THE INTERNATIONALISATION OF IRISH FAMILY LAW

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I. INTRODUCTION

The "Internationalisation Of Family Law" Train Has Left The Station

The period of time since the summer of 2000 has been marked by frenetic legislative activity resulting in the top down Europeanisation of Irish family law. The legislative vehicle selected was the regulation," the provisions of which are directly and uniformly applicable in all the participating Member States without much delay on a specified date. Irish family law was not an area readily associated with the European Community. Consequently, this development came as something of a shock. It was an attempt to legislate for the fact that 15% of marriages are binational and 6 million European Union citizens live in another Member State.

The ongoing European integration and the increasing amount of EU regulations in private law have created a new challenge for private law: the elaboration of a uniform European private law. In harmony with this development, the European Parliament has, initially in 1989 and later in 1994, called for the preparation of a European Civil Code. The response to the challenge set by the European Parliament was the development of a new field of legal comparative activity: the comparative research-based drafting of European private law. Family law, due to "cultural constraints," has until the coming into force of the so-called now repealed Brussels II regulation, remained almost completely outside those activities, although without this classical field of private law the creation of an entire body of uniform European private law can never be completed.

According to Article 65 of the EC Treaty, the European

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Community possesses legal competence for international civil procedure, including family matters. The European Commission is bound by the limits of Article 65 and can only take measures to harmonise procedural family law. It cannot take measures to harmonise substantive family law. That said, this distinction is not easy either to make or to apply. The now repealed Brussels II regulation on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses was the first attempt by the European Community to enter the family law area.

The increasing free movement of persons has resulted in an almost identical increase of cross-border family relations. The accepted instrument to address legal issues arising from such relations is the use of private international law. Private international law, however, is but an interim solution. While private international law enables a certain degree of uniformity to be achieved, the differences between the substantive laws of the Member States are still maintained.

The absence of harmonised family law creates a barrier to the free movement of persons and the realisation of a truly European identity and an integrated European legal space. That said, there is increasing tension between the desire to retain family law under the internal affairs of the member states (justified by the EU principle of subsidiarity) and the ongoing need for more uniform rules and regulations.

The European Court of Human Rights (ECt.HR) has expanded on European family law in a number of its decisions. At a European Union level, the EC Treaty guarantees for all workers freedom of movement. The European Court of Justice (ECJ) has given major impetus to a European family law by attributing implications of a family nature to the freedom of movement. One has yet to notice that, essentially, the European Union has no competence for the unification of family law. Regardless, the Union seems to have abandoned its restraint. It expressly acknowledged the importance of the family with the adoption of the Charter of Fundamental Rights of 7 December 2000. Significantly, at the Laeken European Council meeting of 14 to 15 December 2001, the

harmonisation of family law was specifically mentioned in the recommendation to use all efforts to overcome the problems arising from differences between legal systems.

The Treaty of Amsterdam, as interpreted by the institutions of the European Community, has facilitated the communitarisation of family law. In the 1997 Treaty of Amsterdam, the EU Member States held that economic and political integration required, *inter alia*, the harmonisation of both the law of property and procedural law. Family law is identified in the Action Plan for the implementation of the Treaty of Amsterdam.

Recent EU legislation has been drafted and adopted in the field of divorce and parental responsibility. Steps for the progressive abolition of the *exequatur*[1] in civil and commercial matters adopted by the Justice and Home Affairs Council in November 2000 are to be found in Brussels I and Brussels II.

What has been achieved? The repealed Brussels II regulation on jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses came into force on March 1, 2001. It sought to harmonise the private international law with regard to jurisdiction, recognition and enforcement of judgments on divorce, separation and marriage annulment and on parental responsibility if issued in the context of matrimonial proceedings. It did not deal with applicable law. The Brussels I regulation on jurisdiction, recognition and enforcement of judgments in civil and commercial matters came into force on March 1, 2002. As with the Brussels Convention, the Brussels I regulation also applies to maintenance issues. The Brussels II *bis* regulation repeals the Brussels II regulation and entered into force on March 1, 2005. It extends the scope to all judgments on parental responsibility. It takes over the rules on recognition and enforcement from Brussels II and abolishes *exequatur* for two limited categories of judgments (judgments on cross-border access rights and judgments requiring the return of a child after abduction). It is arguable that Brussels II *bis* implies a certain harmonisation of substantive family law and is not strictly limited to private international law.

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[1] *Exequatur* means an intermediate measure whereby a court decree is given enforceable quality.

The harmonisation of family law in Europe has begun and is seen as the ultimate step in the realisation of free movement for all Europeans. The argument recently advanced in this jurisdiction that there is no need for harmonisation is flawed. Family ties increasingly stretch across one or more jurisdictions. Millions of migrants, including workers and their families moving within the EU, are confronted with different family laws. A different family law may affect free movement within the EU. In this regard, France Frattini, the EU Commissioner for Justice, Freedom and Security recently stated:

> The right of freedom of movement for individuals … is a basic right that must be guaranteed irrespective of the fact that some member states have or do not have legal rules regarding same-sex couples. That is an obvious principle.[2]

Given the fact that the Brussels II *bis* regulation has made it necessary to consider the harmonisation of national divorce law, further European legislation will render harmonisation efforts in other areas of family law unavoidable.

Family law in Ireland is still in a state of rapid change. Irish family law has proved not to be resistant to the reception of foreign law. International relationships do not know of frontiers. This can be seen from the growing number of international instruments governing cross-border issues in family law. Recent and impending legislation in the private international law area can only, therefore, be regarded as a first step, a step which brings the harmonisation of substantive family law closer. It should be stated that the issue of harmonisation and unification of family law has become one of the most debated issues of comparative legal science.

To date, several international instruments have changed the landscape of Irish family law. This article will focus in particular on recent developments. Accordingly, the Brussels II *bis* regulation and the European Convention on Human Rights will be considered in detail. Reference will also be made to impending developments.

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[2] Waterfield, B. (15 November 2004) "Frattini backs EU rights for married gay couples" at http://www.eupolitix.com/EN/News/200411/e2733571-ddd2-4ed0-a594-9ed47f5b264f.htm

II. THE COMMUNITARISATION OF IRISH FAMILY LAW

A. Introduction

The Brussels II Convention, signed on May 28, 1998,[3] was arguably the most dramatic development in the field of family law since the establishment of the EEC. The Convention came as a surprise to many[4] as it was the first time that the EU had introduced a legal measure directly concerning family law. However, in many ways, this Convention or something like it was inevitable. Since the 1992 completion of the internal market, the EU has been increasingly turning away from economic concerns and towards extending European law into other areas. This has been felt for some time in the area of tort. The Product Liability Directive[5] introduced a new strict liability regime for defective products. In defamation, there are now European rules prescribing where a plaintiff can sue and in respect of what damage.[6] Initiatives have been mooted in the areas of property law[7] and succession.[8] In the Borras Report, it was stated that the Brussels II Convention was a "first step … and it may open the way to other texts on matters of family law and succession."[9] The Convention was further justified as a by-product of free movement of persons, provided for in the original EEC Treaty.

B. From Convention to Regulation

The impact of the so-called Brussels II Convention was further extended by its adoption as a regulation of the European Community on March 1, 2001.[10] A regulation is the EC legislative measure of the most binding nature. Once it has been duly enacted

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[3] (1998) O.J. C-221(1).

[4] For a treatment of the difficulties associated with the introduction of a Convention of this nature see, P Beaumont & G Moir, "Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union of the European Community" (1995) 20 (3) E.L.R. 268 and A Reed, "A New Brussels Convention II on Family Law Matters for the European Union" (1996) 18(9) J Soc Wel & Fam L 381.

[5] Directive 85/374/EEC [1985] OJ L210/29, implemented in Ireland by the Liability for Defective Products Act, 1991.

[6] *Shevill v Presse Alliance* [1995] 2 W.L.R. 499; see A Reed "International Torts and Shevill; The Ghost of Forum Shopping Yet to Come", [1996] L.M.C.Q. 108.

[7] The future "Brussels III".

[8] The future "Brussels IV".

[9] *The Explanatory Report on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters*, prepared by A Borras, (1998) OJ C221/28 at para. 1.

[10] Council regulation 1347/2000 OJ L160/19 on jurisdiction and the recognition and enforcement in matrimonial matters and in matters of parental responsibility for the children of both spouses.

and promulgated, it generally is directly applicable throughout the European Union. This means that it automatically has the full force of law in every Member State without the need for any action by that Member State. Moreover, as European Community law is superior to national law within the scope of European Community law, any national law that conflicts with the regulation in any Member State is deemed to be unenforceable to the extent of such conflict.[11] A judge who comes across such a conflict must always enforce the European Community measure over the national measure, even, for example in the Irish context, if neither the Oireachtas nor the Superior Courts have yet invalidated the Irish measure.

The regulation came into force on March 1, 2001 and was repealed when the Brussels II *bis* regulation came into force on 1 March 2005. The impact of the metamorphosis from Convention to regulation was highly significant in several respects. It brought the Convention directly into the corpus of European Community law. As such, it enjoyed the status of supremacy accorded to all binding EU laws.[12] It rendered the measure directly applicable as a matter of European Community law. In other words, the measure became part of the national law of the various Member States without the need for incorporation by the individual states.

The regulation applied to the Member States of the European Union, excluding Denmark, but including the 10 new Member States,[13] who had to accept all existing European Community regulations as a condition of entry to the European Union. The regulation did not apply to either the Channel Islands or the Isle of Man although Gibraltar was covered by its terms.

The regulation applied to all civil proceedings seeking the following:

- a divorce, legal separation and an annulment of marriage; and
- a declaration or other order concerning parental responsibility in respect of the children of both spouses, which declaration was sought in connection with proceedings for a divorce, legal separation and an annulment of marriage.

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[11] See 6/64, *Costa v ENEL* [1964] E.C.R. 585; 106/77, *Amministrazione delle Finanze dello Stato v Simenthal* [1978] E.C.R. 629 (*Simmenthal*).
[12] See 6/64, *Costa v ENEL* [1964] E.C.R. 585, 106/77, *Simenthal* [1978] E.C.R. 629.
[13] Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia, who joined the EU on 1 May 2004.

The aims of the regulation were twofold: first, to standardise the rules regarding the jurisdiction of courts in divorce, legal separation and annulment proceedings; and second, to give priority among courts with jurisdiction to the court first hearing the case. The latter prompted parties with property abroad to litigate earlier in an attempt to secure jurisdiction in their state of choice. It militated against the statutory provisions encouraging parties to engage in mediation and other forms of alternative dispute resolution.

The High Court recently ruled on the implications of the original Brussels II regulation in the case of *YNR v MN*.[14] This case concerned a French couple who married in France in 1978 and moved to Ireland in 1988. The marriage broke down in 2002. Shortly thereafter, in November 2002, the husband initiated divorce proceedings in France. By this time, the wife had returned to France, while the husband remained in Ireland. In December 2002, the wife instituted proceedings in Ireland. Further proceedings were brought in October 2003 and January 2004. The wife challenged, *inter alia*, the constitutionality of the Brussels II regulation and contended that only the Irish court could reorder assets within the state.

O'Higgins J. declined the wife's application that the case should be heard in Ireland. He held that the Brussels II regulation was part of Irish law and expressed the view that the Brussels II regulation was constitutional as it arose out of the "Yes" vote in the Amsterdam Treaty. O'Higgins J. concluded that the High Court had no jurisdiction in the matter. The learned judge noted that, under the Brussels II regulation, the court to which the application is first brought must hear the case. As the French court was the court to which this case was first brought, it had the right to hear the case and determine the issues:

> It would be unwarranted and irresponsible of this court to act on the assumption that the French courts will act other than in any way permitted by the relevant legislation, and it is clear that the Irish courts

[14] High Court, Unreported, O'Higgins J., 3 June 2005.

> have no role in the supervision of the French courts in doing their legitimate business. It is clear that the French courts have jurisdiction in this case and that it is appropriate for this court to declare … that it has no jurisdiction in this matter.

C. Revised Brussels II

"Complete automatic enforcement" is the basis of the new Council regulation repealing Brussels II. It has become known as Brussels II *bis*, although I refer to it in the remainder of this paper as the "the revised Brussels II." It came into force, pursuant to Article 72, on 1 August 2004, though did not apply in its entirety until 1 March 2005. As with Brussels II, the revised Brussels II applies to the Member States of the European Union (excluding Denmark), but including the 10 new EU Member States. Transitional provisions are dealt with by Article 64, which states that "[t]he provisions of this regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties" on or after 1 March 2005. It should, however, be noted that for recognition and enforcement, Article 64(2) and (3) provide that the revised Brussels II applies to judgments given under the repealed Brussels II regulation. A fully automatic enforcement regime takes no account of the fact that circumstances change rapidly in child matters. Indeed, the interlocutory nature of a parental responsibility order makes it unsuitable for automatic recognition and enforcement.

D. Interpretation

In approaching and interpreting the revised Brussels II, it is impossible to overestimate the importance of the Brussels Convention (now regulation[15]), and the considerable body of interpretative case law emanating principally from the ECJ, but also from the courts of the Member States. The Borras Report expressly provides that identical terms in the repealed Brussels II and the Brussels Convention must be given the same meaning and that the

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[15] Council regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

case law of the ECJ on the Brussels Convention and regulation should be taken into account.

No explanatory report accompanies the revised Brussels II, in that this instrument originated as Community legislation. The lack of an equivalent to the Borras Report accompanying the new regulation is a major deficiency. The recitals, thirty-three in number, have, therefore, added weight (in the absence of an explanatory report) as a guide to interpreting the regulation. Despite this, the Commission has prepared a Practice Guide on the application of the revised regulation to the provisions concerning parental responsibility.[16] This Guide is not legally binding, but will be of considerable assistance to judges and practitioners.

E. Scope of the Revised Regulation

The revised Brussels II makes few changes to the provisions on matrimonial matters contained in its predecessor, though the numbering of the Articles has changed. Its focus is on facilitating the recognition of divorces throughout the Community, which it achieves by displacing the *favor matrimonii* presumption with that of *favor divortii*. The principal changes are in relation to children, where the expression "parental responsibility" is greatly extended. The repealed Brussels II regulation confined parental responsibility to the children of both spouses in connection with a divorce, legal separation and marriage annulment and protective measures concerning those children that were taken at the time of the dissolution of a marriage. The revised Brussels II brings about significant changes in respect of jurisdiction, recognition and enforcement for measures pertaining to the protection of children.

Article 1(2) of the revised regulation provides some instruction on the scope of parental responsibility. It "may, in particular, deal with:

(a) rights of custody and rights of access;
(b) guardianship, curatorship and similar institutions;
(c) the designation and functions of any person or body

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[16]The Practice Guide is accessible to download at:
http://europa.eu.int/comm/justice_home/ejn/news/whatsnew_en.htm .

having charge of the child's person or property, representing or assisting the child;

(d) the placement of a child in a foster family or in institutional care;

(e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property."

It should be noted that Article 1(3) excludes the application of the regulation to the establishment or contesting of a parent-child relationship, adoption and "measures taken as a result of criminal offences committed by children."

Article 2 defines "parental responsibility" to mean "all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect." It also provides that the term is to include "rights of custody and rights of access."[17] Article 2(4) provides that agreements between the parties which are enforceable in one Member State shall be regarded as judgments for the purpose of recognition and enforcement in all other Member States.

The revised regulation applies not merely in private law, but also in public law cases. It covers both biological and adopted children of the couple, as well as stepchildren and non-marital children. The revised Brussels II applies to all civil matters relating to the "attribution, exercise, delegation, restriction or termination of parental responsibility."[18] It applies not only to court judgments, but also agreements so long as they are enforceable in the Member State of origin (i.e. the Member State in which they are concluded).

Curiously, "child" is not defined in the revised Brussels II leaving the term to be defined by national law. Neither the Practice

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[17] It should be noted that there is already in existence the Council of Europe's White Paper of 15 January 2002 on principles concerning the establishment and legal consequences of parentage. Principle 18 states:
"Parental responsibilities are a collection of duties and powers, which aim at ensuring the moral and material welfare of children, in particular:
- care and protection;
- maintenance of personal relationships;
- provision of education;
- legal representation;
- determination of residence; and
- administration of property."

[18] See Article 1(1)(b) of Council regulation 2201/2003.

Guide nor the regulation deals with whether the revised regulation applies to unborn children.[19]

The interrelation between the revised Brussels II and the 1996 Hague Convention on the Protection of Children is detailed in Article 61 and will be important to watch. The repealed regulation, which merely covered parental responsibility on a particular occasion, assumed precedence over the 1996 Convention which will govern private international law matters with regard to children at a global level. While parental responsibility is widely defined in the revised regulation, conflict may occur between the instruments due to the differences in geographical scope. This is likely to lead to uncertainty and increased costs for the individual litigant.

F. Jurisdiction

The new rules governing jurisdiction on divorce, legal separation and marriage annulment broadly mirror the repealed Brussels II provisions. Article 3 of the revised regulation governs the issue of jurisdiction. A court will have the power or jurisdiction to litigate a matter relating to divorce, legal separation or marriage annulment in the following cases:

- where the spouses at the time of the application, are "habitually resident" in the territory over which the court has jurisdiction, or
- where the spouses were last "habitually resident" together in the territory over which the court has jurisdiction, provided that one of the parties remains "habitually resident" there, or
- where the respondent to the action is "habitually resident" in the territory over which the court has jurisdiction, or
- if both parties make a joint application, where either spouse is "habitually resident" in the jurisdiction, or
- where the applicant has been "habitually resident" in the territory for at least one year immediately prior to the application being made, or
- where the applicant has been "habitually resident" in the

[19] See Article 2 of the 1996 Hague Convention which defines child to exclude its application to unborn children. Also *B v H (Habitual Residence)* [2002] 1 F.L.R. 389.

territory, once he or she has resided there for 6 months before the application and is either a national of or domiciled in that state.

It is important to note that these grounds are exclusive, so that a Member State cannot take jurisdiction if the case does not fall within one of the grounds, even if both parties enter an appearance. This is copperfastened by Article 17, which provides that each State will automatically carry out a jurisdiction examination. The range of grounds set out are alternatives, without any order of precedence.

Each of the above-mentioned grounds is broadly based on the "habitual residence" of one or both parties. The term "habitual residence" is not defined in the revised regulation and should be interpreted in a manner similar to that adopted by the ECJ in relation to other instruments, an approach that may cause some difficulty, more of which will be discussed *infra*.[20] There is, however, an additional alternative avenue based on either the nationality or domicile of the parties. In the case of all Member States except Ireland and the United Kingdom, nationality is the relevant criterion. For the jurisdictions of Ireland, Northern Ireland, England and Wales and Scotland, domicile is used.

Article 5 of the revised regulation provides that the forum with jurisdiction for the initial separation shall maintain jurisdiction for conversion of the separation into divorce, subject to the caveat that such conversion is possible under the domestic law of the Member State in question. Unlike the revised Brussels I,[21] the revised Brussels II forecloses the possibility of a pre-selection of jurisdiction,[22] except in respect of matters relating to parental responsibility. That said, a number of practitioners in the Member States are now inserting "full and final settlement" clauses in separation agreements which include a provision to the effect that a stated ground of jurisdiction, in Article 3 of the revised regulation for example, is to apply in the event of a divorce. While such a practice has many advantages, it is likely to cause some difficulty as the revised regulation does not include a provision providing for

[20] See p. 13.
[21] See Article 23 of the revised Brussels I.
[22] See Article 12 of the revised regulation.

jurisdiction founded exclusively on the agreement of the parties. It could also result in the case being heard in a Member State in which neither of the spouses has a meaningful connection.

G. Jurisdiction and Parental Responsibility

Article 8(1) of the revised regulation governs the issue of jurisdiction in matters of parental responsibility and is modelled on Article 5 of the 1996 Hague Convention. It attributes jurisdiction to the State of the child's habitual residence and provides as follows:

The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

While alternative grounds of jurisdiction are provided for matrimonial matters, no alternative grounds for jurisdiction are provided in respect of parental responsibility matters, which is a welcome development.

Essentially, jurisdiction is to be based on the child's habitual residence at the time the court is seised. This is a significant departure from the repealed Brussels II regulation where parental responsibility was linked to the divorce. It is to be noted that Article 16(1) defines seised broadly as lodging the documents or equivalent documents that institutes the proceedings.[23] There are, however, a number of limited exceptions.

One such exception is to allow jurisdiction in respect of access to a court in the child's former habitual residence for three months following the child's acquisition of a new habitual residence for the purpose of modifying a judgment on access rights issued in the former State of habitual residence, provided the holder of the access rights continues to have his or her habitual residence in that State.[24] This appears to be a sensible transitional provision but seems to be founded on the assumption that a child automatically acquires habitual residence on moving to the new State. What then is the meaning of the term "habitual residence?" Habitual residence has not been defined in the revised regulation. It has long been argued that there is no need for such a definition and that the words should

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[23] Under the revised regulation the question of when a court is seised is left to national law. Generally, in civil law countries, the court is seised when the defendant is served, whereas in common law countries the court is seised when proceedings are issued. See Case 129/83, *Zelger v Salinitri* (No 2) [1984] E.C.R. 2397 and *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] 1 Q.B. 502; [1992] 2 All E.R. 450. This rule gave an advantage to the common law courts.

[24] Article 9.

bear their ordinary meaning and are not, even collectively, a term of art[25].[26] As aforementioned, in the absence of a definition, habitual residence will be interpreted in a manner similar to that adopted by the ECJ in relation to other Community instruments. In *Robin Swaddling v Adjudication Officer*,[27] the ECJ held, in considering the applicant's entitlement for social security, that the length of residence in the Member State in which payment of the benefit at issue is sought cannot be regarded as an intrinsic element of the concept of residence. While this interpretation of habitual residence may be distinguished on its facts, and the outcome justified as serving a different purpose, if it were applied to the revised Brussels II, it would signpost a departure from the current interpretation of the word in the United Kingdom and Ireland.

The term "habitual residence" has been interpreted in both the United Kingdom and Ireland to mean not only an intention to reside, but also implies a physical presence in the jurisdiction for an appreciable period of time.[28] In the case of *C.M. and O.M. v Delegacion de Malaga and Others*,[29] McGuinness J. held habitual residence to be a factual concept based on residence for a reasonable length of time. The learned judge summarised the position as follows:

> Having considered the various authorities opened to me by counsel, it seems to me to be settled law in both England and Ireland that 'habitual residence' is not a term of art, but a matter of fact, to be decided on the evidence in this particular case. It is generally accepted that where a child is residing in the lawful custody of its parent (in the instant case the mother), its habitual residence will be that of the parent. However, the habitual residence of the child is not governed by the same rigid rules of dependency as apply under the law of domicile and the actual facts of

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[25] *C.M. and O.M. v Delegacion de Malaga and Others* [1999] 2 I.R. 363.
[26] See Rogerson, "Habitual Residence: The New Domicile?" (2000) 49 I.C.L.Q. 86, 87.
[27] Case C-90/97, [1999] E.C.R. I-1075. See also *Gingi v Secretary of State for Work and Pensions* [2002] 1 C.M.L.R. 20.
[28] The question of residence is "essentially a question of fact" in each case. (See Lord Buckmaster in *I.R.C. v Lysaght* [1928] A.C. 234 at p. 248.) In *Levene v I.R.C.* Viscount Cave L.C. nevertheless, referred with approval to an Oxford English definition of residence as "to dwell permanently, or for a considerable time, to have one's settled usual abode, to live in or at a particular place".
[29] [1999] 2 I.R. 363.

> the case must always be taken into account. Finally, a person, whether a child or an adult, must, for at least some reasonable period of time, be actually present in a country before he or she can be held to be habitually resident there.[30]

It is necessary to refine the last sentence of the foregoing paragraph in the light of the recent Supreme Court decision in *P.A.S. v A.F.S.*[31] Fennelly J., giving judgment for the court, held that it was possible for a child to be habitually resident in a place where that child has not been. He stated:

> I do not say that the place of birth of a child is an irrelevant fact. Clearly, it will be of prime importance in many cases. … I do say, however, that to exclude, in every case, the possibility of a child being habitually resident in a country where it has never physically been is to introduce an unjustified restriction into the open and flexible notion adopted by the Convention.

Whether the approach adopted by the ECJ in *Swaddling* will be applied in the future remains to be seen. Will it be that the ECJ approach will apply over the approach adopted by the national law of the Member States? Article 59 of the new Brussels I regulation addresses the issue in the context of domicile. It provides:

> 1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.
> 2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

No such provision is included in the revised regulation in

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[30] At p. 381.
[31] Supreme Court, Unreported, Fennelly J., 29 November 2004.

respect of habitual residence. This would suggest that habitual residence is not to be determined according to national law, but requires a supra-national Community-wide approach.

If the Irish and English definition of habitual residence is adopted, the Article 9 exception in the revised regulation may be redundant as the child may have abandoned his or her previous habitual residence,[32] but may not have yet acquired a new habitual residence. Article 9 is, it would appear, contingent on the child acquiring "a new habitual residence."[33]

There is the possibility of conflicting judgments where a child acquires habitual residence in the new Member State before the three months elapse in circumstances where the court in the new Member State has already made an order under Article 13 of the revised regulation. The latter order is entitled to benefit from the automatic recognition procedure provided for in Article 41 of the revised regulation.[34] In the interests of clarity and certainty, the revised regulation should have left the definition of habitual residence as a matter of national law.

Article 10 of the revised regulation, based on Article 7 of the 1996 Hague Convention, provides that, in the case of a "wrongful removal or retention," the courts in the state of the child's former habitual residence continues to have jurisdiction until the child has acquired a habitual residence in another Member State and either:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:
    (i) within one year no request for return has been lodged or has been withdrawn; or
    (ii) the case before the court in the State of the child's

[32] A person may cease to be habitually resident in a particular Member State in a single day. See (1997) 27 *Fam. Law* (Dec), 782-783.
[33] Per Article 9(1).
[34] See p. 25.

former habitual residence has been closed pursuant to Article 11(7); or

(iii) a custody judgment that does not entail the child's return has been made in the State of the child's former habitual residence.

The other exceptions to attributing jurisdiction to the courts of the Member State in which the child is habitually resident at the time the court is seised are confined to a provision on prorogation of jurisdiction[35] and cases involving the wrongful removal or retention of a child.[36]

H. Prorogation of Jurisdiction

Article 12 of the revised regulation, modelled on Article 10 of the 1996 Hague Convention, provides for prorogation of jurisdiction and thereby addresses one of the criticisms levelled at the repealed Brussels II regulation. Under Article 12(1) of the revised Brussels II, the forum exercising jurisdiction in respect of matrimonial proceedings has jurisdiction "in any matter relating to parental responsibility connected with that application," where at least one of the spouses has parental responsibility in relation to that child and "the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility at the time the court is seised, and is in the superior interests of the child." The use of "the superior interests" rather than "the best interests" of the child is to be regretted in that it signposts a departure from the approach adopted in the 1989 UN Convention on the Rights of the Child. What practical impact this will have is difficult to assess in the absence of detailed guidance on the matter. It should be noted that the Practice Guide states that no departure from the "the best interests" approach was intended:

> No distinction was intended by the drafters between the term "superior interests of the child" (Article 12(1)(b)) and the term "best interests of the child"

[35] Article 12.
[36] Article 10.

> (Article 12(3)(b)) in the English language version. Versions of the regulation in other languages employ an identical wording in both paragraphs.[37]

The jurisdiction of a State over parental responsibility under Article 12(1) is linked with the substantive application and thus will cease when the judgment allowing or refusing the application for divorce, separation or annulment has become final.[38] Where those proceedings have finished, but where proceedings in relation to parental responsibility are still pending, the State retains jurisdiction until they also end.[39] Article 12(3) provides that the courts of a Member State will have jurisdiction in relation to parental responsibility in proceedings other than divorce, legal separation or marriage annulment, where the child has a substantial connection with that Member State (by, for example, being a national of that state) or where one of the spouses having parental responsibility in relation to the child is habitually resident in that Member State. In this regard, that jurisdiction must be accepted by both spouses and be in the best interests of the child. This will prevent parallel proceedings being brought and conflicting custody decisions in that only the courts of one Member State will have jurisdiction.

Article 13, which broadly mirrors Article 6 of the 1996 Hague Convention, provides that if a child's habitual residence cannot be established and jurisdiction cannot be determined under Article 12, then the Member State in which the child is present shall by default assume jurisdiction. Therefore, for Article 13 to apply, it must be proven that jurisdiction cannot be established on the basis of prorogation. Article 14 provides that where no court of a Member State has jurisdiction in matters relating to parental responsibility pursuant to Articles 8 to 13, jurisdiction shall be determined in each Member State by the laws of that State.

I. Transfer to a Court Better Placed to Hear the Case

When, in a matter with which the revised Brussels II is concerned, a court's jurisdiction has been invoked, it is generally not

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[37] At p. 17 of the Practice Guide.
[38] Article 12(2)(a).
[39] Article 12(2)(b).

open to that court to deny a hearing on the grounds that another forum may be more appropriate. Provided that the court has lawful jurisdiction (under the above-mentioned rules) to hear the case, it must proceed with the hearing of the case, save in very limited circumstances.

One notable feature of the repealed Brussels II regulation was the absence of discretion caused by the non-availability of the principle of *forum non conveniens*. This preclusion has the potential to cause difficulty and could result in the custody/access issue being considered in a jurisdiction other than that in which a child resides. Article 15 of the revised Brussels II is a welcome provision facilitating a court with jurisdiction under the regulation to transfer the case to a court in another Member State better placed to hear the case and is similar to Articles 8 and 9 of the 1996 Hague Convention. This provision is significant in that it, for the first time, in a European Community instrument on jurisdiction facilitates discretion. It allows for the transfer of a case, in whole or in part, from the court having jurisdiction to a court of another Member State with which the child has a particular connection, where the court seised of the case is satisfied that the court of the other Member State "would be better placed to hear the case, or a specific part thereof" and that this would be in the best interests of the child. Where the court seised is so satisfied, it may stay proceedings on a *forum non conveniens* basis[40] or it may invite the court of another Member State to assume jurisdiction.[41] The transfer can be requested by either a spouse or on the court's own initiative or "upon application from a court of another Member State with which the child has a particular connection."[42] Article 15(1) makes clear that any transfer will only arise "by way of exception" and is more confined than the analogous provision in the 1996 Hague Convention. Only one transfer is allowed under this provision. The necessary connection for a case to be transferred is confined in Article 15(3) to:

- a Member State in which the child had a formal habitual residence or is a national; or

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[40] Article 15(4).
[41] Article 15(5).
[42] Article 15(2).

- a Member State in which one of the spouses having parental responsibility is habitually resident; or
- a Member State in which "property of the child is located."

Articles 15(4) and 15(5) set down strict time limits and require the second court to accept jurisdiction within six weeks "of their seizure."

Article 15 requires the courts of the Member States to co-operate either directly or through the central authorities designated under Article 53.

The Practice Guide contains valuable information on the procedure for making a transfer. It recommends the use of the European Judicial Atlas in Civil Matters to ascertain where the competent court of another Member State is. The Guide actively encourages judicial co-operation in relevant cases and states:

> It may be particularly useful for the judges concerned to communicate to assess whether in the specific case the requirements for a transfer are fulfilled, in particular if it would be in the best interests of the child. If the two judges speak and/or understand a common language, they should not hesitate to contact each other directly by telephone or e-mail. Other forms of modern technology may be useful, e.g. conference calls. If there are language problems, the judges may rely on interpreters. The central authorities will also be able to assist the judges.

The judges will wish to keep the parties and their legal advisors informed, but it will be a matter for the judges to decide for themselves what procedures and safeguards are appropriate in the context of the particular case.[43]

Article 15 is a useful provision allowing for the transfer of a case to a court of another Member State on the ground of *forum non conveniens*, though it is far too narrowly drawn. It is to be regretted that the drafters of the revised Brussels II have not, in large measure,

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[43] At page 20 of the Practice Guide.

addressed the concerns expressed by family law practitioners on the *lis pendens* rules which have created a "first come first served principle." This will continue to make speed of the essence in Brussels II applications. The danger then is that the parties to a transnational marital breakdown will be lured into a "race" to see who can get to court first. Article 19(1) of the revised regulation provides that where the same action is taken in the courts of two or more countries, all but the first court to be seised of the case must stay proceedings pending the first court's decision. That first court thus has exclusive jurisdiction in the case. The revised regulation is quite inflexible in this regard insofar as matrimonial proceedings are concerned, with Article 15 only allowing the transfer of jurisdiction to another Member State "by way of exception,"[44] where it is in the best interests of the child. Instead of encouraging conciliation and mediation, the limited availability of "one of the most civilised of legal principles"[45] will prompt parties to litigate earlier to secure jurisdiction in their home state. This militates against the statutory provisions encouraging parties to engage in mediation and other forms of alternative dispute resolution.

J. Child Abduction

The revised Brussels II brings about a fundamental change in the procedure for dealing with intra-EC Member State child abduction cases, even though the 1980 Hague Convention continues to apply. It covers children aged 16 and over, unlike the 1980 Hague Convention. At their council meeting of 29 November 2002, the EU justice ministers addressed the relationship between the revised Brussels II and the 1980 Hague Convention on the Civil Aspects of International Child Abduction 1980 (1980 Hague Convention). It was agreed that the courts in the State of the child's habitual residence are to have jurisdiction to make rulings on custody and access rights.[46] The exception to this, as previously stated, is where the child has been living with the non-custodial parent for over a year, and the custodial parent has made no request for his or her return. Recital paragraph 17 in the revised regulation provides that the 1980 Hague Convention will continue to apply in child

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[44] Article 15(1).
[45] Lord Goff describing the principle of *forum non conveniens* in *Airbus Industries GIE v Patel and Others* [1998] 2 All E.R. 257 at 271.
[46] See Article 10 of Council regulation 2201/2003.

abduction cases, but will be complemented by Article 11 of the revised regulation.[47]

Under the revised Brussels II, the courts of the requested Member State can continue to refuse to return a child by invoking the defences provided by the 1980 Hague Convention. Article 11(1) provides that paragraphs 2 to 8 of Article 11 will apply when dealing with applications for the return of a child "wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention."

Article 11(2) requires the court to which an application has been made to issue a judgment on custody without delay and, in doing so, the child must be heard unless it is inappropriate because of his age and maturity.[48] This mirrors obligations arising under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) and Article 12 of the UN Convention on the Rights of the Child 1989. That said, recital paragraph 19 should be noted. It provides:-

> The hearing of the child plays an important role in the application of this regulation, although this instrument is not intended to modify national procedures applicable.

Article 11(3) of the revised regulation provides that the court shall, unless exceptional circumstances make this impossible, issue its order no later than six weeks after it is seised of the application.[49]

Article 11(4) provides that a non-return order pursuant to Article 13(b) of the 1980 Hague Convention cannot be made if it is established that adequate arrangements have been made to protect

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[47] "(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained."

[48] See Article 13 of the 1980 Hague Convention.

[49] See Article 11 of the 1980 Hague Convention.

the child after his return.[50] This will have less of an impact in common law jurisdictions where undertakings and mirror orders[51] have been used for some time to ensure measures are taken in order to protect the child after return. It will, however, bring about a fundamental change in the civil law Member States, where a judge may only order what is provided by statute. In fact, undertakings are unknown in the civil law system. Uncertainty surrounds who has to demonstrate that adequate arrangements have been made to secure the child's protection after his return.

Significantly, as regards the return of the child, a court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.[52] This may lead to an increase in oral evidence in child abduction cases, which, as the Practice Guide states, might include the applicant being heard in his home state through a video link facility:

> One possibility is to use the arrangements laid down in regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in taking of evidence in civil or commercial matters ("the Evidence regulation") … The use of video-conference and teleconference, which is proposed in Article 10(4) of the above regulation, could be particularly useful to take evidence in these cases.[53]

Under Article 11(6), if a court issues an order for non-return under Article 13 of the 1980 Hague Convention, the court must send a copy of the court order on non-return and a transcript of the proceedings, as well as any other relevant documents (to be determined by the judge) to the competent court in the Member State where the child was habitually resident immediately before the wrongful removal or retention. The latter court must receive all the mentioned documents within one month from the date of the non-return order.

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[50] See section 4 and Annex IV of the revised Brussels II which requires a judge in the requested Member State in ordering the child's return to include in any certificate issued details of any protective measures in favour of the child to be taken to ensure the protection of the child after its return to the Member State of habitual residence. Also, Article 36 of the 1980 Hague Convention.

[51] The legal basis for making mirror orders, however, is a matter of concern though it has been suggested that Article 20 of the revised regulation might be sufficient to address this issue.

[52] See Article 11(5) of the revised Brussels II.

[53] At p. 33 of the Practice Guide.

The court seised of the case in the Member State where the child was habitually resident immediately before the wrongful removal or retention is expected to notify and invite the parties, including the health service executive (formerly the health board), to make submissions within three months of the date of the notification so that the court can consider the question of custody.[54] Where a court is not already seised in the child's state of habitual residence, the court or central authority that receives the information must notify and invite the parties to make submissions. If neither parent files custody or access proceedings within 3 months of notification, the child will be left in the State to which he or she has been removed. The child will also remain in the State to which he or she has been removed if, following custody proceedings in the State of the child's habitual residence, custody is awarded to the abducting parent.

If there are custody proceedings and should the order involve the return of the child, it will take precedence over a non-return order made under Article 13 of the 1980 Hague Convention.[55] An abducting parent would not be in a position to challenge the recognition of such an order because the order comes within the automatic recognition procedure provided for in Article 42.

The provisions on the rights of the child in this part of the revised regulation are very much to be welcomed though they stop short of requiring necessary procedural changes in the Member States' domestic law.

In summary, the effect of this section of the revised regulation will, in the writer's view, be to change the application of the 1980 Hague Convention within the EU. It will allow courts in the Member States to which the child has been abducted to make non-return orders, but leave the courts of the child's habitual residence to make final orders requiring the return of the child. In effect, this approach undermines trust between the Member States and will do little to promote co-operation between the courts of the Member States.

While it is the case that the 1980 Hague Convention is not

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[54] Article 11(7).

[55] Article 11(8). The justification advanced for this approach has been that the main objective of the 1980 Hague Convention is, after all, that the State of a child's habitual residence is the jurisdiction best equipped to adjudicate on any dispute relating to the child and not the State to which the child has been abducted.

being "communitarised" by the revised Brussels II, it must be acknowledged that a different regime will apply to abduction within Member States and outside such States. This is regrettable in that it will change the dynamic and operation of the 1980 Hague Convention within the European Union. While the revised Brussels II will, in reality, take precedence where the child is within the EU, the 1980 Hague Convention applies where the child is outside the European Union.[56]

K. Lis Pendens

The revised Brussels II applies in civil proceedings relating to divorce, legal separation or marriage annulment. Each of these applications/actions is considered to be the same cause of action, although, unlike Article 11 of the repealed Brussels II regulation, the revised Brussels II does not use this term. It merely refers to divorce, legal separation or marriage annulment. Where a case might potentially be taken in either or any of two or more States, Article 19 of the revised Brussels II must be considered. Article 19, unlike Articles 11(1) and (2) of the repealed Brussels II regulation, no longer contains discrete provisions addressing competing matrimonial proceedings between the same parties which do and do not involve the same cause of action. It provides that, when proceedings relating to divorce, legal separation or marriage annulment have already been commenced in the courts of one Member State, a court in a different Member State must "stay its proceedings until such time as the jurisdiction of the court first seised is established." Article 19(3) provides that the court second seised must decline jurisdiction in favour of the court first seised. It is to be noted that Article 15 of the revised regulation, which to a limited degree allows a court having jurisdiction under the regulation to transfer jurisdiction to another Member State, attempts to mitigate the worst excesses of the strict *lis pendens* rule outlined above.

L. Provisional and Protective Measures

Article 12 of the repealed Brussels II regulation is imported from Article 24 of the 1968 Brussels Convention (now regulation)

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[56] Article 60(e).

and provides that a court in a contracting State may, even if it does not have jurisdiction under the regulation, take emergency steps to protect either assets or persons. This provision now becomes Article 20 in the revised regulation.

Article 12 of the repealed Brussels II regulation was broader than Article 24 of the Brussels Convention (now regulation) in that the latter provision is confined to matters within the scope of the Brussels Convention. The measures envisaged in Article 12 related to both persons and property and thus touched on matters outside the scope of the regulation. This is no longer the case as Article 1(2)(e) of the revised Brussels II now covers measures for the protection of a child's property.

Article 20 of the revised Brussels II refers to "measures in respect of persons or assets in that State as may be available under the law of that Member State." It is clear from the Brussels Convention (now regulation) jurisprudence that this includes all national injunctive or provisional measures. The Article makes these available as if the case was one proceeding before the national court.

In the context of the Brussels Convention (now regulation), the most important interim measure has been the Mareva injunction. The classic use of this was seen in *Republic of Haiti v Duvalier*.[57] Proceedings were started in the French courts against ex President Jean Paul Duvalier by the new government of Haiti to recover State assets ($120 million) allegedly misappropriated by him and members of his family. The plaintiffs sought a Mareva injunction from the English High Court to restrain the defendants from disposing of any assets in England. Staughton LJ held that he had the power to grant such an injunction.

The issue has arisen whether a court can grant protective measures in respect of a defendant who is domiciled outside the contracting states. In *X v Y*,[58] proceedings were commenced in France against a Saudi Arabian executive who had defaulted on a loan. An application was made in England for a Mareva injunction. The court held that Article 24 of the Brussels Convention (now regulation) was not limited to cases where the defendant was domiciled in a contracting state.

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[57] [1989] 1 All E.R. 456.
[58] [1989] 3 All E.R. 689.

In *Wermuth v Wermuth*, Thorpe LJ afforded a strict interpretation to Article 12 of the repealed Brussels II regulation. He stated:

> We must not take or be seen to take opportunities for usurping the function of the judge in the other Member State. Once another jurisdiction is demonstrated to be apparently first seised, this jurisdiction must defer, by holding itself in waiting in case that apparent priority should be disproved or declined.[59]

This approach seems to be more rigid than that adopted in respect of the equivalent provision in the Brussels Convention (now regulation).

A new paragraph 20(2), inserted in the revised Brussels II, limits the application of Article 20 to matters falling within the scope of the revised regulation and appears vaguer though narrower than Article 12 of the repealed Brussels II regulation. It provides as follows:

The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this regulation as to the substance of the matter has taken the measures it considers appropriate.

M. Access

Section 4 of the revised regulation has brought about fundamental changes to access rights, the most significant of which is the removal of the need of *exequatur*. In particular, Article 41(1) provides that an access judgment that has been certified in the Member State of origin is to be treated for enforcement purposes as if it were handed down in the Member State of enforcement.

Significantly, Article 41(2) provides that the judge of origin should only issue a certificate where all the parties and the child (having regard to his or her age and maturity) have been given an

[59] [2003] 1 W.L.R. 942.

opportunity to be heard. Where a judgment is given in default, certain special considerations apply. The person defaulting must have been served "with the document (instituting proceedings) or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence ..." A judge cannot refuse to issue a certificate, however, where the person defaulting has accepted the decision unequivocally.

Article 41(3) provides:

> Where the rights of access involve a cross-border situation at the time of the delivery of the judgment, the certificate shall be issued ex officio when the judgment becomes enforceable, even if only provisionally. If the situation subsequently acquires a cross-border character the certificate shall be issued at the request of one of the parties.

The certificate referred to above must be in the standard form contained in Annex III of the revised regulation.

With respect to rights of access, the revised regulation applies not merely to access orders made during matrimonial proceedings, but generally. The access provisions of the revised regulation apply to not only parents, but also grandparents and those *in loco parentis*. Article 48(1) of the revised regulation is a welcome provision and mirrors Article 11(2) of the 1980 European Convention on the Custody of Children and on Restoration of Custody of Children[60]. It provides:

> The courts of the Member State of enforcement may make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the Member State having jurisdiction as to the substance

[60] "[T]he competent authority of the State addressed may fix the conditions for the implementation and exercise of the right of access taking into account, in particular, undertakings given by the parties on this matter."

> of the matter and provided the essential elements of this judgment are respected.

As with the repealed Brussels II regulation,[61] the revised Brussels II takes precedence over the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children. Application to enforce any custody order made in a Member State will be made under the revised Brussels II. The opportunity for Member States to enter reservations under Articles 17 and 18 of the 1980 European Custody Convention reduced its potential. Reservations are not possible under the revised Brussels II.

It should be noted that, unlike seeking enforcement under the 1980 Hague Convention, applicants seeking to enforce a custody order under the revised regulation will not automatically receive free legal aid. In short, the means test and merits test will apply.[62] A person seeking to enforce an access order is required to produce the certificate referred to above and a copy of the judgment.

N. Recognition

One of the most common problems when dealing with foreign divorce, separation and parental responsibility judgments is how to enforce them. As in the repealed Brussels II regulation, the revised regulation provides that a judgment given in the courts of one Member State is to be recognised in all other Member States without any special procedure.[63] Article 2(4) of the revised regulation defines judgment as "a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision." The existence of a final judgment relating to divorce, legal separation or marriage annulment in another Member State is declared to be sufficient for updating the civil status records of a Member State.[64] An interested party[65] can contest recognition of the foreign judgment.[66]

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[61] See Article 37 of Council regulation 1347/2000 OJ L160/19.
[62] See Article 50.
[63] Article 21(1). Recognition is restricted to the dissolution of the marriage bond (i.e. annulment, legal separation or divorce), Article 2(4).
[64] Article 21(2).
[65] An "interested party" includes spouses, children and in some states a relevant public authority, and need not be resident in the jurisdiction. See Borras Report, (1998) OJ C221/27, para. 80.
[66] Article 21(3).

Article 49 of the revised regulation provides for the recognition and enforcement of an order for costs and expenses. Similarly, recognition and enforcement will apply to "documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded."[67] Recognition is restricted to the dissolution of the marriage bond (i.e. annulment, legal separation or divorce) and does not apply to other matters.[68] Thus, judgments refusing a divorce or other relief are not entitled to recognition under the regulation.[69]

Article 24 of the revised regulation prevents a review of the jurisdiction of the court of origin. Further, Article 25 states that the recognition of a judgment relating to a divorce, legal separation or a marriage annulment is not to be refused because the law of the recognising Member State would not allow the relevant order on the same facts. This is effectively a limit on the use of the public policy defence to recognition. It is allied to Article 26 on non-reviewability.

O. Defences to Recognition of a Judgment in a Matrimonial Matter

There are a very limited number of defences to automatic recognition, which is not surprising given the fact that the defences rest uneasily with the EC's objective of facilitating the automatic recognition of judgments.

Article 22 of the revised Brussels II details the grounds upon which a judgment relating to a divorce, legal separation or marriage annulment shall not be recognised.

1. Contrary to public policy.

A court in one Member State shall not recognise any decision that is "manifestly contrary to the public policy" of the Member State.[70] Such a conflict must be extremely profound in order to justify refusal. It is not sufficient, for instance, simply to state that the decision is one that the courts of England and Wales, for example, could not make or would not have made. Nor is it

[67] Article 46 of the revised regulation.
[68] Article 21.
[69] See Borras Report, (1998) OJ C221/48, para. 60.
[70] Article 22(a).

sufficient to refuse recognition on the grounds of legislative differences alone. This provision mirrors Article 23(2)(d) of the 1996 Hague Convention.

The case of *Vervaeke v Smith* [71] is perhaps the best example of a case involving public policy grounds. There, the House of Lords refused to recognise a Belgian annulment decree on the grounds that the decree had been obtained using falsified evidence. Regardless, the ECJ has made it clear in *Krombach v Bamberski*[72] and *Hoffman v Krieg* [73] that the public policy ground is to be used sparingly and only in exceptional cases. Under the revised Brussels I, even fraud does not allow the invocation of the public policy defence.[74] The Borras Report, with some justification, refers to this ground of non-recognition in the original Brussels Convention (now regulation) as being of little practical significance.[75] This approach can be gleaned from Article 24 of the revised Brussels II which provides that an alleged fraud going to jurisdiction will not give rise to any right of review under the revised Brussels II:

> The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.

2. Natural Justice

Where a judgment was given in default of appearance of one of the parties, certain special conditions apply. A court may refuse to recognise such a judgment where the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally.[76]

The reasoning here is that such failure may constitute a breach of natural justice, a failure to give all parties to the case an

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[71] [1983] 1 A.C. 145, [1982] 1 All E.R. 144.
[72] Case C-7/98 [2000] E.C.R. I-1935.
[73] Case 145/86 [1988] E.C.R 645.
[74] See *Societé d'Information Service Realisation (SISRO) v Ampersand Software BV*, 29 July 1993, The Times.
[75] (1998) OJ C221/27 at para. 69.
[76] Article 22(b).

opportunity to be heard.

A court cannot refuse to recognise a judgment where the respondent has clearly indicated that he or she has accepted the judgment of the court without any conditions or complaint ("unequivocally"). While there is no express provision for the application of the doctrine of estoppel under the revised Brussels II, it seems from the wording of Article 22(b) that a person who had previously benefited from recognition of a divorce would not be able to avail of the Article 22(b) defence because he or she would be deemed to have "accepted the judgment unequivocally." The Irish Supreme Court has recently considered and rejected the application of estoppel to the issue of marital status in the case of *CK v JK; FMcG (notice party)*.[77] While it would appear that all members of the Court saw the respondent's claim as unmeritorious, the Court was persuaded that the introduction of a principle of estoppel would cause great uncertainty regarding the marital status of many persons.

Natural justice is the most commonly used defence under the Brussels Convention (now regulation) and has given rise to the greatest number of difficulties. The ECJ, in considering the equivalent provision under the Brussels Convention (now regulation), has held that due service consists of two elements – service according to the rules of the first court and service in time.[78]

3. Irreconcilable Judgments

For divorce, legal separation or marriage annulment, the revised Brussels II excludes recognition of a judgment irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought.[79] A court, for instance, would obviously not be required to recognise a foreign divorce in respect of parties whose marriage has already been annulled by the courts of the jurisdiction in which recognition is sought. Pre-eminence is given to the judgment of the recognising court. There is no requirement that the judgment of the recognising State pre-date the judgment for which recognition is sought.

In cases where a judgment is irreconcilable with an earlier

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[77] [2004] 1 I.R. 224; [2004] I.E.S.C. 21

[78] See Case 166/80, *Klomps v Michel* [1981] E.C.R. 1593 and Case 305/88 *Isabelle Lancray v Peters and Sickert* [1990] 1 E.C.R. 2725.

[79] Article 22(c).

judgment of another Member State or a non-Member State involving the same parties, a similar principle applies.[80] In such a case, the earlier judgment is to be enforced in preference to the later on condition that the earlier judgment meets the conditions necessary for recognition in the Member State in which recognition is sought. Thus, in *Hoffman v Krieg*,[81] where the ECJ considered the Brussels Convention (now regulation) equivalent, a German judgment awarding maintenance on desertion was clearly irreconcilable with a subsequent Dutch divorce. This ground does not, however, prevent matrimonial proceedings being taken within a Member State while identical proceedings are currently in being in a non-Member State.

The ECJ has taken a very narrow and restrictive approach to the foregoing defences.[82] Indeed, as previously stated, the very existence of any of the grounds of non-recognition seems at odds with the EC objective of removing all obstacles to the recognition of judgments.

P. The Substance of the Decision Cannot be Questioned

Proceedings to obtain recognition may not question the decision on the basis of the substance of that decision.[83] In this respect, the recognition process is somewhat like judicial review. Once the court has established that none of the criteria for the non-recognition set out above have been satisfied, it must recognise the judgment in question. It cannot question the decision on the basis, for instance, that the domestic judge would not have reached the same decision on the facts. Indeed, the domestic court cannot challenge the decision on the basis that such a judgment would have been unobtainable in the home state. Article 25 makes it clear that differences in applicable law cannot be invoked as a ground for non-recognition.[84]

Q. Stay of Proceedings

Article 27 provides that a court can stay proceedings for recognition and enforcement if there is an appeal against that judgment. In Case 3/77 *Industrial Diamond Supplies v Riva*,[85] the

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[83] Article 26.

[84] See *Interdesco SA v Nullfire Ltd* [1992] 1 L1 Rep 180 where the ECJ considered a similar provision in the Brussels Convention (now regulation).

[85] [1977] E.C.R. 2175; see also *Petereit v Babcock International Holdings* [1990] 1 W.L.R. 450.

ECJ held that appeal means one, the outcome of which may result in the annulment or amendment of the judgment that is the subject matter of the recognition or enforcement proceedings.

R. Recognition of Parental Responsibility Judgments

In parental responsibility cases, the revised Brussels II takes a somewhat different approach.[86] It provides that, in such cases, a court can refuse recognition of a judgment if it is irreconcilable with a later judgment of the Member State in which recognition is sought.[87] This is justified as orders relating to parental responsibility may be subject to reconsideration in the light of new circumstances. Thus, a judgment of the State addressed is not entitled to automatic priority. The same approach applies in the case of a conflict between two judgments from other Member States.[88] The later in time will prevail. In the case of a judgment of a non-Member State, the judgment will only be recognised if it is a judgment of the State in which the child is habitually resident and also fulfils any other conditions necessary for it to be recognised in the State addressed.[89] Article 23(g) of the revised Brussels II inserts an additional ground of non-recognition for parental responsibility judgments which mirrors Article 23(2)(f) of the 1996 Hague Convention. It provides that a judgment placing a child in care[90] in another Member State (other than one seised of the application) will only be recognised if the authority facilitating such a placement has adhered to the procedure outlined in Article 56. For example, the authority must first consult with the Central Authority or other competent authority in the Member State where the placement is to take place.

S. Enforcement

The enforcement provisions are limited to judgments relating to parental responsibility. For judgments relating to matrimonial matters, recognition procedures are sufficient.[91] Article 28 provides that an enforceable judgment from one Member State can be

[86] Article 23.
[87] Article 23(e).
[88] Article 23(f).
[89] Article 23(f).
[90] In either institutional care or in foster care.
[91] Article 21.

declared enforceable in another Member State on the application of an interested party.[92] [93] That said, under the revised Brussels II a declaration of enforceability is not required for an access order or an order for the return of the child under Article 11(8) of the revised regulation.[94] This new approach to the enforcement of access and non-return orders may cause considerable difficulty. Custody and access decisions, which are interlocutory in nature, are unsuitable for automatic recognition and enforcement. The removal of all intermediate steps to the recognition of access judgments may, therefore, be inappropriate.

T. Procedure

Once jurisdiction has been secured, the required steps for effective service should be taken without delay.[95] The service requirements for each of the Member States under the revised Brussels II regulation are set out on the Europa website.[96]

Article 30(1) of the revised regulation provides that the national law of the enforcing State will govern the application procedure for enforcement. The applicant must provide an address for service within the jurisdiction of the court seised.[97] If the law of the enforcing State does not provide for the furnishing of such an address, the applicant must appoint a representative *ad litem*.

Articles 37 and 39 specify the documents to be produced in an application for either recognition or enforcement or an application contesting such recognition. The applicant must produce an authentic copy of the judgment and, in the case of enforcement documents, establish that according to the Member State of origin, the judgment is enforceable and has been served. Where appropriate, the applicant is required to produce a document showing that he is in receipt of legal aid in the Member State of

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[92] An "interested party" includes spouses, children and in some States a relevant public authority, and need not be resident in the jurisdiction. See Borras Report, (1998) OJ C221/27, para 80.

[93] A judgment on the exercise of parental responsibility will be enforceable in all Member States by a mere declaration, save for the United Kingdom where judgments will only be enforceable following formal registration in England and Wales, Scotland or in Northern Ireland.

[94] See Articles 41(1) and 42(1).

[95] See Council regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

[96] See http:europa.eu.int/comm/justice/judicialatlascivil/html/docservformflen.htm. See also European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005 (S.I. No. 112 of 2005).

[97] Article 30(2).

origin. In the case of default proceedings, an original or a true copy of the document instituting the proceedings is required, which will establish that the party in default was correctly served or any document indicating that the defendant accepted the judgment unequivocally. A person requiring the updating of civil status records must produce a document indicating that the judgment is not subject to appeal in the Member State where the judgment was given.

When the required documents are not available to the court, Article 38 allows the court, before recognition is sought, to specify a time during which they must be produced or, alternatively, to vary the documents required. If the court considers that it has sufficient information before it, it may dispense with the documentary requirements. If the enforcing court requires it, a translation of the documents must be furnished. The translation is to be certified by a person qualified to do so in one of the Member States. Article 29 specifies the courts in the Member States to which application is to be made.

U. Partial Enforcement

Article 36(1) provides that a court may order partial enforcement in circumstances where enforcement has been requested in respect of several matters, but cannot be authorised in all of them. An applicant may request partial enforcement of a judgment under Article 36(2).

V. Appeal against an Order for Enforcement

Article 33 provides a party against whom enforcement is ordered with a right of appeal. Such an appeal must be made within one month of service of the judgment where the defendant is habitually resident in the contracting State in which the decision permitting enforcement is given. Where he is not habitually resident in that particular State, he has two months to appeal. Time runs either from the date of service of the decision on him or at his residence. No extension of time is permitted. Article 34 sets out the courts to which an appeal may be addressed.

Appeal proceedings may be stayed on the application of the appellant, if the judgment is being appealed in the Member State of origin, or if the time for such an appeal has not yet expired.[98]

W. Legal Aid

Article 50 provides that, if the applicant, in his State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses, he will also be entitled in the enforcing State to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the State addressed. The applicant for enforcement or recognition must produce a document showing that he or she is entitled to legal aid in the State of origin. As with the repealed Brussels II regulation, the revised Brussels II provides that the entitlement to legal aid will apply in respect of the *ex parte* stage.

X. Security for Costs

Article 51 provides that security for costs cannot be required of an applicant to enforce a foreign judgment, on the ground that the applicant is a foreign national or is not domiciled or habitually resident in the State in which enforcement is sought. This reflects the equivalent provision in the repealed Brussels II regulation.

Y. Central Authorities

Article 53 requires each Member State to establish a central authority to which central authorities from other Member States or holders of parental responsibility will be able to request cooperation or assistance with the application of the revised Brussels II. Such cooperation or assistance is broadly defined in Article 55 and is to be provided free of charge.[99] It includes both facilitating communications between courts, administrative authorities and agreement between holders of parental responsibility. The foregoing will be complemented by the European Judicial Network in Civil and Commercial Matters,[100] which facilitates judicial cooperation between the Member States in cross-border family issues.

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[98] Article 35.
[99] Article 57(3).
[100] Council Decision of 28 May 2001 (2001/470/EC) applicable since 1 December 2002.

Z. The Voice of the Child in the Revised Regulation

A judgment under the revised Brussels II will not be recognised if it was given without the child having been afforded the opportunity to be heard, "in violation of fundamental principles of procedure of the Member State in which recognition is sought," or without a similar opportunity being given to any other person claiming that the judgment infringes his or her right of parental responsibility. This mirrors an equivalent provision in the 1996 Hague Convention. Member States rules set out how the child should be heard. The Borras Report provides that these rules "must include the rules in the United Nations Convention of 20 November 1989 on the Rights of the Child and in particular Article 12 thereof…"[101] Article 12 of the 1989 Convention provides:

1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The repealed Brussels II regulation makes little reference to children and is confined to parental responsibility in respect of the natural and adopted children of both spouses.[102] The status of the child in the revised regulation is, however, significantly enhanced. To this end, the hearing of the child plays an important role in the application of the revised regulation. This is a welcome departure from the invisibility of children in the repealed Brussels II regulation. In particular, Article 11(2) requires the child to be heard during child

[101] (1998) O.J. C-221/52 at para. 73.
[102] See Article 3(2)(b) and Article 15(2).

abduction proceedings "unless this appears inappropriate having regard to his or her age or degree of maturity."[103] This is in line with Article 13 of the 1980 Hague Convention which allows a court to refuse to return a child if the child objects to being returned, having regard to the age and maturity of the child. Article 41(2)(c) establishes the child's status in access proceedings:

> The judge of origin shall issue the certificate only if:
> (c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

The child is to be heard in accordance with the arrangements detailed in Article 11 of EC Council regulation 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.[104] While, according to recital paragraph 19, it is left to Member States' discretion to provide a framework for representing the interests and wishes of the child, this discretion must be exercised in a manner compatible with the provisions of the 1989 United Nations Convention on the Rights of the Child (UNCRC). Research undertaken by the European Forum for Child Welfare in 2001, which took the form of an examination of the implementation of Article 12, UNCRC in six Member States,[105] identified significant shortcomings and divergent age-based restrictions in giving effect to the right of the child to be heard in family law proceedings. The writer participated in this research, the findings of which highlight the absence of an automatic right for the child to be heard in private law proceedings in Ireland.

While the revised Brussels II establishes the general right of the child to be heard in family proceedings, child-consultation procedures remain an issue of national law. This is regrettable and will result in the child's right to be heard being dependent on the Member State in which he or she is habitually resident. The vulnerable position of the migrant child arising out of the divergent

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[103] See also Article 42(2)(a).
[104] (2001) O.J. L 174, 27.6.2001.
[105] Austria, Greece, Netherlands, Ireland, Italy and the United Kingdom.

child-consultation procedures between the Member States should be addressed in advance of the 7 year review of the revised regulation required under Article 65. This would ensure greater uniformity between Member States and have a significant impact on honouring not only the terms but also the spirit of Article 12 of the 1989 UNCRC.

AA. Conclusion

Considering the controversy that accompanied the introduction of the repealed Brussels II regulation, it is surprising that these new developments have attracted so little debate. The greatly extended scope of the expression "parental responsibility" is to be welcomed as is the limited availability of the principle of *forum non conveniens*. The revised Brussels II is likely to increase trans-frontier judicial cooperation and represents a more equitable balance between placing a premium on ease of access to the courts of other Member States at the expense of whether the court with first jurisdiction is the most appropriate venue for the parties' case.

One unfortunate matter is that a comprehensive family law regulation was not negotiated on this occasion to cover all aspects of child and matrimonial jurisdiction. As it now stands, issues of status and matrimonial jurisdiction will be dealt with by different regulations. The revised Brussels II is, therefore, unlikely to achieve the uniformity realised by the original Brussels Convention. This is, in part, due to the fact that the conditions that heralded the success of the original Brussels Convention are no longer present. Indeed, reaching agreement in the future will be more difficult in that a number of features of the family law systems in the newer Member States do not appear to be compatible with the family law systems of the original Member States. It will now require consensus among 24, and possibly 25, European Member States.

III. THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON IRISH FAMILY AND CHILD LAW

A. Introduction

Internationally, the traditional nuclear family is becoming an

endangered species. Notwithstanding this, the designation of the family as a private realm in Article 41 of the Constitution, which is virtually impenetrable, still endures in Ireland today as can been seen from the Supreme Court's decision in *North Western Health Board v HW and CW*.[106] In the face of such a restrictive interpretation of the "family," litigants have sought redress under international law through international human rights treaties. However, our dualist approach to international law makes international human rights treaties binding on the State, though not on the courts, as such treaties have not been incorporated into Irish law.[107] This will now change, to a limited extent, with the incorporation of the European Convention on Human Rights and Fundamental Freedoms (ECHR) into domestic law.

Of special significance, therefore, in discussing our international obligations are the relevant provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which have been incorporated into Irish law by way of statute. As a result of incorporation, the provisions of the ECHR have become part of Irish law. It is now possible to take proceedings in the Irish courts alleging a breach of the ECHR. Previously, to assert any rights under the ECHR, an injured party had first to exhaust all domestic remedies before bringing the case to the ECt.HR in Strasbourg with the costs and delays associated with that process.

There is little doubt that inconsistencies will arise between Irish family law and practice and the standards required by the ECHR. Nonetheless, the significance of this development has been overstated in the arena of Irish family law. The indirect or interpretative mode of incorporation preserves the domestic primacy of the Constitution.[108] Consequently, Article 41 of the Constitution will continue to act as an impediment to the effective implementation of the legal entitlements of individuals under the ECHR. In particular, incorporation of the ECHR at sub-constitutional level will ensure that child rights remain subordinate to parental rights.[109] Therefore, in the family law arena, there will continue to be cases where a remedy for a breach of a ECHR right

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[106] [2001] 3 I.R. 635.

[107] Most of the other Member States of the Council of Europe adopt a monist approach to international law, where international law is automatically applicable in domestic law, without the need for any implementing legislation.

[108] See s 2 of the European Convention on Human Rights Act, 2003.

[109] If there is a conflict between a provision of the Constitution and the ECHR, the Constitution prevails.

cannot be procured in the Irish courts, with the only avenue at the disposal of such litigants being an application to the Strasbourg Court.

B. European Convention on Human Rights Act, 2003

The European Convention on Human Rights Act, 2003 (2003 Act) was signed by the President on 30 June 2003 and came into force on 31 December 2003.[110] Section 1 of the 2003 Act provides that Articles 2 to 14 of the ECHR and Protocols 1, 4, 6 and 7 are to be incorporated into Irish law.

A number of issues emerge from a consideration of the provisions of the 2003 Act insofar as they impact on family law. The most significant is the fact that no provision has been made for legal aid in the Act, a right established under Articles 6 and 8 ECHR.[111]

1. The New Regime

Section 2 of the 2003 Act requires the Irish courts to interpret Irish law in a manner compatible with the State's obligations under the ECHR "insofar as is possible." All courts are now obliged to interpret and apply any statutory provision or rule of law in accordance with the ECHR and take judicial notice of the decisions of the institutions of the ECHR. Where this is not possible and where no other legal remedy is adequate and available, the superior courts may make declarations of incompatibility in relation to legislation and awards of damages (and other remedies) against "*organs of the State*" who behave in a manner contrary to the State's obligations under the ECHR.

Every organ of the State, pursuant to s 3(1) of the 2003 Act, is required to perform its functions in a manner compatible with the ECHR. The definition of "*organ of the State*" specifically excludes the courts.[112] Section 3(2) of the 2003 Act states:

> *3.–(2) A person who has suffered injury, loss or damage as a result of a contravention ... may, if no other remedy in damages is available, institute*

[110] See S.I. No. 483 of 2003, made pursuant to s 9(2) of the 2003 Act.
[111] See *Airey v Ireland* (1979–80) 2 E.H.R.R. 305.
[112] It does however appear to include health service executives.

> *proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3),*[113]*in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate*. (emphasis added)

The effect of this provision is that if a person has suffered injury, loss or damage as a result of a breach of s 3(1), he may take an action for damages, but only if no other remedy in damages is available. It excludes proceedings taken in the District Court. This is a matter of particular concern in the child law area, as the District Court has principal jurisdiction for proceedings instituted under the Child Care Act, 1991, as amended. Section 3(5) of the Act states that proceedings for violation of an ECHR right must be brought within one year of the contravention. This one year period may be extended by a court order if the court considers it appropriate in the interests of justice. Section 4 of the 2003 Act requires a court to take judicial notice of both the ECHR provisions and the decisions of the institutions of the ECHR. It further requires a court to "*take due account of the principles laid down by . . . decisions*" of the institutions of the ECHR when applying the ECHR provisions.

Section 5 of the 2003 Act provides that where the High Court, or the Supreme Court on appeal, rules that there is an incompatibility between domestic law and the Convention, a declaration of incompatibility may be granted by that court. It should, however, be noted that demonstrating that no other legal remedy is "*adequate or available*" is a condition precedent to invoking this section. Further, legal aid is not available to the applicant seeking a declaration of incompatibility. Where the courts issue a declaration of incompatibility, it is a matter for the Government to consider the steps to be taken to remedy the incompatibility as such a declaration will not, for constitutional reasons, affect the validity, enforcement or continuing operation of the national law in question. Section 5(4) creates a new compensatory scheme for a person who has been granted a

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[113] This subsection deals with jurisdiction limitations.

declaration of incompatibility by the courts. Such a person may apply to the Government for payment of *ex gratia* compensation in respect of any injury, loss or damage she may have suffered as a result of the incompatibility. This section has been criticised for failing to provide a mechanism whereby the level of compensation awarded can be appealed.

Section 6 of the 2003 Act provides that, before a court decides whether to make a declaration of incompatibility, the Attorney General must be given notice of the proceedings in accordance with the rules of court. In summary, the remedies available to a litigant under the 2003 Act are confined to a declaration of incompatibility (and possible *ex gratia* compensation) and an action for damages against an "organ of the State" (i.e. a health service executive).

The Supreme Court recently held that the 2003 Act could not be applied retrospectively.[114] Kearns J., delivering the judgment of the Supreme Court, stated:

> On the face of it, the language and terminology of the Act appears to suggest prospective obligations only. None of the sections are directed to backward-looking obligations. No express provision for retrospective application of the Act to past events is anywhere to be found in the Act, other than insofar as s 2(2) provides that existing legislation is also to be interpreted by reference to Convention principles. However, no additional provision appears in s 2(2) suggesting that a retrospective application of the section is envisaged. … In a matter of such far-reaching importance it would be a considerable omission on the part of the draftsmen not to include a provision for retrospective application to past events if such was the intention.[115]

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[114] *Dublin City Council v Jeanette Fennell,* Supreme Court, unreported, Kearns J., 12 May, 2005.

[115] At page 39.

2. The District Court

Sections 2 and 4 of the 2003 Act apply in the District Court. Consequently, decisions of the ECt.HR are now relevant in public and private law cases dealt with in this court. The District Court must also interpret legislation in a manner harmonious with the State's obligations under the ECHR. This, it must do, however, "*in so far as is possible*" and "*subject to the rules of law relating to interpretation and application.*" No remedy is available in the District Court for breach of a ECHR right. District Court issues likely to be informed by ECt.HR jurisprudence include placing children in care, access issues in respect of children placed in care, the representation of children in proceedings and expert reports in cases involving children.

C. Family Law and the European Convention on Human Rights

1. Family Life

One cannot avoid noting the enormous potential of the ECHR to protect and promote the rights of individuals. Article 8(1), ECHR guarantees, as a basic right, the right to respect for private and family life, home and correspondence. Article 8(2) sets out the limits of permissible interference with the enjoyment of these rights by the State. The ECHR (unlike the Irish Constitution) makes no distinction between the family life of a marital and non-marital family.[116]

Family life constitutes not only relations between parents and their children, but also extends to grandparents and grandchildren.[117] For other relationships, it is necessary to produce evidence of a real and close family tie. In summary, the existence of family life is a question of fact and degree.[118] Family life, for example, has been

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[116] See *Marckx v Belgium* (1979–80) 2 E.H.R.R. 330, *Johnston v Ireland* (1987) 9 E.H.R.R. 203 and *Keegan v Ireland* (1994) 18 E.H.R.R. 342; see also *Berrehab v The Netherlands* (1989) 11 E.H.R.R. 322 where the ECt.HR held that the traditional family relationship between a divorced man and his marital child did not cease to exist on the separation or divorce of the parents; *Boyle v UK* (1995) 19 E.H.R.R. 179 where family life was held to exist between an uncle and a nephew; *Kroon v The Netherlands* (1994) 19 E.H.R.R. 263 where the relationship between a man and a child conceived during an extra-marital affair, which amounted to a long-term relationship, wherein the parties had four children by the time of the application, constituted a family within the meaning of Art 8 of the ECHR; and *Boughanemi v France*, ECt.HR 24 April 1996, Reports of Judgments and Decisions 1996.II, 594, para 35 where family life was held to exist where the father could show a close relationship to the child. Also *Elsholz v Germany*, [2000] E.C.H.R. 70.

[117] *Marckx v Belgium* (1979–80) 2 E.H.R.R. 330.

[118] *X, Y and Z v UK* [1997] E.C.H.R. 20.

held by the ECt.HR to include the relationship between an adopted child and adoptive parents.[119] Similarly, for a foster parent and a foster child, although the Court has noted that the content of family life may depend on the nature of the fostering arrangement.[120] The position of a non-marital father lacking a legal filiation link (through marriage or recognition) was considered in *RS Yousef v The Netherlands*.[121]

In *Dudgeon v United Kingdom*[122] and *Norris v Ireland*,[123] the ECt.HR described sexual life as the most intimate aspect of a person's private life for the purposes of Art 8, ECHR.[124] The ECt.HR has not, however, been prepared to extend the concept of "family life" to include a same-sex relationship, though, as the margin of appreciation narrows, the Court may change its mind on this issue. Belgium, the Netherlands and Spain now allow same-sex couples to marry. Two decisions of the House of Lords are also worth noting. The first is *Fitzpatrick v Sterling Housing Association*,[125] where the House of Lords held that a same-sex couple could be treated as members of each other's family for the purposes of the Rent Act 1977 (as amended).[126] In the later case of *Ghaidan v Godin-Mendoza*,[127] the House of Lords, addressing the same statute, went further and held that a same-sex couple could be regarded as if each partner was the "husband" or "wife" of the other. A majority of the House of Lords held that "living with the original tenant as his husband or wife" could be afforded a functionalist reading and could be divested of its gendered leanings.

It can be seen that the protection to be offered to the *de facto* family as defined within the jurisprudence of the ECt.HR is varied and a wide margin of appreciation is allowed to the contracting parties. More than in any other area of law, there is great potential for conflict between the Irish domestic concept of the family and concepts set down by the ECt.HR.

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[119] *X v France* (1982) 5 E.H.R.R. 302.
[120] *Gaskin v UK* (1990) 12 E.H.R.R. 36, para 49; *X v Switzerland*, Application No. 8257/78, 10 July 1978; and *Rieme v Sweden* (1992) 16 E.H.R.R. 155.
[121] [2003] 1 F.L.R. 210.
[122] (1981) 4 E.H.R.R. 149.
[123] (1991) 13 E.H.R.R. 186.
[124] See also *X v UK* (1997) 24 E.H.R.R. 143.
[125] [1999] 3 W.L.R. 1113, [2001] 1 A.C. 27.
[126] 1977 c. 42.
[127] [2004] U.K.H.L. 30, [2004] 2 A.C. 557 [2004] 3 All E.R. 411, [2004] 3 W.L.R. 113.

2. *Legal Aid*

In *Airey v Ireland*,[128] the ECt.HR held that Article 6 of the ECHR imposed obligations upon a State which may only be discharged by providing legal representation.[129] This decision does not create a right to free legal aid in all civil cases, but rather imposes a duty upon the State to act, which depends upon the nature of the rights under consideration.[130] It is likely that the requirement to provide free legal aid will arise more frequently in relation to children than to adults.

3. *Delay*

The prospects of a fair hearing may be diminished by significant delay in family law proceedings. This may result in a breach of Articles 6 or 8 of the ECHR or, as in *W v UK*,[131] of both. In particular, Article 6 of the ECHR provides:

> In the determination of his civil rights and obligations …, everyone is entitled to a … hearing within a reasonable time by [a] ... tribunal …

Article 7 of the European Convention on the Exercise of Children's Rights, 1996 requires that "[I]n proceedings affecting a child the judicial authority shall act speedily to avoid any unnecessary delay and procedures shall be available to ensure that its decisions are rapidly enforced."

Mindful that "justice delayed" is often "justice denied," or at least diminished, the jurisprudence of the ECt.HR has tended to lean toward requiring that the national authorities display special diligence in expediting proceedings involving children. Indeed, in *H v UK*,[132] the ECt.HR stated that exceptional diligence is required where the maxim "justice delayed is justice denied" is fully applicable. This might arise where custody and access proceedings are initiated by parents of children in the care of health service executives; as such proceedings are decisive for the parents' future relations with their children and have a "particular quality of

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[128] (1979–80) 2 E.H.R.R. 305.
[129] See also *Dombo Beheer BV v Netherlands* (1994) 18 E.H.R.R. 213 and *P, C and S v UK* (2002) 35 E.H.R.R. 1075.
[130] Interestingly, Ireland entered a reservation in respect of legal aid on 3 September 1953.
[131] (1988) 10 E.H.R.R. 29 at 65.
[132] (1988) 10 E.H.R.R. 95.

irreversibility." The ECt.HR in *H v UK* alluded in particular to delay such that the elapse of time has the effect of determining the issue. Denham J expressed a similar view in *M(E) ex parte v M(J)*,[133] a Hague Convention case (i.e. child abduction case) where time is of the essence. In *Price and Lowe v United Kingdom*,[134] the ECt.HR held unanimously that the length of the civil proceedings (which began on 12 February 1986 and ended on 30 March 1998) amounted to a violation of Article 6(1) ECHR. The ECt.HR stated as follows:

> The Court has held on a number of occasions that a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings, does not dispense the State from complying with the requirement to deal with cases in a reasonable time[135]. In the light of the preceding comments, …, the Court finds that the proceedings in the present case were not dealt with within a "reasonable time", as required by Article 6 of the Convention.[136]

In *Nuutinen v Finland*,[137] the ECt.HR held that Article 6, ECHR had been violated by custody and access proceedings which had lasted for five years and five months. If it transpires that a child is seriously neglected or ill treated due to a delay in the procurement of a s. 20 report, for example, a breach of Article 3, ECHR may also arise. In *Glaser v UK*,[138] the ECt.HR stated that it is essential that custody and access cases be dealt with speedily. The ECt.HR ruled that neither the volume of work nor shortage of resources will justify excessive delay.

4. Right To A Fair Trial

One of the procedural safeguards afforded by the ECHR is

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[133] [2003] 3 I.R. 178
[134] [2003] E.C.H.R. 409.
[135] See *Buchhotz v Germany* judgment of 6 May 1981, Series no. 42, p. 16,§50; *Guincho v Portugal* judgment of 10 July 1984, , Series A no. 81, p. 14,§ 32; *Capuano v Italy*, judgment of 25 June 1987, Series A no. 119, p. 11,§25; *Mitchell and Holloway v the United Kingdom* [2002] E.C.H.R. 812.
[136] [2003] E.C.H.R. 409
[137] [2000] E.C.H.R. 354.
[138] [2000] E.C.H.R. 418.

the right to a fair trial.[139] Article 6(1) provide,s "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[140]

In *Ruiz-Mateos v Spain*[141] the ECt.HR stated that, "as a matter of general principle the right to a fair adversarial trial means the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party." The three central requirements of a fair trial are:

> (a) hearing in the presence of the parties;
> (b) all evidence should be produced to the parties; and
> (c) there should be an opportunity to challenge evidence, including the right to cross-examine witnesses.[142]

In children's cases, however, the Court has determined that some relaxation of the composition of a typical court and its procedures may be required.[143]

The right to a fair trial mirrors, of course, the explicit obligations under Article 6, ECHR, but it is also arguably a part of the procedural safeguards in Article 8. The inextricable link between the rights expressed in Article 6 and the inherent safeguards of Article 8 is underlined by the decision in *Keegan v Ireland*[144]. In that case, involving primarily the question of a non-marital father's right to be consulted in relation to the adoption of his child, the court held that the father's rights under Articles 6 and 8, ECHR had been violated. The Court, in particular, noted that:

> [t]he fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the proposed adopters and

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[139] See *V v UK* [1999] E.C.H.R. 171
[140] See also *Barbera, Messegue and Jabardo v Spain* [2000] 11 E.H.H.R. 360.
[141] [1993] 16 E.H.R.R. 505.
[142] *X v Austria*, Application No. 5362/72, (1972) 42 CD 145.
[143] See *McMichael v UK* (1995) 20 E.H.R.R. 205, though in that case the failure to disclose social reports to the applicants amounted to a violation of Article 6(1), ECHR. Also *L v UK* (2000) 2 .F.L.R. 322 where a breach of Article 6(1), ECHR was held in respect of the provision of documents at case conferences when not all participants see them. This case also considered the obtaining of information from Adoption Agencies and Local Authorities.
[144] (1994) 18 E.H.R.R. 342.

> to the subsequent making of an adoption order, amounted to an interference with his right to respect for family life.[145]

Article 8, ECHR was applicable, the ECt.HR emphasised, despite the fact that the natural parents of the child were never married to each other. For two years prior to the making of the adoption order, the mother and father had been living in a stable relationship and that, essentially, formed a family for ECHR purposes. Alluding to Article 6, ECHR, the ECt.HR held that the father's right to "a fair and public hearing by an independent and impartial tribunal" had also been violated. Effectively, the father had "no rights under Irish law" to challenge the decision to place his child for adoption, either before the Adoption Board or before the Courts. In summary, he had "no standing in the adoption procedure generally."[146] The applicant was awarded £12,000 in pecuniary and non-pecuniary loss and approximately £38,000 in respect of his domestic and Strasbourg legal costs and expenses. The Adoption Act, 1998, in amending the Adoption Act, 1952, has now introduced consultation procedures for natural fathers in the adoption process and also details the circumstances when such procedures need to be applied.

5. The Right To Marry

The right to marry is guaranteed by Article 12 of the ECHR: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

In the past, this right has been held to refer to a traditional marriage of a heterosexual couple. Particular difficulty has arisen in the case of a person who is transsexual, especially where such a person has undergone gender reassignment surgery. The ECt.HR initially rejected the proposition that the failure to recognise such gender reassignment was a breach of Article 12 of the ECHR.[147] More recent cases, however, indicate a growing recognition of the

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[145] At p. 362, para 51.
[146] *ibid* at 364.
[147] See, for example, *Rees v UK* (1987) 9 E.H.R.R. 56 and *Cossey v UK* (1991) 13 EHRR 622.

right to marry as a member of the sex with whom one psychologically identifies (provided that the party has undergone a "sex change"). In *Christine Goodwin v UK*,[148] the ECt.HR, in a unanimous decision, held that the United Kingdom was in breach of Articles 8 and 12, ECHR by refusing to allow a post-operative male to female transsexual the right to marry under any circumstances. The ECt.HR justified its departure from the *ratio* in *Rees* and *Cossey* in the following manner:

> Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family . . . There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality . . . While it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.[149]

The unanimous decision of the ECt.HR in the *Goodwin* case is interesting in the Irish context in that it was issued in the same week as the rejection by the High Court of the application by Dr Lydia Annice Foy to have her birth certificate amended to reflect the fact that, though registered at birth as male, she had undergone gender-reassignment procedures to allow her to appear as a woman.[150] This case is currently on appeal to the Supreme Court.

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[148] [2002] 2 F.L.R. 487.
[149] See also *I v UK*, [2002] 2 F.L.R. 518.
[150] See *Foy v The Registrar of Births, Deaths and Marriages*, Unreported, High Court, McKechnie J., 9 July 2002.

D. Child Law and the European Convention on Human Rights

1. Introduction

The civil and political rights enshrined in the ECHR emphasise individual and familial freedom and autonomy and protection from excessive state interference. The ECHR is not child focused as such in the same way as the UNCRC. It does not recognise children as a special group requiring particular protection because of their inherent vulnerability in a world of adults. The rights contained in the ECHR are as available to children as to adults, however, and there is an increasing awareness that the ECHR has potential as an important resource in the promotion of child rights. While it must be acknowledged that only a small body of ECHR case-law deals with cases from the perspective of the child, it has been utilised very effectively to protect children within their family life with their parents.

2. The Voice Of The Child

Children have a right to be heard in legal proceedings affecting them. Hearing the voice of the child in legal proceedings is not, however, easy. After all, our family law system is adult, rather than child-centred. Moreover, the child's views and the welfare of the child are not synonymous.

A court can be an intimidating place even for a worldly adult. For a child, it must be especially so. A key concern must be to avoid the process causing additional trauma to the child. In addition to preventing trauma, there is also a further concern of a more judicial nature. The court will also be concerned to ensure that a child giving evidence will be able to give as full, accurate and coherent an account as possible. A belief that this cannot always be realised, when added to the fear of further traumatising the child, often results in the court's failing to hear the evidence of children.

Both of the concerns noted above are, no doubt, genuine and worthy. The inevitable result, however, is that the child is often effectively silenced in such proceedings, perhaps to the detriment of his or her ultimate welfare. The right of children to be heard can no longer be sidelined, especially in the light of our obligations under the ECHR.

Articles 6 and 8, ECHR afford certain procedural safeguards applicable in court proceedings in a contracting state. The right of the individual to participate in legal proceedings is one of those procedural safeguards, a conclusion underlined by the ECt.HR in *T v UK*[151] and *V v UK*.[152] Both cases concerned whether two eleven-year-old boys who were tried for murder in an adult court had received a fair trial within the meaning of Article 6, ECHR. The cases turned on whether the boys had participated effectively in their own criminal trial and the court held that they had not. The provision of separate and impartial representation to children was, in these cases, deemed to be essential to the conduct of certain criminal proceedings involving children. A similar approach was adopted by the ECt.HR in the case of *S.C. v UK*,[153] where the ECt.HR held that there had been a violation of Article 6(1) of the ECHR. Considering the far-reaching nature of many public law proceedings involving children, a similar approach is likely in relation to applications by a health service executive for orders for care or supervision of a child and perhaps even in civil proceedings generally.

Recent Strasbourg case law points to the fact that courts determining custody and access issues should hear children of sufficient age and maturity. Where this is not possible, a reasonable explanation not to hear a child of sufficient "age and maturity" should be provided by the Irish court.[154]

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[151] [1999] E.C.H.R. 170

[152] [1999] E.C.H.R. 171

[153] June 15, 2004, Application No. 60958/00.

[154] A relevant and instructive case is the recent decision of Finlay-Geoghegan J. in *FN and EB v CO, HO and EK* (unreported, High Court, Finlay-Geoghegan J., 26 March, 2004), where the applicant maternal grandparents were appointed guardians over two children, aged 13 and 14. The learned judge held that while the Oireachtas did not detail the factors to be taken into account when making a decision under s 8(2) of the Guardianship of Infants Act 1964, the provisions of ss 3 and 25 of the 1964 Act were applicable. Section 25 of the Guardianship of Infants Act 1964 (as inserted by s 11 of the Children Act 1997) requires that:

> "In any proceedings to which s 3 [of the 1964 Act] applies,[154] the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter." (Section 3 of the 1964 Act makes it abundantly clear that in considering an application relating to the guardianship, custody or upbringing of a child, the court must have regard to the welfare of the child. This, the section states, is "the first and paramount consideration".)

In this regard Finlay-Geoghegan J. held that the children in the case were of an age and maturity to have their wishes taken into account. This is an interesting and innovative judgment which draws a useful link between the personal right of a child under Article 40.3 of the Constitution to have a decision made in accordance with natural and constitutional justice and the provisions of the Guardianship of Infants Act 1964:

> "[Section] 25 should be construed as enacted for the purpose of *inter alia* giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of a child."

Failure to hear children, aged four and six years, was a feature of the decision in *Kutzner v Germany*,[155]even though expert evidence was obtained by the court in that case prior to its decision to take the children into care.

In *Sommerfeld v Germany*,[156] the ECt.HR criticised the German national court for not obtaining a psychological report to assess the apparently entrenched views of a thirteen year-old child not to see her father. The Chamber's decision was overturned by the Grand Chamber, who held that the national court could rely on the directly expressed wishes of a 13-year-old.[157] That said, the December 2003 French decision of *Palau-Martinez* highlights the need for expert evidence in the making of decisions on custody and access matters.

The decision of the ECt.HR in *Sahin v Germany* [158] is worthy of particular note. In that case, a father's application for access (in respect of his five year old child) was rejected on the basis that expert evidence supported the termination of access. The domestic court did not hear the child. Rather, it relied on the experts' view that the hearing of the child in court would impose a psychological strain, since the child could gain the impression that her statements would be decisive. The Chamber, however, held that the domestic court should only have considered the best interests of the child after having direct contact with her. In particular, the Chamber stated that complete information on the relationship between the father and the child was an indispensable prerequisite for establishing a child's true wishes and thereby striking a fair balance between the interests at stake. This case was later referred to the Grand Chamber where the Chamber's decision was overturned. The Grand Chamber held that the Regional Court had not overstepped the margin of appreciation in relying on the expert's statements "about the risks inherent in questioning a child."[159] Notwithstanding the fact that hearing a child between four and five years old did not amount to a violation of Article 8, ECHR, the Grand Chamber held that the hearing of a child in court depends "on the specific circumstances of each case, having due regard to the age and maturity of the child concerned."[160]

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[155] [2002] E.C.H.R. 160
[156] [2001] E.C.H.R. 588
[157] [2003] 2 F.C.R. 619.
[158] [2002] 1 F.L.R. 119.
[159] [2003] 2 F.L.R. 671.
[160] [2003] 2 F.L.R. 671, para. 73.

3. Care Order

The right to family life cannot be interfered with, unless such interference is in accordance with law and has an aim or aims that is or are legitimate.[161] The interference must also be shown to be "necessary in a democratic society." As a core principle, then, the ECHR requires that the contracting parties refrain from arbitrary interference in the lives of individuals in the State. Where the State intervenes in the life of a family, for instance by taking a child into care, the State must show that its intervention is in accordance with the law, for the furtherance of a legitimate aim or aims and necessary in a democratic society.

In a case against Finland, the ECt.HR held that, because the care order was not the only option available to the local authority for securing the children's protection, the reasons used to justify it were insufficient and amounted to a violation of Art 8, ECHR.[162] The impact of the judgment is that where health service executives fail to use a care order as a measure of last resort, a violation of a core provision of the ECHR may arise.[163]

4. The Right To Liberty And Security

Article 5, ECHR guarantees the right to liberty and security, though this right is not an absolute right. It has been invoked in cases involving disturbed children, for whom there are, at present, insufficient high support units in Ireland and where, in many cases, they are held in penal institutions for want of appropriate accommodation. Ireland was held to be in breach of Article 5, ECHR in *DG v Ireland*.[164] The case challenged the legality of detaining in St Patrick's Institution a 16 year-old non-offending child with serious behavioural problems. The ECt.HR held that the detention of the child in St Patrick's Institution was in contravention of rights guaranteed under Article 5(1), ECHR. The ECt.HR ruled that the State acted unlawfully in failing to provide the disturbed child with a safe, suitable therapeutic unit and upheld the claim that the child's human rights were violated and his right to compensation denied.[165]

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[161] Art 8(2), ECHR.
[163] See also *EP v Italy* (2001) E.C.H.R. 17.
[164] [2002] E.C.H.R. 443.
[165] See, however, *Koniarska v UK*, application no. 33670/96, judgment of 12 October 2000, where the court held that placing a child in secure accommodation was not contrary to the ECHR as it amounted to 'educational supervision' within the meaning of Article 5 of the ECHR.

5. Access

Where a child is validly taken into care, Article 8 of the ECHR guarantees that parents and children have access to each other. Any restriction on access must be justified by reference to Article 8(2), ECHR.[166] There is, in addition, a positive duty on the health service executive to facilitate access between the parent and child.[167] The ECt.HR has taken the view that, as the mutual enjoyment by a child and a parent of each other's company constitutes a fundamental element of family life, access should only be denied where there is clear evidence that it is contrary to the best interests of the child. This approach now forms part of Article 9(3) of the UNCRC which provides for "the right of the child who is separated from one or both parents to maintain public relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

The ECt.HR has also stated access to be the right of the child.[168] In protecting individual rights, the State is under an obligation to prevent interference by others with a view to undermining these rights.[169] This is a positive duty placed on the State. In *Hokkanen v Finland*, for instance, the ECt.HR ruled that the Finnish government had a positive obligation to facilitate parental access to a child, including ensuring that third parties (in this case the maternal grandparents) did not impede the child's right to access.[170]

The ECt.HR has held that a care order is intended to be temporary in nature and that its implementation must always be guided by the ultimate aim of family reunion. Contact between parents and children in care is vital to maintain the family relationship. In *Olsson v Sweden*,[171] the ECt.HR noted that there was a positive obligation on each State to take appropriate measures to facilitate a reunion between children and their parents. In that case, three children from one family (the Olssons) had been placed

[166] See for instance, *Hendriks v Netherlands* (1983) 5 E.H.R.R. 223; *W v UK* (1988) 10 E.H.R.R. 29; *R v UK* (1988) 10 E.H.R.R. 74; *O v UK* (1988) 10 E.H.R.R. 82; *H v UK* (1988) 10 E.H.R.R. 95; *Olsson v Sweden* (1989) 11 E.H.R.R. 259 and *McMichael v UK* (1995) 20 E.H.R.R. 205.

[167] See *Eriksson v Sweden* (1989) 12 E.H.R.R. 183.

[168] See *Hoppe v Germany* [2003] 1 F.L.R. 384.

[169] See *Airey v Ireland* (1979–80) 2 E.H.R.R. 305, *X and Y v Netherlands* (1985) 8 E.H.R.R. 235; *Johnston v Ireland* (1987) 9 E.H.R.R. 203; *Keegan v Ireland* (1994) 18 E.H.R.R. 342 and *Hokkanen v Finland* (1994) 19 E.H.R.R. 139.

[170] (1994) 19 E.H.R.R. 139. See, however, *Nuutinen v Finland*, [2000] E.C.H.R. 354.

[171] (1989) 11 E.H.R.R. 259.

in foster care with different foster parents living a considerable distance from each other and from the parents of the children. As a result of the geographical distance between them, contact between the children themselves and between the parents and the children was made virtually impossible. This, the ECt.HR concluded, constituted a breach of Article 8, ECHR, the State having failed to make adequate provision for intra-familial contact. The administrative difficulties (such as the apparent shortage of appropriate foster families), asserted in a defence by the State, were deemed not to be of sufficient weight to prevent a ruling against it.[172] Little guidance is given, however, as to what is an acceptable distance by which children and their parents can be separated.

6. *Protection*

There is an obligation, imposed by Article 3, ECHR, to protect children from harm and ill treatment. In *Z and Ors v UK*,[173] the ECt.HR called into question the approach of the English courts to the liability of public authorities. It held that a local authority has a positive duty to see that measures are taken to protect a child at risk. The ECt.HR noted, in particular, the local authority's failure to assign a senior social worker or guardian *ad litem* for the child at the centre of that case.

In *A v UK*,[174] the ECt.HR, considering the caning of a nine year-old boy by his stepfather and the defence of "reasonable chastisement" in the law of the UK, concluded that the State had failed to protect the applicant from punishment amounting to inhuman or degrading treatment within the meaning of Article 3, ECHR. The Court held that cognisance should be taken of the following criteria when considering whether the punishment is reasonable:

- the nature and context of the child's behaviour;
- the duration of the behaviour;
- the physical and mental consequences of the behaviour of the child; and

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[172] See *Implementation Handbook for the Convention on the Rights of the Child*, prepared for UNICEF by Rachel Hodgkin and Peter Newell, New York, 1998, 152.
[173] [2001] 2 F.L.R. 612.
[174] (1999) 27 E.H.R.R. 611.

- the age and personal characteristics of the child.

It is clear from the judgment of the ECt. HR in this case that the State has a positive duty to take measures to ensure that no one private individual is subjected to torture, inhuman or degrading treatment at the hands of other private individuals. On this point, the court held that States are:

> [r]equired to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence against such serious breaches of personal integrity.

7. Consultation and Access To Reports

Parents should be adequately consulted about and informed of all matters pertaining to their children. Failure to do so will amount to a breach of Article 8, ECHR, unless the exempting provisions of Article 8(2) apply. In *McMichael v UK*,[175] the ECt.HR ruled that a parent cannot, without good reason, be denied access to reports or documents relating to his or her child. To do so would be to deny the parent his right to participate in the decision-making process relating to his or her child.

Denying a parent access to reports or documents may also constitute a breach of Article 6, ECHR, which guarantees the right to a "fair and public hearing." This necessarily involves the right of access to reports or documents, save where this is otherwise than in the best interests of the child. The principle of proportionality will apply in the provision of reports or documents. It should be stated that while there is no absolute right to reports or documents, the ECt.HR jurisprudence dictates that a decision to disclose should be

[175] (1995) 20 E.H.R.R. 205.

considered speedily. Moreover, an independent authority such as a court should make this decision. In *TP and KM v UK*, [176] for example, the ECt.HR held that parents, defending serious allegations regarding children, should be afforded full access to information as to their factual basis.

8. Overview

The European Convention on Human Rights Act, 2003 has created a significant paradigm shift in legal culture in family law. In relation to the law on children, it has consolidated the four main aims of the UNCRC, the standard-setter on children's rights, which have been identified as prevention, protection, provision and participation. Where family law and child law issues conflict in terms of rights, it is now necessary to balance the rights of different family members. The approach when Article 8, ECHR is invoked in relation to private family law will be to balance the rights of all family members, with the interests of the child being decisive where the way is not clear.[177]

IV. Impending Developments

A. Access

A new Council of Europe Contact Convention is currently in preparation, which will contain a procedure for advanced recognition and enforcement, thereby enabling courts in the contracting States to make mirror orders.[178] Twelve countries signed the Convention on the first day it was available for signature.

B. The Hague Child Protection Convention 1996

The Hague Child Protection Convention 1996 ("the 1996 Convention") came into force on 1 January, 2001.[179] The 1996 Convention has a potentially much wider scope than any of the other Hague Conventions affecting children. Its ambit is wider than that under the revised Brussels II. Ireland has already passed the implementing legislation in the form of the Protection of Children (Hague Convention) Act 2000.[180] Ratification by Ireland has not

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[176] (2001) 2 F.L.R. 549.
[177] See *Yousef v The Netherlands* (2003) 1 F.L.R. 210.
[178] 2003 European Convention on Contact Concerning Children ETS 192.
[179] This is when Slovakia's ratification took effect, thereby providing the third ratification (Monaco ratified in May 1997 while the Czech Republic ratified in March 2000).
[180] Number 37 of 2000.

been possible due to a dispute between Spain and the United Kingdom over Gibraltar. This dispute has held up the joint ratification of the European Union states.

As regards jurisdiction, there are a number of rules dealing with different aspects of the 1996 Convention, but the main rule, contained in Article 5, is to ascribe jurisdiction to the state of the child's habitual residence, and jurisdiction will change with any changes in habitual residence. Application of the law of the State of habitual residence is unaffected by a wrongful removal or retention unless circumstances similar to the exceptions to parental child abduction in the 1980 Hague Convention are applicable. Article 7 provides that, in cases of wrongful removal or retention, jurisdiction remains in the State of the child's former habitual residence unless there has either been acquiescence or one year has elapsed since the wrongful removal and the child is settled in its new environment. Authorities can decline jurisdiction upon the basis of *forum non conveniens*.[181] The emergency jurisdiction provided for by Article 11 is likely to prove useful in that the State where the child or his or her property is situated has jurisdiction to take necessary measures of protection.

As with other modern child Conventions, it will be incumbent upon each Member State to establish a Central Authority to facilitate cooperation between States to fulfil the purposes of the 1996 Convention. Article 32 could be useful in the context of child abduction in that it provides that the authorities of another State may, for specified reasons, request the central authority of a child's habitual residence to begin measures to protect a child's person. In summary, the 1996 Hague Convention provides an important additional control on international child abduction.

B. Maintenance

In April 2004, the European Commission published a Green Paper on the questions arising in the recovery of maintenance claims. The Green Paper was part of a public consultation on this difficult issue. A "legislative package" will soon emerge which will reflect the

[181] The doctrine of *forum non conveniens* is a distinctive feature of the law relating to jurisdiction in common-law systems and affords the court a discretionary power to refuse to take jurisdiction if there is some other available forum which *prima facie* is clearly more suitable for the trial of the case. See Articles 8 and 9 of the 1996 Convention.

results of the consultation process. One of the key recommendations is likely to be the removal of the exequatur procedure. The package is likely to include proposals permitting "precise identification of a debtor's assets in the territory of the Member States" so that mutual recognition can occur in an environment that enhances cooperation between Member States' courts. Measures for the harmonisation of conflict-of-law rules are also likely to be included in the legislative package.

C. Divorce

The European Commission launched a Green Paper on applicable law and jurisdiction in divorce matters on 14 March 2005. The Green Paper outlines the practical difficulties for the increasing number of "international couples" who divorce each year within the European Union. It addresses many of the difficulties caused by the implementation of the repealed Brussels II regulation and the revised Brussels II. In particular, it deals with the question of applicable law, for which there are no community rules at present. The revised Brussels II does not cover conflict-of-law rules.

The Green Paper criticises the current "lack of legal certainty and flexibility" and states that "the current situation may also lead to results that do not correspond to the legitimate expectations of citizens." It deals with the problems created by the alternative grounds for the jurisdictional rules relating to divorce. The paper provides a number of examples, such as a Finnish-Swedish couple living in Ireland or an Italian couple living in Germany, to illustrate the need for adopting European rules on selecting the competent law for settling divorce cases. It acknowledges that the rule on "lis pendens"[182] may induce the parties to a transnational marital breakdown into a "race" to see who can get to court first. This makes speed of the essence in "international" divorces.

The Green Paper invites interested parties to indicate whether they support harmonisation of the conflict-of-law rules "based on a set of uniform connecting factors". It also invites submissions on whether spouses should be allowed to a limited

[182] The "first come first served principle".

extent to choose the law applicable to their divorce, legal separation or marriage annulment.

V. Conclusion

The impact of the recent proliferation of international instruments on various aspects of Irish family and child law is worthy of consideration. Currently, there are three bodies generating such instruments; namely, the Hague Conference, the Council of Europe and the European Commission. International regulation is, therefore, becoming increasingly complex. Unfortunately, this heightened complexity may serve to undermine the very objectives such regulation seeks to confer. Nowhere is this more evident than in the area of child abduction and the emergence of the revised Brussels II regulation.