered by the rules on jurisdiction, the parties involved may choose the Member State in which they can expect the family and succession law to be enforced extra-judicially in a manner that suits them. For example, spouses seeking a divorce are likely to be most attracted to a simple and inexpensive out-of-court divorce if a Member State offers such a divorce and is not bound by the rules on jurisdiction. Without a jurisdiction regime, the spouses would be free to choose, at least with regard to private divorces, while they can only initiate a court divorce in a Member State that has jurisdiction for matrimonial matters according to Articles 3ff of the Brussels IIb Regulation.

60 Finally, the policy basis for jurisdiction regimes also applies to a de-judicialised enforcement of family and succession law. The international jurisdiction should determine the legal infrastructure of a State that is closely linked to the parties involved, the facts, the applicable law or the effects of an act. (60) This understanding should not only apply in the judicial enforcement of family and succession law, but also when the relevant provisions are implemented by authorities other than courts.

The proposed solution

61 There are two main regulatory approaches for including the de-judicialised enforcement of family and succession law in the law of jurisdiction.

Extension of the uniform rules on jurisdiction – Principle 4

62 Firstly, the jurisdiction rules of the relevant – current or future – European legal instruments could also be extended to non-judicial actors in the enforcement of family and succession law. In this case, authorities other than

(60) See, for example, Jan Kropholler, 'Internationale Zuständigkeit' in *Handbuch des Internationalen Zivilverfahrensrechts*, vol I (Mohr Siebeck 1982) ch III paras 19ff.

courts would only be allowed to take action if the Member State to which the activity – in whatever way – is attributable also has jurisdiction.

63 This model can already be found in the jurisdiction rules for succession matters, at least in a special rule. Article 64, sentence 1, of the Succession Regulation provides that the European Certificate of Succession is issued in the Member State whose courts have jurisdiction under the general jurisdiction rules of the Succession Regulation in Articles 4ff. Article 64, sentence 2, of the Succession Regulation then clarifies that this extension of the rules on jurisdiction also applies if the authority entrusted with issuing the certificate is not a court (lit a of the provision), but another authority (lit b of the provision). This extension of the uniform rules on jurisdiction applies, for example, to notaries (or courts when they do not exercise judicial functions ([61])), insofar as they are competent to issue the European Certificate of Succession under the respective implementing law of the Member State. It could even be considered whether this provision applies by analogy to the issue of Member State succession certificates by non-judicial bodies, such as notaries in the *WB* or *E.E.* scenario (see para 55 above).

64 However, the extension of the rules on jurisdiction to courts will in any case reach its natural limits if family and succession law is enforced by private individuals alone, for example, if a Member State were to allow a purely private divorce without State involvement – which is apparently not yet the case under the laws of the Member States, since divorce agreements of the spouses, if admissible, are in any case registered or notarised by the State. ([62]) This is because private actions cannot be restricted by rules on jurisdiction that are always addressed to State authorities. At best, one could consider the nullity of the legal transaction in question if it violates the 'rules on jurisdiction' because it was carried out in a non-competent Member State. This would, of course, raise numerous follow-up questions regarding the localisation of the legal transaction: Where is the legal transaction carried out if the parties are in different countries? What about legal acts in special sovereign zones, such as on the high seas? In any case, however, an extension of the jurisdiction rules to purely private actions would reach far into the substantive law of the Member States.

65 Against this background, the Project Group with regard to Principle 4 is of the opinion that the European legislator – when drafting new jurisdictional rules, for example, for gender recognition, or reforming the current instruments, in particular, the Succession Regulation – should ensure that courts (especially where they do not exercise 'judicial functions') or other authori-

([61]) See Case C–187/23 *Albausy* [2024] EU:C:2025:34, para 66.

([62]) *Dutta/Patreider*, Comparative Report, paras 20–23.

ties of a Member State only participate in an act in family and succession matters if that Member State has jurisdiction for the matter according to the relevant rules of the European Union.

Additionally in Principle 5(3)(d): Indirect examination of the uniform rules on jurisdiction in the case of the cross-border extension of effects

66 An alternative model would be the indirect application of the rules on jurisdiction when it comes to the cross-border extension of the effects of the de-judicialised enforcement of family and succession law.

67 Examples of such 'indirect' jurisdiction filters for the extra-judicial administration of justice in family and succession matters can also be found in the current private international law of the European Union. Article 64 of the Brussels IIb Regulation provides that the new provisions on the recognition of authentic instruments and agreements in matrimonial matters only apply if the Member State in which the authentic instrument was formally drawn up or registered, or in which the agreement was registered, has jurisdiction under the uniform rules. In addition, Article 66(2)(a) of the Brussels IIb Regulation provides that the competent authorities in the Member State of origin may only issue a certificate for the authentic instrument or agreement – which is necessary for the cross-border extension of its effects under the new rules – if this Member State was also internationally competent under the Regulation. This ensures that the rules on jurisdiction are observed in any case when the effect is extended across borders.

68 The Project Group is of the opinion that the European Union legislator should additionally use this technique of indirect jurisdiction. As recommended in Principle 5(3)(d), the European Union should allow Member States to refuse the extension of the effects of an act if the Member State whose authorities other than courts participated in the act did not have jurisdiction in the matter according to the relevant rules of the European Union. Such an indirect jurisdictional filter is a discrimination of acts in family and succession matters in which authorities other than courts participate because, at least within the European Union, jurisdiction is not checked when it comes to the recognition of court decisions; the lack of jurisdiction of the Member State of origin is not listed among the grounds for refusal of recognition in any of the existing instruments. However, the Project Group considers this filter necessary at least for a certain period of time while the authorities other than courts (for example, civil status officers and notaries) become accustomed to checking the jurisdiction of their State.

PRINCIPLE 5 (EXTENSION OF EFFECTS)

1. *The European Union should ensure that the effects of an act in family and succession matters according to the law of a Member State whose authorities other than courts participated in the act are extended to all Member States as far as the law of the European Union harmonises the law applicable to, and the jurisdiction for, the family and succession matter.*
2. *The European Union should provide for uniform European certificates to facilitate the cross-border circulation of such acts between the Member States.*
3. *The European Union should allow the Member States the possibility to refuse the extension of the effects of an act if:*
   (a) *such extension is manifestly contrary to the public policy of the Member State to which the effects of the act are to be extended; or*
   (b) *it is irreconcilable with an act or decision issued in proceedings between the same parties in the Member State to which the effects are to be extended; or*
   (c) *it is irreconcilable with an act or decision issued in another Member State or in a third State in proceedings involving the same cause of action and between the same parties, provided that the act or decision fulfils the conditions necessary to extend its effects to the Member State to which the effects of the act are to be extended; or*
   (d) *the Member State whose authorities other than courts participated in the act did not have jurisdiction in the matter according to the relevant rules of the European Union.*

Comments

Principle 5 is addressed to the European Union legislator when reforming **69**
the current, or adopting new, private international law instruments. Its aim is to facilitate the extension of effects of acts in family and succession matters throughout the European Union (subsections 1 and 2), while at the same time introducing necessary safeguards for Member States and the parties involved (subsection 3).

Extending the effects of an act (Principle 5(1))

Principle 5(1) intends to ensure that an act (para 4) in family and succession **70**
matters, in which in one Member State an authority other than a court participated, has the same effects in the other Member States, without any special procedure being required. Hence, the Project Group proposes that the European legislator introduce rules similar to the recognition regime for court decisions (or extend the existing ones) for acts in which authorities other than courts participated, provided that the act (a) is in at least one Member State reserved to courts (Principle 1) and (b) produces as to its

essential elements the same effects as a court decision (to the extent possible). The extension of effects under Principle 5(1) should then take place by operation of law.

71 The introduction of such a far-reaching extension of effects by the European legislator is, however, only justified if the European Union harmonises (or already has harmonised in existing instruments) the rules on applicable law and jurisdiction in the respective area of family and succession law. Only then can a harmony of decisions within the European Union and a jurisdictional filter avoid, at least in theory, irreconcilable acts in family and succession matters in different Member States. Extending the effects of an act in family and succession matters without harmonising the rules on applicable law and jurisdiction would additionally give an incentive to forum and law shopping. All these implications would endanger the legal certainty (63) and predictability of the results which the private international law of the European Union aims to secure. Furthermore, mutual trust in connection to the extension of effects of de-judicialised acts in family and succession matters is only justified between Member States if they are already bound by common jurisdictional and conflict rules. It is, hence, consistent that, at least in the area of family and succession law, the European legislator has so far linked the extension of effects, in particular, of court decisions, to the harmonisation of the rules on jurisdiction and the applicable law. This connection appears both within the same instrument (eg, Succession Regulation) and complementary instruments (eg, in the Brussels IIb Regulation and the Rome III Regulation). Also, the automatic extension of the European Certificate of Succession and its uniform effects to the other Member States according to Article 69(1) of the Succession Regulation is based on the fact that the Succession Regulation harmonises jurisdiction and the applicable law. (64)

72 The term 'extension of effects' intends to convey a neutral and functional concept of transposing a legal situation shaped by means of a foreign act into the legal system of the other Member States. The need to introduce a different terminology arises from the fact that, in de-judicialised settings, it is currently not always sufficiently clear whether changes in a legal situation (eg, the dissolution of a marriage) derive from the participation of a State authority in an act or directly from the declarations of the parties. (65) This

---

(63) Cf also European Law Institute, *Charter of Fundamental Constitutional Principles of a European Democracy* (European Law Institute 2024) 44ff (Principle 9: Legal certainty).

(64) See Rembert Süß, 'Der Vorbehalt zugunsten bilateraler Abkommen mit Drittstaaten' in Anatol Dutta and Sebastian Herrler (eds), *Die Europäische Erbrechtsverordnung* (C.H.Beck 2014) 191 para 29.

(65) *Dutta/Patreider*, Comparative Report, paras 19ff.

leads to issues in the qualification of acts in cross-border scenarios (see also Principle 7(1) and paras 107ff) and thus in the identification of the applicable regime ('recognition' or 'acceptance').

73 Which effects an act has, and which thus are to be extended, is to be determined by the law of the Member State whose authorities participated (see para 16) in it. Competence in this regard should lie with the authorities of the Member State of destination. Where an act contains effects which are not known in the law of the Member State of destination, the authorities of that Member State should be allowed to adapt the act, to the extent possible, to an act or decision known under their Member State law which (a) has equivalent effects attached to it; (b) pursues similar aims and interests; and (c) respects the essential elements of the incoming act. This should in any case not result in effects going beyond those provided for in the law of the Member State of origin.

European certificates for acts in family and succession matters (Principle 5(2))

74 Principle 5(2) proposes to further facilitate the circulation of acts in family and succession matters by introducing harmonised standard forms or certificates accompanying acts intended for cross-border use. Such certificates are already established under the existing instruments for the recognition and enforcement of decisions as well as of agreements and authentic instruments. (66) Acts accompanied by the respective certificate should be received by the authorities of the other Member State without any special procedure being required. (67) The grounds for refusal under subsection 3 continue to apply.

75 The certificates should serve the aim of facilitating the extension of effects of an act given in one Member State, namely by recording the essential contents of the underlying act in a formalised and easily understandable manner. Free text fields should be limited to the extent necessary, with the certificates mainly relying on numbered fields. In line with the existing *acquis*, (68) the certificates should thus not replace the acts to which they are attached but serve as an additional document accompanying and explaining them, as well as establishing their contents and thus also facilitating the examination of the grounds for refusal. No autonomous legal effects should be connected to the certificate.

76 The contents of the forms will vary depending on the family and succession

(66) See Article 36 and Annexes I–IX of the Brussels IIb Regulation; Article 80 of the Succession Regulation.

(67) See eg Article 65 in conjunction with Article 31(1) Brussels IIb Regulation.

(68) In particular, Article 36 and Annexes I–IX of the Brussels IIb Regulation.

matter concerned. The authorities receiving the certificate should, however, be put into a position to retrace the relevant facts of the underlying act, the procedural steps taken (69) and considerations applied by the authority issuing the act or certificate. This strengthens mutual trust in matters concerning the extra-judicial administration of justice.

77 The European legislator, when implementing Principle 5(2) in existing or future instruments, should provide that the certificates be issued by the authorities of the Member State whose authorities participated in the act to which the certificate is attached. Which authorities to involve, be they judicial or non-judicial, should in the end, however, be left to the national laws of the Member States in their implementing legislation. The authority participating in the act does consequently not necessarily have to be the authority issuing the certificate. However, Member States should, for the purpose of procedural economy, limit the need to involve several authorities.

Grounds for refusal (Principle 5(3))

78 Principle 5(3) proposes that the European legislator implements safety measures to ensure that Member States can refuse the extension of effects of an act to their territory. Member States should not be obliged in every case to extend the effects of an act according to the law of a Member State whose authorities other than courts participated in the act. The provision is consistent with the *acquis* of the European Union in family and succession matters and modelled on similar rules found in the relevant European private international law instruments, especially when it comes to the recognition of decisions. (70) If in the existing or future instruments the European Union extends the effects of acts in family and succession matters as proposed under Principle 5(1), it becomes necessary to introduce similar grounds here. The notions should, in principle, coincide with the current meaning given to the terms under the private international law instruments of the European Union. Where necessary, changes in the application or interpretation might have to be adopted.

---

(69) Eg whether the authority checked their jurisdiction. See Point 4 of Form V Annex 5 of the Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council 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.

(70) See eg Articles 38f Brussels IIb Regulation; Article 40 Succession Regulation; Article 24 Maintenance Regulation; Articles 37 of both the Matrimonial and Partnership Property Regulations.

Bearing this in mind, the courts or other competent authorities asked to extend the effects of an act should not, for example, be able to apply the public policy exception (Principle 5(3)(a)) on the mere ground that the act stemmed from an authority other than a court, especially if the minimum standards established by Principle 3 were complied with. Although not expressly mentioned, a Member State could further consider an act contrary to its public policy if said act was not enacted in compliance with the minimum standards of Principle 3. A similar approach applies to Principle 5(3)(b) and (c). Authorities should not automatically consider acts irreconcilable with judicial decisions based on the fact that their origins are in one case judicial and in one case not. The acts or decisions, for the present purposes, consequently, do not have to be of equal status or final. Principle 5(3)(d), on the other hand, expands the *acquis*. The ground for refusal is, however, closely connected to, and justified by, the obligations established under Principle 4 (see, in particular, paras 66ff). **79**

PRINCIPLE 6 (PRELIMINARY REFERENCE)

If an authority of a Member State participates in an act in family and succession matters, this authority should be considered as a 'court or tribunal' for the purpose of Article 267 of the Treaty on the Functioning of the European Union.

Comments

Principle 6 suggests that the Court of Justice of the European Union (when interpreting the Treaty on the Functioning of the European Union [TFEU]) or the Member States (when reforming the Treaty) should consider expanding the concept of 'court or tribunal' for the purpose of Article 267 TFEU, in order to include authorities other than courts participating in acts in family and succession matters (see para 16). This Principle primarily addresses the Member States as the parties to the Treaty, although similar outcomes could be achieved through an extensive interpretation of Article 267 TFEU by the Court of Justice. This Principle relates mainly to the existing and future private international law instruments of the European Union. **80**

The Principle applies to all authorities participating in de-judicialised proceedings. This could include: (a) authorities which take decisions in certain matrimonial, succession or parental responsibility matters, carrying out substantive controls and adopting a measure having the same effect as a decision; (71) (b) authorities drawing up authentic instruments after a formal **81**

(71) The following authorities carry out this substantive control: Romanian notaries (who may reject a divorce agreement if it is not in accordance with the best interests of the

and procedural scrutiny; (72) and (c) those merely recording a declaration and an agreement, after verifying their own competence to receive it. (73) All these authorities may need to apply the private international law instruments of the European Union when participating in an act in family and succession matters. (74) Therefore, the possibility of a preliminary ruling can be a useful tool for all the authorities mentioned above, in order to clarify any questions that may arise, and also consistent with the doctrine affirmed by the Court of Justice, which has exclusive jurisdiction to interpret European Union law through preliminary rulings, with the aim of ensuring the uniform application of European Union law across all Member States. (75)

---

child, as indicated in the social investigation report: *Vlad*, Romania, para 34); Lithuanian notaries (who may assess the fairness of the agreement between the spouses: *Bogdziewicz*, Lithuania, para 34); Portuguese civil registrars check that all legal requirements have been met and assess whether agreements on the maintenance of the spouse, the allocation of the use of the family home and the future treatment of pets protect the interests of both spouses and their children (*Teixeira Pedro*, Portugal, para 22).

(72) See the Italian lawyer-assisted negotiations for separation and divorce (*Stracqualursi/Chiricallo*, Italy, paras 94ff), the Spanish divorce decreed by the *Letrado de la Administración de Justicia* (*Esteve Alguacil*, Spain, para 6) and the Greek notarial deed of divorce and dissolution of a registered partnership (*Zervogianni*, Greece, para 18). Acts drafted by an administrative authority are classified as an 'authentic instrument' under Article 2(2)(2) Brussels IIb Regulation, Article 3(1)(c) Matrimonial Property Regulation and Article 3(1)(i) Succession Regulation.

(73) See the Italian divorce before the mayor (*Stracqualursi/Chiricallo*, Italy, paras 107ff) or the Danish divorce in front of the Agency in green cases, where the public authorities' involvement in family law cases will mostly be reduced to the registration or granting of a formal approval of the agreement reached between the parties, without any substantial review (*Pedersen/Thøgersen*, Denmark, para 34). Such arrangements are defined as 'agreements' in Article 2(2)(3) of the Brussels IIb Regulation.

(74) Doubts have arisen in succession cases (C–387/20 *OKR* [2021] ECLI :EU:C:2021:751; C–148/22 *OP* [2023] ECLI:EU:C:2023:924), in divorce cases (C–68/07 *Sundelind Lopez* [2007] ECLI:EU:C:2007:740) and more recently for parental responsibility (Case C–572/21 *CC v VO* [2022] ECLI:EU:C:2022:562), a problem that had long remained unanswered. This can be complicated by overlapping Regulations with different rules (ie the Brussels IIb and Maintenance Regulation) or by the criteria set by individual Regulations. For instance, the Court of Justice clarified the notion of citizenship in the *Hadadi* case (Case C–168/08 *Hadadi* [2009] ECLI:EU:C:2009:474), while a clear interpretation of 'habitual residence' in divorce cases was given in 2023 (C–462/22 *BM* [2023] ECLI:EU:C:2023:553), but when residence is fragmented, some doubts could still arise.

(75) That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties (Opinion 2/13 [Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms] of 18 December 2014, EU:C:2014:2454, para 201 and *ex multis* Case C–284/16 *Achmea* [2018] EU:C:2018:158, para 32).

Against this background, not all authorities are entitled to submit preliminary references, from the perspective of the proposed Principle 6, which is limited to scenarios where the relevant act is reserved to courts in at least one Member State (see Principle 1). For example, Austrian notaries involved in succession proceedings, preparing decisions ultimately issued by courts but not independently adjudicating disputes, generally lack the essential characteristics of an authority participating in an act according to Principle 1 (76). In Sweden, the Tax Agency (*Skatteverket*) plays an important role in civil status registration, but its decisions are not constitutive – they do not establish or alter legal statuses or relationships in the same manner as court rulings (77). These authorities do not take decisions which are reserved for courts in at least one Member State, nor do they participate in proceedings intended to produce equivalent legal effects. Consequently, the Project Group considers that they should not have access to the preliminary reference procedure under Article 267 TFEU in accordance with Principle 6. **82**

Given the increasing use of out-of-court procedures, providing these proceedings with access to Article 267 TFEU would promote the uniform interpretation and application of European Union law. This inclusion would not only enhance the consistency and coherence of the Union's legal system, which is the very purpose of Article 267 TFEU, but would also directly support the objective of judicial cooperation of Article 81 TFEU, (78) which seeks to develop a legal area based on mutual trust and common standards. **83**

Moreover, by implementing this Principle, the European legislator could turn extra-judicial procedures into a truly competitive alternative to judicial proceedings in cross-border situations. Those procedures already offer significant advantages, such as shorter timelines and lower costs, at the same time preventing an escalation of disputes in family and succession matters (see para 9): by allowing them to request preliminary rulings, they would also gain an additional layer of reliability and compliance with European Union law, ensuring outcomes that are not only efficient but also legally robust and trustworthy, making them an attractive and fully viable alternative (see in general Principle 2). **84**

(76) *Patreider*, Austria, para 120.

(77) *Vaigė*, Sweden, para 2.

(78) The concept of 'court' is relevant in other contexts of European Union law (it is used in the European private international law instruments, in Article 19 TEU and Article 47 CFR), but the definitions are not uniform.

The current definition of 'court' according to the Court of Justice of the European Union under Article 267 TFEU

85 The concept of 'court or tribunal' in Article 267 TFEU has been shaped and refined by the case-law of the Court of Justice. (79) The Court of Justice applies an autonomous and uniform interpretation to qualify a 'court or tribunal' for the purposes of preliminary rulings. (80) This assessment is guided by a number of factors that are related, in particular, to the institutional features and the functional role of the referring body.

86 In fact, the referring body is required to be established by law, permanent (it must not be a temporary or *ad hoc* institution) and independent. Independence (81) includes both *external* and *internal* aspects, as the body must be free from hierarchical control or external influence, and, in addition, members must act impartially and without bias. Moreover, the body must resolve disputes (82) and deliver decisions of a judicial nature; procedures must allow for adversarial debate. (83)

87 The approach of the Court of Justice has become even stricter in its most recent judgments. For example, in *Nada*, the Court dismissed a preliminary reference, arguing that the referring body, the Austrian *Unabhängige Schiedskommission*, lacked sufficient independence; (84) in *CityRail*, the Czech Republic Transport Infrastructure Access Authority was not qualified as a court for failing to meet the institutional criteria of a court; (85) in *OKR*, a Polish notary was denied the qualification of court with the argument that its

---

(79) Case C–115/22 *Nada* [2024] ECLI:EU:C:2024:384, para 34; Case C–722/21 *Frontera Capital* [2022] ECLI:EU:C:2022:412, para 11.

(80) Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444.

(81) Cf also European Law Institute, *Charter of Fundamental Constitutional Principles of a European Democracy* (European Law Institute 2024) 52–56 (Principle 14: Judicial independence and impartiality; Principle 15: Rules governing judicial independence; Principle 16: Specific guarantees), 56f (Principle 17: Independence as a general principle of reviewing bodies).

(82) Case C–138/80 *Borker* [1980] ECLI:EU:C:1980:162, para 4; Case C–318/85 *Greis Unterweger* [1986] ECLI:EU:C:1986:106, para 4; Case C–111/94 *Job Centre* [1995] ECLI :EU:C:1995:340, para 9; Case C–134/97 *Victoria Film* [1998] ECLI:EU:C:1998:535, para 14; Case C–195/98 *Österreichischer Gewerkschaftsbund* [2000] ECLI:EU:C:2000:655, para 25; Case C–58/13 *Torresi* [2014] ECLI:EU:C:2014:2088, para 19; Case C–453/20 *CityRail* [2022] ECLI:EU:C:2022:341, paras 43ff.

(83) See, *inter alia*, Case C–54/96 *Dorsch Consult* [1997] ECLI:EU:C:1997:413, para 23; Case C–53/03 *Syfait and Others* [2005] ECLI:EU:C:2005:333, para 29; Case C–246/05 *Häupl* [2007] ECLI:EU:C:2007:340, para 16 and Case C–118/09 *Koller* [2010] ECLI :EU:C:2010:805, para 22; more recently: Case C–453/20 *CityRail* [2022] ECLI :EU:C:2022:341, para 41, Case C–718/21 *Krajowa Rada Sądownictwa* [2023] ECLI :EU:C:2023:1015, para 40; Case C–115/22 *Nada* [2024] ECLI:EU:C:2024:384, para 35.

(84) Case C–115/22 *Nada* [2024] ECLI:EU:C:2024:384.

(85) Case C–453/20 *CityRail* [2022] ECLI:EU:C:2022:341.

role was administrative rather than judicial. (86) In *Albausy*, Advocate General *Campos Sánchez-Bordona* quotes *OKR* and mentions that the Court of Justice has to verify whether there is a case pending before a court and 'whether it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature'. (87) If these conditions are not fulfilled, the referring body cannot be considered to be exercising a judicial function, even if it fulfils the other conditions laid down in the case-law of the Court of Justice. This strict approach is largely due to the increasing number of preliminary references, which has made the Court of Justice a supranational judicial review body of national legislation. (88)

88 Nevertheless, the Court of Justice has occasionally adopted a functional approach, especially in family and succession matters. For example: in the *Brigitte Schlömp* case, the Court of Justice considered a Swiss mediation body to be a 'court' on the basis of the functional equivalence of its decisions to those of judicial authorities. (89) Most recently in the *Albausy* case, the Court dismissed a preliminary reference from a German court issuing a European Certificate of Succession, holding that, in that role, it was not exercising judicial functions. (90) However, the Court of Justice, while declaring the referral inadmissible, effectively addressed the substantive questions raised. Reading between the lines, this decision, while seemingly reinforcing the restrictive interpretation of Article 267 TFEU, demonstrates how this restrictive interpretation can lead to procedural inefficiencies without necessarily serving the underlying purpose of preliminary references.

The opportunity of extending preliminary references to authorities other than courts in family and succession matters

89 Against this background, one may object that interpretative questions concerning the application of European Union law can be raised in the course of a judicial review procedure against extra-judicial acts, where a court could then request a preliminary ruling under Article 267 TFEU. This argument was developed in the *OKR* judgment, (91) suggesting that there is no need to grant a preliminary reference at the level of the extra-judicial proceedings,

---

(86) Case C–387/20 *OKR* [2021] ECLI:EU:C:2021:751.

(87) Case C–187/23 *Albausy* [2024] EU:C:2024:309, Opinion of AG Campos Sánchez-Bordona, para 26.

(88) Initially, the criteria were less strict (see C–61/65 *Vaassen-Göbbels* [1966] ECLI :EU:C:1966:39).

(89) Case C–467/16 *Brigitte Schlömp v Landratsamt Schwäbisch Hall* [2017] ECLI :EU:C:2017:993.

(90) Case C–187/23 *Albausy* [2025] ECLI:EU:C:2025:34.

(91) Case C–387/20 *OKR* [2021] ECLI:EU:C:2021:751, para 33.

because judicial remedies are sufficient to ensure the effectiveness of the preliminary ruling mechanism.

90 However, this argument is not fully convincing for a number of reasons. Firstly, it lacks consistency, because it contradicts the idea that courts other than those of last instance can make preliminary references; this is, however, possible under Article 267(2) TFEU, which is aimed to ensure the uniform application of European Union law at all stages of judicial proceedings. Secondly, the above-mentioned reasoning leads to delays and an increase in litigation, as the parties may be forced to take disputes to courts simply to resolve uncertainties in European Union law. Finally, it makes the preliminary ruling dependent on the availability of the parties to judicially challenge the acts of authorities other than courts.

91 Following Principle 6, in allowing preliminary references during the drafting or registration of an act in family and succession matters, the Court of Justice would help resolve ambiguities earlier. This proactive approach promotes efficiency, ensures legal certainty, and supports the uniform application of European Union law. It also helps to prevent unnecessary appeals that could overburden judicial systems of the Member States. Furthermore, it acknowledges the increasing use of out-of-court procedures, safeguards their efficiency, and strengthens their reliability in cross-border legal situations.

92 An extension of Article 267 TFEU would also be beneficial to ensure that authorities other than courts carry out their duties correctly, minimising the risk of professional liability or sanctions due to errors or omissions in the performance of their duties. ([92])

The need for extending preliminary references to authorities other than courts in family and succession matters

93 The Court of Justice's case-law in family and succession matters represents a relatively small portion of its total caseload. ([93]) One possible explanation is that the de-judicialisation trend may have limited the number of preliminary references in these areas, as the strict doctrine upheld by the Court of Justice requires an act to be challenged before the court for a preliminary reference to be made. In some legal systems, however, this requirement may be limited in practice, particularly where the legal effects derive directly from the will of the parties rather than from decrees of authorities other than courts.

([92]) Only in some countries, if doubts arise regarding a person's rights or legal facts, notaries must refuse to certify such rights or facts (see eg *Bogdziewicz*, Lithuania, para 7; see also the role of the Italian Public Prosecutor: *Stracqualursi/Chiricallo*, Italy, para 104).

([93]) Annual Report 2023 Statistics concerning the judicial activity of the Court of Justice.

94 The comparative analysis shows that the effects of out-of-court procedures sometimes depend on an out-of-court decision and in other cases they result directly from the will of the parties (the agreement or the declaration itself, after a structured procedure involving an authority). This, in particular, applies to succession law, where, in many Member States, notaries rather than courts play the central role in the implementation of the succession upon death, (94) but also to divorce and separation proceedings. This distinction has significant implications for legal remedies. (95) In Member States such as Italy or France, where extra-judicial divorces are directly established by binding agreements, these acts can usually only be challenged through substantive (contractual) remedies. Challenges are often limited to issues such as lack of consent or breach of mandatory rules: therefore, there is no general possibility of appeal. In such cases, granting authorities other than courts participating in the act the right to make preliminary references under Article 267 TFEU becomes crucial. Without this option, the parties may lack effective mechanisms to resolve questions of European Union law that arise during procedures.

95 The need to entitle authorities other than courts to raise a preliminary reference is even more compelling in countries where no consensual judicial alternative to non-judicial procedures is contemplated (even if there is the possibility of having the act reviewed in court). For example, since December 2017, divorce by mutual consent in Greece has been possible only before a notary, and the dissolution of a registered partnership between same-sex couples is only possible out-of-court. (96) In Portugal, if the spouses, in addition to the consensual dissolution of the marriage, also conclude complementary divorce agreements (on additional issues arising from divorce), they must file a common request to the civil registrar. (97) In Lithuania, the courts will dismiss a claim if the claimant has not first followed the mandatory out-of-court settlement procedures prescribed by law for this type of case. In

(94) *Dutta/Patreider*, Comparative Report, paras 35ff.

(95) *Dutta/Patreider*, Comparative Report, paras 18ff. The acts of Romanian notaries can be challenged by any interested person through an action for annulment in court. Further, any decision to reject the application may be appealed to the lowest court within ten days from receiving it (*Vlad*, Romania, para 37). In Lithuania, an interested party may file an appeal with the court that is within the area of the notary's office if they are of the opinion that an executed notarial deed or the refusal to execute a deed is erroneous (*Bogdziewicz*, Lithuania, para 40). A decision taken by the Danish Agency in yellow cases may be appealed within four weeks to the family court, with permission from the appeals permission board (*Pedersen/Thøgersen*, Denmark, para 39).

(96) *Zervogianni*, Greece, paras 17 and 22.

(97) *Teixeira Pedro*, Portugal, para 21.

these jurisdictions, therefore, the parties are forced to resort to contentious proceedings in order to bring the family and succession issue before a court that can refer the case to the Court of Justice. ([98]) The extension of the preliminary reference to these authorities is, therefore, necessary and impelling.

Compatibility of the proposed solution with the purpose of preliminary rulings

96 The solution proposed in Principle 6 is not only beneficial and sometimes essential to enhance the mutual trust that underpins judicial cooperation in civil matters but is also consistent with the fundamental purpose of preliminary references.

97 Article 267 TFEU is intended to provide a framework for cooperation between the Court of Justice and national courts (and potentially other authorities exercising judicial functions) in order to ensure the correct and uniform application of Union law in the Member States, ([99]) preventing the Court of Justice from becoming an advisory body to public administrations. ([100]100) This purpose should guide the best interpretation of the term 'court or tribunal' in Article 267 TFEU, excluding inconsistent criteria, such as the existence of a dispute.

98 In consensual family and succession matters, the main purpose of the judicial procedure is to provide a formal framework to the will and ensure that procedural and substantive requirements are met but does not necessarily imply the exercise of an administrative function. Indeed, in the *CityRail* case, the Court of Justice considered that neither the presence nor the absence of a contentious proceeding was decisive when it came to the question of whether an authority exercised judicial functions. ([101]) On the contrary, the Court clarified that an activity is administrative in nature when: (a) it can be initiated *ex officio* by the authority itself and (b) the authority lacks impartiality (because it favours and promotes public interests over private ones), conditions that are not present in the context under consideration here.

99 Therefore, when an authority's decisions produce definitive legal effects in family and succession matters, it exercises judicial rather than administrative

---

([98]) *Bogdziewicz*, Lithuania, para 19.

([99]) Case C–115/22 *Nada* [2024] ECLI:EU:C:2024:384, para 33; Case C–338/23 *Bravchev* [2024] ECLI:EU:C:2024:4, para 18; Case C–378/08 *ERG* [2010] ECLI :EU:C:2010:126, para 72.

([100]) See Case C–453/20, *CityRail* [2022] ECLI:EU:C:2022:341, para 45; Case C–462/19 *Anesco and Others* [2020] ECLI:EU:C:2020:715, para 49; Case C–394/11 *Belov* [2013] ECLI:EU:C:2013:48, para 40; Case C–136/11 *Westbahn Management* [2012] ECLI :EU:C:2012:740, para 27; Case C–134/97 *Victoria Film* [1988] ECLI:EU:C:1998:535, para 15.

([101]) C–453/20 *CityRail* [2020] ECLI:EU:C:2022:341.

functions: in those cases, the courts' role does not differ from that played by non-judicial authorities when they issue a final decision that regulates the substantive legal situation ([102]) (in cases such as divorces finalised by Lithuanian notaries ([103]) and civil registrars in Portugal). ([104])

100 A possible counter-argument might be that the extension of the preliminary reference mechanism to non-judicial authorities acting in family and succession matters would open the floodgates to all cases involving authorities other than courts. However, family and succession cases concern the enforcement of private rights, therefore, there is no significant risk of turning the Court of Justice into a consultative organ for public administrations and overburdening the Court of Justice by extending preliminary reference mechanisms to all authorities other than courts.

101 Besides, non-judicial authorities, according to Principle 5, should respect certain standards. These safeguards ensure that authorities other than courts meet the other criteria that the Court of Justice considers essential for preliminary references.

102 As a result, the Project Group argues for the extension of the right to raise a preliminary reference to authorities other than courts falling within the definition of 'court' in the relevant Regulations of the European Union. ([105])

([102]) Only in Denmark's yellow cases is the administrative authority (the Family Law Agency) allowed to settle a dispute between a couple. Unlike the green cases, the outcome in these cases is a decision.

([103]) *Bogdziewicz*, Lithuania, para 34.

([104]) *Teixeira Pedro*, Portugal, para 22.

([105]) These criteria generally ensure that the authority: exercises judicial functions or acts under the delegation or supervision of a judicial body; ensures impartiality and the right of all parties to be heard; makes decisions that are subject to review or appeal before a judicial authority; makes decisions which have the same legal force and effect as those made by judicial authorities in equivalent matters.

These authorities are classified as *judicial authorities* under the Matrimonial Property Regulation (Recital 29 and Article 3(1)(d)) and the Succession Regulation (Article 3(2)). The Court of Justice of the European Union further confirmed this approach in the *WB* case (Case C–658/17 *WB v Przemysława Bac* [2019] ECLI:EU:C:2019:444), where it emphasised that the concept of 'court' in the Succession Regulation must be interpreted broadly to include notaries exercising judicial functions. The Rome III Regulation (Article 3(2)) does not contain specific criteria, while, according to the Brussels IIb Regulation (Recital 14 and Article 2(2)(1)), the term should be given a broad meaning so as to cover administrative authorities, or other authorities, such as notaries, who or which exercise jurisdiction in certain matrimonial matters or matters of parental responsibility. Any agreement approved by the court following an examination of the substance in accordance with national law and procedure should be recognised or enforced as a 'decision'.

The Italian negotiation assisted by lawyers and under the control of the public prosecutor, seems to meet all these requirements (*Stracqualursi/Chiricallo*, Italy, paras 94ff). Lithu-

103 Principle 6 could also potentially apply to cases where the legal effects stem directly from the will of the parties, with the role of the authority other than courts limited to procedural functions, such as registration. This is a particularly ambitious proposal given the current case-law of the Court of Justice, as it concerns scenarios where there is no formal decree or decision issued by a public authority. This extension is nevertheless very important because such acts are not easily challenged, since the remedies are not clearly identified, not all States provide for specific procedures, or allow remedies for any circumstances. Without the possibility of a preliminary ruling for authorities participating in these acts, there is a significant risk of an inconsistent or unconvincing application of European Union law, undermining its uniform interpretation and the rights of individuals in cross-border matters.

PRINCIPLE 7 (MORE LEGAL CERTAINTY)

1. *When shifting competences from courts to other authorities or the parties themselves according to Principle 2, Member States should provide for clear substantive and procedural rules, and, in particular, clarify whether substantive or procedural remedies apply.*
2. *The European Union should ensure that its private international law instruments cover acts in family and succession matters comprehensively.*
3. *The European Union should simplify the regimes by which European private international law instruments extend the effects of acts in family and succession matters.*

Comments

104 When shifting competences to authorities other than courts (see para 6) and when reforming existing extra-judicial procedures in family and succession law, Member States act independently of each other based on their competences for substantive family and succession law. Procedures thus inevitably vary from Member State to Member State. Nonetheless, especially in view of the increasing corpus of regulations concerning cross-border family and succession law, it appears desirable that Member States follow some common guiding criteria when considering what to regulate and what not. Among these is the need to increase legal certainty and predictability. (106)

---

anian notaries, who assess the fairness of the agreement between the spouses, meet all these requirements as well (*Bogdziewicz*, Lithuania, para 34).

(106) Cf also European Law Institute, *Charter of Fundamental Constitutional Principles of a European Democracy* (European Law Institute 2024) 44ff (Principle 9: Legal certainty).

Principle 7 intends to strengthen legal certainty and predictability by inviting Member States and the European Union to clarify certain aspects of the existing framework for cross-border family and succession matters, while changing others. It is addressed to both the Member States (Principle 7(1)) and the European Union (Principle 7(2) and (3)). **105**

In particular, when starting to involve non-judicial authorities in the administration of justice, Principle 7(1) proposes to clearly identify the roles and functions of the parties and authorities involved, including potentially applicable legal remedies. Principle 7(2) and (3), on the other hand, focus on the cross-border dimension of acts in family and succession matters. They constitute broader recommendations both for existing and forthcoming instruments of the European Union in cross-border family and succession matters. Principle 7(2) sets out to guarantee consistency, by closing gaps in the current framework and by avoiding inconsistencies in, or with, future instruments – especially if they are due to the participation of authorities other than courts. It argues for the strengthening of a functional understanding of the terms 'court' and 'decision' as well as for a potential revision of the scopes of application of the existing instruments. At the same time, the Project Group is of the opinion that the existing regimes, in particular in matters of 'recognition', should be simplified (Principle 7(3)). **106**

Substantive or procedural remedies (Principle 7(1))

In general

Principle 7(1) is intended to apply both when shifting competences to authorities other than courts and when reforming existing extra-judicial procedures. The scope of application is determined by Principle 1 (see paras 1ff). **107**

When further de-judicialising the administration of justice in family and succession matters, Member States should ensure that the role of the parties and authorities involved is clearly identified. Establishing whether the legal consequences are determined by the involvement of the authority or already by the declaration or agreement of the parties would bring more legal clarity to family and succession matters and allow for an easier qualification of the act for cross-border purposes. An indication might be provided by the remedies given to parties when challenging the respective act. The applicability of contractual remedies or the extension of the general rules of the law of obligations can indicate that the de-judicialised solution adopted in a Member State is contractual in nature and that the legal effects already derive from the agreement or the declarations of the parties. Should the legal effects, on the other hand, be determined, or the legal situation between the parties shaped, by the involvement or activities of an authority, a qualifica- **108**

tion of the act as a 'decision', also for the purposes of European private international law, might be more feasible.

109 An easier characterisation of an act as a contract or agreement rather than a public decision under the relevant European private international law rules facilitates the circulation of the act, strengthens legal certainty and accelerates proceedings. Member States should, in the opinion of the Project Group, thus also strive to find uniform qualifications for out-of-court solutions intended to cross borders and consider that their national acts might circulate throughout the Union, with their effects having to be extended to other jurisdictions (see paras 69ff). The Project Group believes that comprehensible and transparent rules in this regard will further help to strengthen mutual trust between Member States.

The need for more legal clarity in out-of-court proceedings – the example of divorce

110 The need for more legal clarity is best showcased by highlighting the current framework in extra-judicial divorce matters. In recent years, a growing number of Member States have introduced the possibility of dissolving marriages through partially or completely de-judicialised proceedings. (107) It is, however, not always easy to determine whether the dissolution of the marital bond results directly from the parties' agreement, whether it arises from the public authority's decree or whether substantive or procedural remedies apply. In Italy, an out-of-court divorce option before a mayor was introduced in 2014 (108): in the proceedings, that cannot be accessed in the presence of minor children, the mayor's role is confined to verifying the fulfilment of formal requirements and confirming the parties' intention to divorce or separate. Moreover, agreements presented to the mayor cannot include provisions related to asset transfers or lump-sum maintenance payments. While many procedural aspects relating to this kind of divorce were expressly regulated, and while the agreement has the same effects as a judicial decision and produces *res judicata* effects, the rules do not clarify what kind of remedies apply. It thus had to be clarified by the Supreme Court that contractual remedies as well as the rules on vitiating factors could be extended to this type of out-of-court divorce. (109)

111 Another example is the notarial divorce in Romania (110): here, the divorce derives from a public deed issued by a notary. Parties can proceed to the

(107) *Dutta/Patreider*, Comparative Report, paras 19ff.
(108) Article 12 of Decree-Law 132 of 2014.
(109) *Stracqualursi/Chiricallo*, Italy, paras 116ff.
(110) *Vlad*, Romania, paras 20ff.

divorce even if they have minor children, who in that case must be heard by the notary. Romanian law, however, does not specify the consequences of instances in which a child is not heard or of cases in which an agreement is incompatible with the child's best interests.

More comprehensive approach of European private international law (Principle 7(2))

112 The Project Group is of the opinion that the European Union should ensure that, in the situation described in Principle 1, the existing and future private international law instruments cover acts in family and succession matters comprehensively.

113 The conflict rules of the family and succession law instruments should generally apply to courts and other authorities (including entities acting in an official capacity or authorised under national law to carry out certain tasks) alike, provided that they are entrusted with the same or corresponding tasks in different Member States and should the acts emanating from them produce the 'same' legal effects. (111) As highlighted, applying certain (jurisdictional or recognition) regimes should, in principle, not merely depend on the fact that a function is carried out by a court rather than by another authority. The focus should lie on the function itself. This does not necessarily mean that all acts in family and succession matters should automatically be subject to the same regime, but rather that functionally equivalent tasks or acts should be treated alike, especially for the purpose of the extension of their effects.

114 The European Union should, however, not only consider ensuring that all acts in family and succession matters are covered by a specific regime of its instruments but by a private international law instrument in general. The current situation is best highlighted by the Rome III Regulation.

115 Rome III implemented an enhanced cooperation in the area of the law applicable to divorce and legal separation. 17 Member States apply its rules at the moment. (112) According to the jurisprudence of the Court of Justice, the harmonised conflict rules can, however, only be invoked if the applicable law was determined in court proceedings. Rome III thus cannot determine the law applicable to a mere private divorce based only on the declaration of

(111) Recital 70 Brussels IIb Regulation.

(112) Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia, and Spain.

the spouses, as it 'cover[ed] solely divorces pronounced either by a national court or by, or under the supervision of, a public authority'. (113)

116 Not all forms of de-judicialised divorces that have been (or will be) introduced in the Member States in recent years (or in the future) might necessarily meet the respective requirements. The lines are, it seems, blurred when it comes to the French 'notarial' divorce. The role of the notary, as an authority exercising public authority, is very limited in these cases. While the divorce agreement is drawn up by lawyers, signed by them and the parties, the notary only formally (114) reviews the act and files it in their register in order to render the act enforceable. (115) The agreement thus – at its core – constitutes a private deed. Whether the lawyers involved can be qualified as a public authority for the present purposes might be questionable (even if they might qualify as an entity acting in an official capacity or exercising public powers under national law). (116) Similar doubts arise as to the role of the notary. Given that they do not carry out a control as to the substance of the agreement, it does not seem that they either pronounce or supervise the dissolution of the marriage as would be required under the case-law of the Court of Justice. (117)

117 The current post-*Sahyouni* framework for these and other types of purely private divorces is consequently problematic: purely private divorces have to be dealt with on the level of the applicable law determined by the pertinent *national* conflict rules and not by those of the Rome III Regulation. Some national legislators have already introduced rules referring parties in any case to the provisions of the Regulation, regardless of the fact that a case formally fell within the Regulation's scope of application. Others have established autonomous rules. Member States that abolished pre-existing internal conflict rules after the adoption of the Rome III Regulation are left with applying

---

(113) Case C–372/16 *Soha Sahyouni v Raja Mamisch* [2017] ECLI:EU:C:2017:988, paras 48 and 45. See also Case C–372/16 *Soha Sahyouni v Raja Mamisch* [2017] ECLI :EU:C:2017:686, Opinion of AG Saugmandsgaard Øe, para 65.

(114) In practice, they verify that the time limits have been complied with.

(115) *Berre*, France, para 11. The French Ministry of Justice clarifies that notaries could always receive such divorce agreements provided that French law applied without the strict need for them to have international jurisdiction.

(116) Eg Case C–342/15 *Leopoldine Gertraud Piringer* [2017] ECLI:EU:C:2017:196, para 67.

(117) Case C–646/20 *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB* [2022] ECLI:EU:C:2022:879, paras 54f, 59 ('retain control over the grant of the divorce'; 'examin[ing] the conditions of the divorce in the light of national law and the actual existence and validity of the spouses' consent to divorce').

the Regulation by way of analogy. (118) The different solutions adopted to close the '*Sahyouni* gap' can consequently lead to different solutions on a private international law and substantive level, causing disharmonies in an area of European private international law that was at least partly harmonised under the enhanced cooperation that is Rome III. A consistent approach and a comprehensive system would provide for mechanisms inclusive of the different types of de-judicialised divorces, addressing jurisdiction, applicable law and recognition. It is, consequently, the opinion of the Project Group that the question of whether a private divorce (from a third country or the EU) is to be recognised under conflict of laws should be determined under European Union law.

Simplifying existing regimes (Principle 7(3))

118 The current recognition rules of European private international law instruments in family and succession matters have become more complex in recent years. Traditionally, recognition was a category reserved for judicial decisions. The effects of authentic instruments were extended by other means. (119) While their substantive effects (ie those of the underlying legal relationship [*negotium*]) had to be determined by the applicable law, the acceptance of a document (*instrumentum*) was ensured by way of presumptions of authenticity or the automatic extension of the instruments' evidentiary effects. (120)

119 These approaches were challenged, however, when the European Union started to introduce uniform European certificates with autonomous effects, (121) and, later on, regimes differing from the traditional categories, specifically established for certain types of documents. (122) These developments seemingly blurred the lines drawn between the original regimes, the more so as the Court of Justice of the European Union has extended the recognition regimes for decisions considerably (see para 53), leaving little room for these other regimes.

120 The planned Parenthood Regulation might be taken as an example for the

(118) Cf Anatol Dutta, 'Private divorces outside Rome III and Brussels II bis? The Sahyouni gap' (2019) 56 CMLR 1661, 1661ff.

(119) See eg Article 59 of the Succession Regulation.

(120) Ibid.

(121) European Certificate of Succession (Articles 62 of the European Succession Regulation). More recently: the European Certificate of Parenthood (Articles 46ff of the planned Regulation on Parenthood [COM (2022) 695 final]) and the European Certificate of Representation (Articles 34ff of the Proposal on the International Protection of Adults [COM (2023) 280 final]).

(122) Eg agreements with binding effects under the Brussels IIb Regulation.

rising complexity in 'recognition' matters. The initial proposal provides for four different regimes, distinguishing between the recognition of decisions and of authentic instruments with binding legal effects, on the one hand, and the acceptance of authentic instruments without binding legal effects as well as the circulation of a European Certificate of Parenthood, on the other. While the creation of new sub-categories in theory ensures that most Member State documents, be they judicial or non-judicial in nature, are covered by at least one of the regimes, it further increases uncertainties as to the documents' qualification and as to the scope of application of the respective regimes. Concerning the potentially new instrument in matters of parenthood, this might cause issues for authorities and legal practitioners to determine, for example, whether an authentic instrument has binding legal effects or not. The distinctions in the Regulations can at times appear theoretical and can, in practice, often only be implemented with difficulty, especially where the respective doctrinal categories do not exist. ([123])

121 Different approaches might be taken to tackle these issues. The European Union could, for example, extend or further clarify existing definitions (and widen the obligations of Member States to provide and update lists of authorities and types of documents and decisions) rather than introduce additional regimes for specific types of Member State documents. This would further ensure the flexibility required for changes in national legislation or the introduction of new types of acts.

([123]) Council document 13200/23, p 10: 'BE is not in favour of the distinction between authentic instruments with binding legal effect and authentic instruments with no binding legal effect but with evidentiary effect, as the distinction is highly theoretical and not practical.' Repeated in Council document 15669/23, p 140 where the Belgian delegation further proposes to consolidate all rules on authentic instruments in one chapter. Similar concerns (clarity of the distinction) were also raised by Lithuania, see Council document 15669/23, p 141. Austria (ibid) proposed to remove the rules on binding authentic instruments altogether. Concerns were also expressed by the Romanian delegation, ibid, p 142.

ISBN 978-88-28-87393-8

€ 154,00
024224885