

Regulating Cross-National Divorce, Child Contact and Residence in the European Union^{*}

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Introduction

This paper explores the challenges associated with negotiating family life in a specifically cross-national, European context. It is based on the findings of a three year, European Commission and Nuffield-funded research project in which I was involved with Louise Ackers at the University of Leeds in 1997-2000 and on subsequent research I undertook with legal practitioners, funded by the University of Liverpool.¹

The initial research (referred to hereafter as 'the Children and Migration research') examined the socio-legal status and experiences of children who move within the European Union. It explored children's status as decision-makers, both in the private family sphere (including the extent to which they are involved in decisions to move between countries and the various ancillary issues raised by such a move), and in the public sphere (that is, the nature and extent of children's rights as independent EU citizens). The specific consequences of migration for family relationships emerged as an important

^{*} Aspects of this paper are drawn from Ackers, L. and Stalford, H. (2004) *A Community for Children?: Children, Citizenship and Migration in the European Union*, Aldershot: Ashgate, particularly chapter 7; and Stalford, H. 'Brussels II and Beyond: A Better Deal for Children in the European Union?' in Boele-Woelki, K. (ed) (2003) *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Commission for European Family Law, The Netherlands: Intersentia, pp. 471-487

¹ All of the research is discussed in detail in Ackers, L. and Stalford, H. above note.

and discrete dimension of the project. We were particularly interested in exploring how children sustained contact with relatives following a move to another country and in assessing the quality of that contact in the face of linguistic, cultural, financial or time constraints. This aspect of the project coincided with a highly significant development in EU law and policy-making – one which saw the EU institutions extend its law-making competence to areas of private family law in cases of cross-national divorce and family separation. The EU institutions' activity in this regard gathered significant momentum in the latter stages of the Children and Migration research prompting further exploration of the content and impact of the resulting legislative measures. With funding from the University of Liverpool, I conducted a one-year pilot study (2002-3) involving detailed legal analysis, and a survey and interviews with legal practitioners working in the area of international family law.² The study aimed also to consider the status afforded to children in the new EU family provisions, and the extent to which this reflects and reinforces the primacy attached to children's right to be heard under domestic family law.

This paper will begin with a discussion of some of the main challenges arising out of cross-national contact and residence arrangements by reference to the experiences of those interviewed for the Children and Migration research. It will examine the effectiveness of the law in addressing these challenges. It will then move on to outline (very briefly) the measures subsequently implemented at EU level to regulate cross-national divorce, child contact and residence. It will focus, in particular, on the position of children within these

² This pilot work is intended as a prelude to more in-depth large scale work involving children and families who have experienced cross-national family separation as a result of divorce.

provisions, drawing on the interviews with legal practitioners. The paper will end with a discussion (posing as many questions as answers!) as to whether EU activity in the family arena serves to expedite decision-making in this complex area of law and, in particular, whether it serves to protect or enhance in any way the status of children involved in these processes.

In order to set the context for this discussion, I will begin with a statistical overview of the incidence of divorce across the European Union and among the sample interviewed for the Children and Migration research.

Managing family relationships cross-nationally

A cursory glance at recent European statistics provides some indication of the prevalence of divorce across the EU. Latest figures³ indicate that marriage is now a less stable institution as ever, evidenced in the increased divorce rate. Indeed, across the 'new' EU (including the 10 Member States who acceded to the EU in May 2004) the number of divorces has almost quadrupled since 1960. In 2002, there were 863,000 divorces across the EU 25 (33%) compared with 637,000 in 1980 (20%). Divorce appears most prevalent in Germany, the UK and France⁴ where the number of divorces in 2001 reached 197,500, 156,800 and 112,600 respectively.⁵

The Children and Migration research involved in-depth, semi-structured interviews with 180 children and parents across the UK, Sweden, Portugal

³ Population Statistics 2004, EUROSTAT: Luxembourg: Office for Official Publications of the European Communities, 2004, p.115

⁴ Above note, pp.125 -126

⁵ Above note, p.125

and Greece. It revealed 38 cases (21%) of divorce and separation.⁶ In 23 of these cases the child lived with the mother. Of the remainder, there were 5 cases in which the father had custody and 2 cases where the custody arrangement had changed following problems in the child's relationship with the custodial parent. In 5 cases the child lived apart from both parents, for example at boarding school, or with friends or relatives, and in 3 instances the siblings were effectively split between the parents.

The sample included 22 non-custodial parents who lived in a different country to their children, 12 of whom saw each other during school holidays, once or twice a year on average. In 7 cases, the child no longer had any contact at all with the absent parent.

There was a general disinclination to pursue formal legal proceedings in respect of child contact and residence arrangements, with most families opting for a more flexible and informal approach. In fact, only two of the families interviewed for our study pursued the formal legal route. This may reflect a desire to avoid the time or financial costs or, indeed, the hostility associated with formal legal proceedings. Deciding on contact and residence informally did not necessarily make for a more harmonious, problem-free experience, however. Some families we interviewed may well have benefited from the security provided by more structured legal arrangements, particularly where effective communication between the parents had broken down. Indeed, the consequences of more ad hoc contact arrangements are

⁶ This figure is less than European divorce and separation figures partly because our data only includes divorce or separation rates of those with children. In reality, there may have been more since some of the sample only reported their marital status at the time of interview and did not reveal previous instances of divorce or separation.

particularly acute for children who rely entirely on their parents' practical support to enable them to sustain contact with the non-custodial parent in another Member State. This is highlighted by one particular case in which the English mother's resentment of her ex-husband appeared to compromise her daughters' contact with him.⁷

The parents had initially met on holiday in Greece and, after marrying, they moved to Holland, her husband's country of origin. She worked full-time as a qualified nurse until she had their two daughters at which point she started working part-time. When the girls were aged 2 and 6 the husband left the marriage to move in with his new partner. He refused to pay any maintenance for the children. Unable to support the children and pay the rent on her part-time salary, the mother decided to take the girls back to the UK to be near their English grandparents. After a year or so, the father made contact with the mother, requesting that the girls go and stay with him during the holidays. He agreed to pay her £250 a month in maintenance costs provided she complied with this:

Mother: The girls are going over at Easter - he has just changed beyond all recognition and we're devastated by it but what can we do? It's particularly hard for [the older daughter] because he abuses it. He phones and says to her "oh you never want to come, you never phone". He's very selfish, desperately selfish. Its actually ripped the family apart. I'd rather they didn't go at all. He won't pay the maintenance if they don't go and we are desperately

⁷ In this case, both mother and daughter were interviewed together at their own request.

short of cash. I'd rather they weren't party to any more hurt than they have already been.

Daughter: Well, I know that when we go, I don't want to upset mum. He does have a go at me over the phone sometimes, he says, 'why don't you see me very much'

While more formal contact and residence arrangements for this family would have yielded a more concrete obligation on the part of the father to pay child maintenance, such legal processes can be both financially onerous and, ultimately, prove difficult to enforce in another Member State. This is illustrated by the following case in which a German mother abducted her children:

The mother had been living in Greece with her Greek husband and their two children. Pregnant with their third child, and without the consent of the father, she returned to Germany with the two children. The father pursued legal action in Greece against the mother and was awarded official custody of the two older children while the mother was awarded custody of the new baby. On travelling to Germany to get the children, for reasons that are unclear, he returned with only his seven-year-old son. A bitter custody battle continued between the couple for a further five years, during which time there was, strangely, a total absence of contact between the father and his two other children. While the youngest child remained with the mother in Germany, the eldest daughter chose to relocate herself to Greece at the age of 14 to live

with her father. During the interview, the daughter revealed that she wished to return to Germany to live with her mother - she had learned very little Greek during her four years there and had had problems 'communicating' with her paternal grandparents and stepmother.

This case illustrates the challenges of negotiating child contact and residence in a migration context and the relative vulnerability of both parents and children left with inadequate and inaccessible legal protection. Even with legal instruments in place at international⁸ level to resolve these disputes, the process is a long drawn-out one raising problems of ultimate enforcement and sustainability.

The involvement of children in cross-national contact and residence arrangements

A particular concern raised by these examples relates to the extent to which children are involved in decision-making processes in the context of family transition and re-location. There was very little reference to any efforts by either the parents or the courts to actively engage the children in decisions around contact or residence.⁹ Subsequent interviews with legal practitioners demonstrate an ongoing failure to actively engage 'competent' children in

⁸ For instance, the Hague Convention on the Civil Aspects of International Child Abduction 1980 and the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and Restoration of Custody of Children 1980. Both of these have been implemented in England by the Child Abduction and Custody Act 1985.

⁹ Had our research specifically focussed on the issue of cross-national contact and residence, these issues would have been explored in more depth and may have revealed a more participatory approach in this regard. Chapter five of the book discusses the involvement of children in migration decision-making more generally.

cross-national family processes.¹⁰ This is in spite of the positive developments towards more participatory approaches at domestic level.¹¹

Failure to consult appropriately with children in this context can have an acute impact on those involved in trans-national parental responsibility disputes; the implications of these decisions for the child are inevitably more far-reaching where one parent lives in another Member State. For example, there is limited scope for effective co-parenting arrangements, less regular but more intensive and extended periods of contact will generally take place (usually during school holidays), and it is more difficult to ensure the safe return of the child following a period of contact. Cultural, linguistic and social factors will also influence the child's experience or desire to maintain contact or reside with one or other parent as he or she matures. These factors highlight the importance of ensuring effective consultation with the child, not only at the initial stage following parental separation, but on an ongoing basis in accordance with changes in the life-course (such as a subsequent migration or the development of a new relationship by one or other parent).

A High Court judge interviewed in the course of the pilot study further expressed the view that children, particularly in the context of international family disputes, should receive separate representation in view of the added implications of decisions of this nature. He identified, in particular, a need to ensure uniformity across the different Member States' in their approach to representing and consulting with children:

¹⁰ The methodology involved the distribution of a postal questionnaire to approximately 280 solicitors and barristers practising in family law across England. The response rate was approximately 20 per cent. This was then supplemented by five exploratory interviews with barristers, solicitors and one High Court judge.

¹¹ For an overview of different Member States' approaches to child consultation in family proceedings, see Stalford, H. (2003) 'The Rights of the Child in International Family Proceedings' *International Family Law*, June Issue, pp. 68-74

“I think the child needs to be represented. It’s going to be an issue in England of course because representation of the child is deemed to be very expensive and only takes place in some very special cases. I’m increasingly of the view that we are going to have to agree on a structure of cases and categories of cases which we think are important for children to be represented...particularly if we are going to have an international dispute over a child. I think it is very important for the child’s voice to be heard loud and clear...The decisions are crucial: if the child is going to speak in language X or language Y...are they going to go into a foreign education system or will they have to put up with the English type of education...All those crucial decisions to make...”

The interviews for the Children and Migration study were conducted prior to the implementation of EU legislation regulating cross-national divorce and parental responsibility. The findings I have highlighted, however, indicate a general preference for non-legal mechanisms of dispute resolution as well as problems associated with recognition and enforcement of agreements (regardless of whether or not they have been secured through the legal process). This leaves room for some speculation as to whether or not the developments subsequently made in the European family law arena now provide a more expeditious, participatory mechanism for regulating migrant family relationships.

Overview of the new EU Family Provisions

In order to understand the content of the new EU legislation on cross-national divorce and parental responsibility, we need to understand the events that led to its implementation.

The legislation as it now stands is derived from an agreement made between the then 15 Member States in 1998: the Brussels II Convention of 28th May 1998.¹² The aim of this Convention was to introduce uniform rules for determining jurisdiction and ensuring enforcement between Member States of agreements relating to annulment, divorce, separation and parental responsibility. It was a non-binding, intergovernmental agreement such that compliance with its provisions depended entirely on mutual trust and co-operation between the Member States. It also complemented, and in some respects duplicated, the provisions of a number of existing private international law instruments.¹³

In a bid to strengthen the impact of the Brussels II Convention and streamline legislation in this area, it was not long before the EU institutions converted it into an enforceable, uniformly applicable law which would usurp the parallel private international law instruments. March 1st 2001, therefore, saw the implementation of **EC Regulation 1347/2000 of 29 May 2000**.¹⁴ Like its predecessor, Regulation 1347/2000 regulated matters concerning jurisdiction,

¹² The Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters O.J. C221 16.07.1998.

¹³ Such as the Hague Convention on Recognition of Divorces and Legal Separation 1970, the Hague Convention on the Civil Aspects of International Child Abduction 1980, and the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and Restoration of Custody of Children 1980.

¹⁴ Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for the children of both spouses. OJ L 160, 30/06/2000, p.0019-0029. The Regulation is directly binding on all Member States with the exception of Denmark.

recognition and enforcement of judgements in two types of civil proceedings:

(a) divorce, marital separation and marriage annulment (Art.1); and (b) to the residence and contact rights of parents over the children of both spouses in the context of events specified under (a).

This Regulation has recently been repealed in response to a number of criticisms relating mainly to its narrow personal scope.¹⁵ The resulting legislation is **Council Regulation 12513/03**¹⁶ which came into force in August 2004 and which all Member States (with the exception of Denmark) are obliged to implement in its entirety by 1st March 2005.

The new Regulation largely reproduces the aims of the Convention and Regulation 1347/2000 to **expedite recognition and enforcement procedures** for determining cross-national child contact and residence arrangements. It covers divorce, legal separation and annulment as well as any issues relating to the attribution of parental responsibility, including child protection measures (Article 1).¹⁷ In matters of parental responsibility, the Regulation applies to *all* children independently of any link with matrimonial proceedings (Article 1).¹⁸ This is a significant amendment of the previous draft of this legislation which only regulated parental responsibility

¹⁵ These are described in detail in Stalford, H. (2004) 'A Guide to Decision-Making in Europe' in Bradley, C (ed) *International Guide to Family Law*, London: Solicitors Family Law Association.

¹⁶ EC Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility Council of the European Union, 2002/0110 (CNS) Brussels, 20 October 2003

¹⁷ The new legislation remains exclusive of maintenance issues which are dealt with under an alternative, more general EU instrument: EC Regulation 44/2001 off 22 December 2000, OJ L012, 16/01/2001, p.0001-0023, implemented on 1st March 2002. For a discussion of the challenges involved in negotiating cross-national maintenance, see Stalford, H. (2003) 'Old Problems, New Solutions?: European Union Regulation of Cross-National Child Maintenance', *Child and Family Law Quarterly*, Vol. 15(3) pp. 269-278

¹⁸ Amendment based on the 2001 Commission proposal for a separate Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility (OJ 2001/ C 332 E/11)

arrangements for the children of **both spouses** who were in the process of divorce, separation or marriage annulment. It excluded any consideration of parental responsibility towards stepchildren or children adopted by only one spouse in a previous union. Furthermore, it precluded any consideration of the rights of children born outside of marriage.

It must be emphasised from the outset that the Brussels II Regulation does not seek to amend the content of domestic legislation, but merely to **refine the conditions in which it is applied in cross-national disputes**. In that sense, it addresses procedural rather than substantive issues. It determines which jurisdiction will apply where parties to the proceedings are living in different countries and bringing competing claims in respect of divorce and parental responsibility. This is decided by reference to a series of criteria such as the 'habitual residence' of the parents (Articles 3-7) or, in cases of child contact and residence, the habitual residence of the child (Article 8). Once jurisdiction is established by reference to the Brussels II Regulation, the substantive issues are then settled at domestic level according to the family law rules of that jurisdiction.

A second important objective of the Regulation is to ensure that any decisions reached under the family law of a particular jurisdiction will be **automatically enforceable** in any other jurisdiction of the EU in which either of the parties are living or to which they subsequently migrate. For example, parental responsibility agreements negotiated between parties in England and Wales are automatically enforceable in other Member States should either of them subsequently move (Article 2(4)). This prevents one or other parent from, for

example, defecting to another Member State in order to secure a more favourable contact arrangement under that different jurisdiction.

The status of children under the Brussels II Regulation

While the new Regulation makes some reference to the status of children within cross-national family proceedings, the practical impact of this legislation on the day-to-day experiences of children has been largely overlooked by academics, legal practitioners and policy-makers alike.¹⁹ This is something of a surprise considering the emphasis that national systems and ideologies of family law now place on the welfare and rights of children. The substance and procedures espoused by English family law in particular have long since moved beyond the view that divorce is merely about renegotiating the relationship between two adults towards a prioritised concern to facilitate the ongoing relationship between parents and their children.²⁰ In that sense, children's rights have become integral to the application and success of domestic and private international family law.²¹ This prompts some concerns as to the extent to which the EU has espoused children's rights within the new Regulation.

¹⁹ For further discussion of this, see Stalford, H. 'Brussels II and Beyond: A Better Deal for Children in the European Union?' in Boele-Woelki, K. (ed) (2003) *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Commission for European Family Law, The Netherlands: Intersentia, pp. 471-487

²⁰ A brief history of children's rights within family law is provided by Mavis Maclean in her paper, 'Divorcing Families: The Economic Realities', paper for the Care, Values and the Future of Welfare (CAVA) Seminar, University of Leeds, 21-22nd September 2001. See also, Gollop, M., Smith, A.B., and Taylor, N.J. (2000) 'Children's Involvement in custody and access arrangements' *Child and Family Law Quarterly*, 12(4) pp.396-399; Trinder, L. (1997) 'Competing Constructions of childhood: children's rights and children's wishes in divorce' *Journal of Social Welfare and Family Law*, 19(3), pp.291-305; and Lyon, C. and Parton, N. (1995) 'Children's Rights and the Children Act 1989' in Franklin, B. (ed) *The Handbook of Children's Rights*, London: Routledge.

²¹ See for instance, Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction 1980; and Articles 8, 9, 10, 22, 23, 28 and 33 of the Convention On Jurisdiction, Applicable Law, Recognition, Enforcement And Co-Operation In Respect Of Parental Responsibility And Measures For The Protection Of Children 1996.

The Regulation specifies that, in determining which jurisdiction is competent to rule on matters of parental responsibility, the child's 'superior interests' must be considered (Articles 12 and 15).

The new Regulation's also requires that the child is given an opportunity to be heard (Article 23(b)) as a precondition for the recognition of a parental responsibility judgment in another Member State.²² On paper, therefore, the new Regulation appears to have progressed beyond a mere affirmation of the 'best interests' principle towards a more positive and empowering endorsement of the child's right to be heard in cross-national family proceedings. Authority remains, however, with individual Member States to specify the content and scope of domestic procedures for consulting with children. Yet this is based on the presumption that effective mechanisms are in place at national level to consult with the child in accordance with his or her age and maturity.²³ Divergent child-consultation procedures between the Member States, including differences in age-based restrictions on allowing children to participate, compounds the uncertainty facing children caught in the middle of cross-national contact and residence negotiations. Notwithstanding the differences between substantive family rights available under the various domestic family law systems, adults at least enjoy largely unfettered access to the legal process regardless of the Member State in which they reside. The nature and extent of migrant children's right to be heard, on the other hand clearly varies according to the Member State in

²² . It also introduces the same requirement in the context of decisions determining access (Article 41(2)(c)) and return (Article 42(2)(a)).

²³ For a summary of different Member States' approaches to consulting with children in family proceedings, see Stalford, H. (2003) 'The Rights of the Child in International Family Proceedings' *International Family Law*, June Issue, pp. 68-74

which they are habitually resident. Ensuring greater uniformity between Member States' procedural obligations vis-à-vis direct consultation with children would avoid this kind of 'territorial injustice' by ensuring that, regardless of where the case is heard, the child's rights within the process are equally respected.²⁴

Since the new Regulation does not actually impose additional obligations on Member States with regard to their child consultation procedures, it is unlikely to have a significant and immediate impact upon domestic practice in this regard. The new Regulation does, nonetheless, consolidate and reinforce, in the specific context of custody and access proceedings, a universal right of the child to be heard and to maintain direct contact with both parents. Its very status as a directly effective instrument precludes selective implementation of its provisions by Member States and, at very least, draws attention to the need to ensure more rigorous enforcement of existing domestic procedures to safeguard the rights and interests of the child.

Conclusion

Migration no doubt adds a variety of new complexities to children's experiences and vulnerabilities in the negotiation and application of contact and residence arrangements (although it would be disingenuous to present this as an entirely negative experience for all of our sample – in most cases, the children interviewed relished the opportunity to spend periods of contact with their non-custodial parents abroad and benefited hugely from the

²⁴ In the light of the proposed amendments to the Brussels II Regulation and the emphasis on the 'best interests' principle in addressing conflicts of jurisdiction, it is interesting to speculate on whether the Member State which affords greater weight to the expressed wishes of the child will be favoured over the less accommodating Member State.

opportunities this presented to them). The findings of the Children and Migration study suggest that private international law instruments in place at the time to expedite decision-making in this regard were not particularly effective, or indeed, accessible. This strengthened the case for a directly and uniformly enforceable legislation for cross-national family disputes between the 25 EU Member States. By becoming more fully immersed in family law issues through the implementation of the new Regulation, however, the EU has assumed specific responsibilities in respect of the rights of the child. This demands urgent consideration as to the nature and quality of children's rights endorsed by the EU and whether it is of the same calibre as that espoused by parallel international and domestic law.

Although the Regulation does not currently impose additional obligations on Member States to involve children where appropriate in family proceedings, it can articulate and reinforce a universal right of the child to be heard and to maintain direct contact with both parents in accordance with international human rights obligations. In any case, the EU must embrace children's rights issues wholeheartedly if it is to regulate family life legitimately and convincingly.