

Chapter 4

A European Model for Harmonizing the Law on Parental Responsibilities: The Family Law Perspective



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Abstract Since 2001 the academic Commission on European Family Law (CEFL) has drafted Principles of European Family Law that are thought to be most suitable for the harmonization of family law within Europe. The CEFL Principles are non-binding rules. They can be considered to be a model law which national legislators can take into account.

This contribution explains methodological aspects of the drafting process of the Principles on Parental Responsibilities. It informs about the huge amount of international and European instruments. Although each of these instruments only addresses some specific aspects of the law regarding parental responsibilities, they collectively built the general framework which to a considerable extent has also determined the national systems in Europe. Before focussing on the concept of parental responsibilities, as well as on those Principles which specifically address the situation upon divorce and separation of the parents (joint and sole exercise, (dis-)agreement on exercise, residence of the child, relocation, maintenance of personal relationships, hearing of the child, representing the child), information about the structure of the Principles is provided. Finally, more than 10 years after the publication of the Parental Responsibilities Principles it makes sense to take stock and explore how they have been perceived.

Keywords Europe · Parental responsibilities · Harmonization · Methodology · Comparative family law

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4.1 Comparative Research-Based Drafting of Principles of European Family Law

Family law in Europe consists of two sets of legal rules: national substantive family law on the one hand and their respective private international law rules for family matters on the other. The latter apply in cross-border family relations, for instance, if a couple who both have Portuguese nationality but live in Belgium want to obtain a divorce. The substantive family law systems largely differ. No one system is the same as another. These dissimilarities between the family law systems create problems for the increasing number of families who have links with more than one State, due to their nationality or habitual residence. They must cope with two problems: firstly, the internationality of their relationship is disregarded since, according to the traditional rules of private international law, their cross-border relationship (e.g. marriage, divorce) must be located within the territory of one State, whereas such a relationship is, by definition, connected to more than one State. Secondly, case law of the European countries indicates that crossing borders often results in the loss of rights (e.g. civil status) or the creation of financial obligations. The international couple may ‘shop’ for the specific jurisdiction which provides the most favourable results for themselves as individuals (e.g. a quick divorce or a lifelong maintenance claim). Since in particular within the European Union the European Commission has no competence to harmonize or unify the family law systems of the Member States it is up to legal scholars to provide solutions which might lead to the further harmonization of family laws in Europe.

Some 18 years ago the Commission on European Family Law (CEFL) started its academic work through drafting Principles of European Family Law that are thought to be most the suitable for the harmonization of family law within Europe. This has resulted in Principles regarding Divorce and Maintenance between Former Spouses (2004), Parental Responsibilities (2007) and Property Relations between Spouses (2013). The next set of Principles regarding *de facto* Unions will be finalised in 2019. The Principles on European Family Law are non-binding rules. They function like Model Laws. First and foremost, they are addressed towards national legislators, however, it is for them to decide whether they reform their family laws according to the proposals of the CEFL. Eventually, the CEFL Principles can function as a source of inspiration for both the European and international legislator.

The aim of this contribution¹ is twofold. It explains the methodological aspects of the drafting process and it informs the reader about the content of the Principles on Parental Responsibilities, about CEFL’s considerations as to why the various rules were adopted and about the huge amount of international and European instruments that are relevant in the context of parental responsibilities. Although each of these instruments only addresses some specific aspects of the law regarding parental

¹See also Boele-Woelki, The CEFL Principles regarding parental responsibilities: Predominance of the common core, in Boele-Woelki/Sverdrup (eds), *European Challenges in Contemporary Family Law*, European Family Law series no. 19, Intersentia 2008, pp. 63–91.

responsibilities, they collectively build the general framework which to a considerable extent has also determined the national systems in Europe. In no other field of family law have so many agreements between states been drafted, concluded, adopted and have become binding. This development which started some 50 years ago and which culminated in 1989 with the adoption of the Convention on the Rights of the Child can be classified as a spontaneous harmonisation of the law regarding the parent-child relationship. It forms the very foundation on which the CEFL Principles were drafted. Before focussing on the concept of parental responsibilities, as well as on those Principles which specifically address the situation upon divorce and the separation of the parents (joint and sole exercise, (dis)agreement on exercise, residence of the child, relocation, maintenance of personal relationships, hearing of the child, representing the child), information about the structure of the Principles is provided. Finally, 12 years after the publication of this set of Principles it makes sense to take stock and explore how they have been perceived. Did they have any impact on the process of the harmonization of family law?

4.2 Working Method

The establishment of the CEFL in 2001 and its drafting of common Principles have led to a widespread and intensive debate among family law comparatists about the working method to be applied. Over the years the CEFL has applied its own method which in short consists of six steps. The *first* step is to select the fields of family law that are most suitable for harmonization. The *second* step is to draft a questionnaire which proceeds from the functional approach. According to this problem-oriented approach questions are posed in purely functional terms without any reference to the concepts of a specific legal system, thus asking what is the underlying problem that a certain legal provision aims to redress. The *third* step is to draw up national reports which not only take the law in the books into account, but also the law in practice. Each legal system may prescribe its list of official sources, but this list, which is only designed to bind judges and courts internally, does not necessarily bind a comparatist. The practical importance of the law as it appears in action also holds true in the field of family law. The national reports are aimed at discovering what practitioners are actually doing with the legal rules. The *fourth* step is to collect and to disseminate the comparative material. In addition to the country-by-country reports which are accessible on the CEFL's website, an integrated and printed version laid out according to the numbers of the questions has been published. This integrated version provides a rapid overview and a straightforward simultaneous comparison of the different solutions within the national systems. The *fifth* step is to draft the Principles of European Family Law. Proposals are made by the members of the Organizing Committee which are discussed with the authors of the national reports (the Expert Group). At this stage a decision must be made between either the 'common core' or the 'better law' approach. The *sixth* and final step is to publish the Principles.

Similarities and differences, convergence and divergence, common law and/or better law are the key expressions which are discussed in the process of indicating the various findings. The main questions boil down to the following: When and why should we build on similarities, convergence and, finally, the common core and how can we cope with differences and divergences, as well as when and why do we opt for the better law approach? In drafting the Principles of Parental Responsibilities these questions were repeatedly posed and finally answered for each specific subject. Many similarities, a great deal of converging tendencies and a common core regarding numerous issues could be detected.

4.3 International and European Instruments

In the field of parental responsibilities, the differences among the European systems are considerably less strong than in other fields of family law. Hence, in the majority of issues CEFL's Principles only restate the common solutions that are generally applied. The harmonisation of the law regarding parental responsibilities within Europe has gradually taken place through the many international and European instruments. In drafting the Principles on Parental Responsibilities 16 conventions by respectively the United Nations, the Hague Conference on Private International Law, the Council of Europe and the European Union, 1 EU Regulation, 4 Declarations of the United Nations, 13 Recommendations and, additionally, the White Paper of the Council of Europe were taken into account.² Although each of these instruments only addresses some specific aspects of the law regarding parental responsibilities, they collectively built the general framework which to a considerable extent has also determined the national systems in Europe. In no other field of family law have so many agreements between states been drafted, concluded, adopted and have become binding.

²BOELE-WOELKI, K./FERRAND, F./GONZÁLEZ BEILFUSS, C./JÄNTERÄ-JAREBORG, M./LOWE, N./MARTINY, D./PINTENS, W., *Principles of European Family Law Regarding Parental Responsibilities*, European Family Law Series no. 16 (2007), 15–19.

4.4 Structure

The publication of 39 Principles regarding Parental Responsibilities,³ including the compilation of the comparative material,⁴ are the result of teamwork to which 26 legal experts from 22 European jurisdictions in the field of comparative family law have contributed. Each section containing a Principle consists of four parts. The text of the Principle itself⁵ is followed by an overview of the relevant international and/or European provisions regarding the issue addressed in the Principle in order to recall the international commitments that have previously been achieved. The international obligations built the framework along which the Principles have been drafted. The comparative overviews and the comments do not only refer to the 22 national reports by the CEFL experts, but include, in addition, the related international and/or European instruments. All four parts belong together.

Preamble

Chapter I: Definitions

Chapter II: Rights of the child

Chapter III: Parental responsibilities of parents and third persons

Chapter IV: Exercise of parental responsibilities

Section A: Parents

Section B: Third persons

Chapter V: Content of parental responsibilities

Section A: The child's person and property

Section B: Maintenance of personal relationships

Chapter VI: Termination of parental responsibilities

Chapter VII: Discharge and restoration of parental responsibilities

Chapter VIII: Procedure

The table of contents indicates which issues are addressed. Essentially, a distinction is made between three different areas. Chapters I, II and VIII contain general rules. To these general rules belong four different parts: first, the Preamble, second, two Principles which define, first, the concept of parental responsibilities and, second, the holders of parental responsibilities. The choice for a broad concept of parental responsibilities necessitates indicating who can be attributed with parental responsibilities and can exercise the necessary rights and duties. CEFL's concept explicitly makes a distinction between parents and third persons. Primarily parents

³BOELE-WOELKI, K./FERRAND, F./GONZÁLEZ BEILFUSS, C./JÄNTERÄ-JAREBORG, M./LOWE, N./MARTINY, D./PINTENS, W., *Principles of European Family Law Regarding Parental Responsibilities*, European Family Law Series no. 16 (2007).

⁴BOELE-WOELKI, K./BRAAT, B./CURRY-SUMNER, I. (eds.), *European Family Law in Action, Volume III: Parental Responsibilities*, European Family Law Series no. 9 (2005).

⁵Enclosed in the Appendix at the end of this contribution.

are in charge of exercising parental responsibilities. However, persons other than parents as well as public bodies can also have parental responsibilities. The relevant international and European human rights instruments have profoundly influenced Chap. 2 which is devoted to the rights of the child. With its five Principles this Chapter forms the main general part of the CEFL Principles. The rights of the child are always to be taken into account in all matters of parental responsibilities. They constitute the principal point of departure along which all other issues should be addressed. Also the procedural aspects are of a general nature. Chapters 3, 4 and 5 address three aspects: the position of parents and third persons, the exercise of parental responsibilities and their content. Chapters 6 and 7, finally, deal with the termination of parental responsibilities and being discharged therefrom.

4.5 Concept of Parental Responsibilities

What are parental responsibilities and who are its holders? In accordance with international and European instruments the CEFL opted for a broad concept of parental responsibilities consisting of a collection of rights and duties that embody the concept of taking care of the child's person and property (Principle 3:1). Concepts like guardianship and custody that are still used in national systems have been abandoned. CEFL's concept of parental responsibilities applies to children from the moment of their birth until they have reached the age of majority. A difference between younger and adolescent children has been recognized, although the indication of an age limit has intentionally been avoided. It not only depends on the child's age but also upon his/her maturity whether his/her opinion should be taken into account.

The Principles refer to the rather long-winded term "holders of parental responsibilities". Normally, the child has two parents who are the holders of parental responsibilities. However, also a person other than a parent, who has no legal ties with the child, can be attributed with and exercise parental responsibilities. Principle 3:2 clarifies this distinction. Primarily, the parents, whose legal parentage has been established, are in charge of the exercise of parental responsibilities. However, physical persons other than the parents as well as public bodies can also have parental responsibilities. According to the CEFL Principles it is thus possible that there might be even more than two holders of parental responsibilities.

4.6 Divorce and Separation

In the case of divorce or the separation of the parents they continue to hold parental responsibilities jointly. Principle 3:10 states that parental responsibilities should neither be affected by the dissolution or annulment of the marriage or other formal relationship nor by the legal or factual separation between the parents. Hence a

divorce or separation has no influence on the attribution of parental responsibilities. The Principle is in accordance with the common core of the legal systems that were surveyed by the CEFL. Consequently, parents who have parental responsibilities should have a continuous equal right and duty to exercise such responsibilities jointly. Exceptions to the joint and equal exercise of parental responsibilities are however recognized because it is realized that parental responsibilities should be exercised by the parents together “whenever possible”. This is expressed in Principle 3:11. The fact that parental responsibilities should be exercised jointly does not mean that parents must act together in all circumstances. This issue is further developed under Principle 3:12(1) which grants the authority to act alone in daily matters. However, Principle 3:12(2) requires that important decisions concerning matters such as education, medical treatment, the child’s residence, or the administration of his or her property should be taken jointly. The Principle contains a non-exhaustive list which serves as an illustration. Not all matters in these areas require a joint decision; this is only so if the matter is important. The Principles do not provide a criterion in order to evaluate whether or not an issue is important. Decisions with a long-lasting effect for the child should, however, be considered as being important. For example, whereas authorizing a child to attend a language course will not be deemed to be an important decision on education requiring the consent of both parents, a change of school would probably be regarded as such. Much, however, depends on the circumstances of the case. Irrespective of whether a matter is to be considered important, a parent should have the right to act alone in urgent matters. In this case the other parent should be informed without undue delay (Principle 3:12 (2)).

Given the fact that the joint exercise of parental responsibilities becomes more complicated after divorce or the separation of the parents, they are encouraged to agree on how to arrange their rights and duties. Principle 3:13(1) lays down the generally acknowledged principle that the parents can make agreements concerning the exercise of parental responsibilities. This means that they may agree on several matters or on a specific issue. The scope of an agreement can cover all aspects of parental responsibilities listed in Principle 3:1, in particular care, protection and education. An agreement between the holders of parental responsibilities may also lead to the sole exercise of parental responsibilities by one of the parents according to Principle 3:15(a); however, both the agreement on joint exercise as well as on sole exercise are subject to the best interests of the child. As a result, the competent authority, usually a court, should scrutinize the agreement from this perspective.

In many cases, however, the parents disagree on their joint exercise of parental responsibilities. This situation has been addressed in Principle 3:14. In the case of a disagreement they may apply to the competent authority, but only if they cannot agree on an important matter, such as the child’s residence or educational matters. If the competent authority is requested to decide the dispute, it should first attempt to attain an agreement between the parties. The competent authority can decide the dispute itself or it can authorize one of the parents to act alone with regard to one or more issues. The second alternative avoids any unnecessary intervention in family life. However, the practical result will often be the same, because deciding on the

most competent parent will be difficult without taking into account the disputed issue itself. Therefore, Principle 3:14(3) leaves it open whether parental responsibilities may be exercised by one holder of parental responsibilities alone or the dispute itself may be decided by the competent authority. Authorizing one of the parents to act alone will be preferable where it can be established that a specific, separable issue must be resolved and one of the holders of parental responsibilities has a sufficient degree of competence or knowledge to pursue the best interests of the child concerning this question. In any case the competent authority must observe the principle of the best interests of the child and also has to take into account the former practice of the parents.

The majority of the Principles which belong to Chap. 4 on the exercise of parental responsibilities are based on the common core which can be found in both the national systems and the international and European instruments. These general rules to be applied were selected as the best solutions. In respect of a few, but important, aspects it was not possible to discover a common approach. Regarding these aspects, a solution was selected which is applied in only a few countries. They are practicable and in line with CEFL's objectives in creating a flexible and efficient system which is also based on equality. This applies to the power of the parents having joint parental responsibilities to act alone in daily matters (Principles 3:12(1)), the obligation of the parent who acted in urgent cases to inform the other parent without undue delay (Principles 3:12(2)), the competence of the competent authority to decide on a dispute or to authorize one of the parents having joint parental responsibilities in case of a disagreement between them (Principles 3:14(3)), the exercise of parental responsibilities by one parent if both parents have made an agreement to that end (Principle 3(15)) and the recognition that parental responsibilities may be exercised by third persons in addition to or instead of the parents (Principle 3:17). Hence, in respect of these issues the CEFL applied the better law approach in order to establish a coherent regulatory scheme.

4.7 Maintenance of Personal Relationships, Residence of the Child and Relocation

The maintenance of personal relationships between the child and his or her parents forms a part of parental responsibilities. Such a maintenance of personal relationships is established by contact. Principle 3:25 prefers contact to "access" because this term is broader and better expresses the bilateral nature of personal relationships. Because the maintenance of personal relationships exists mainly in the child's interests, the child should have his or her own right of contact whereas the parents should have a right and a corresponding duty. Principle 3:25(1) therefore expressly establishes that contact is a right and it implicitly declares that it is also a duty for the parents.

Principle 3:25(2) states that a child should also have a right of contact with relatives other than his or her parents. This includes mainly his or her grandparents. In these cases, there exist close family ties and grandparents can fulfil an important role for the development of the child. Grandparents are not expressly mentioned despite the fact that they enjoy a privileged status according to many family systems. Also with siblings, personal relationships should be maintained. However, Principle 3:25(2) does not establish a list of such relatives. This is in accordance with Article 5 § 1 of the Convention on Contact Concerning Children 2003. This right to contact should exist even against the will of the parent(s). The child's right to maintain relationships with persons other than a parent does create an obligation for parents to enable and support such contact. The question of whether these persons have an actionable right allowing them to have contact even in opposition to the wishes of the parents has not been dealt with in the CEFL Principles. There are good reasons for not enforcing such contact if it seriously disturbs the parent-child relationship. This is recognized by some national systems which do not grant such a right to persons other than parents or which allow more restrictions on this right than they do when the issue at stake is contact between the child and a parent.

Principle 3:25(3) recognizes also that with third persons who are not relatives, close ties can exist. This group embraces a great variety of persons (step-parents, foster parents). Particularly when these persons have fulfilled social family functions, the maintenance of personal relationships is appropriate and generally in the best interests of the child. However, Principle 3:25(3) only states that there "may" be contact; there is no automatic maintenance of personal relations. Since the factual circumstances and the degree of closeness may differ greatly, in these cases there should only be a right for these persons but not an obligation.

Two issues deserve special attention when the parents divorce or separate. Where will the residence of the child be and under which circumstances should it be possible to relocate to a different place or country? In many national systems, the determination of the child's residence is not a separate issue. The child's residence falls under the exception that no common core could be found. The lack of a common core regarding this aspect is due to the fact that, on the one hand, we are witnessing a greater mobility of persons not only within Europe but all around the globe, and, on the other hand, that joint parental responsibilities increasingly lead to equal parenting which eventually results in an alternating residence for the child. These developments are new and are approached differently in the systems surveyed. Legislation is exceptional and judicial decisions differ to a great extent. In this area, the CEFL Principles provide new solutions which to a certain extent are based on the legal practice of some countries. These solutions may function as guidelines not only for legislatures but primarily for the courts and other administrative bodies which are requested to decide on disputes concerning the child's residence.

In accordance with CEFL's approach the decision with whom the child should reside is left to the parents. Principle 3:20(1) recalls that any determination of the child's residence requires the parents to reach an agreement to this effect if they cease to live together. This is consistent with Principle 3:10 which establishes that

parental responsibilities are as such unaffected by the fact that the parents divorce or separate. If they fail to agree on the child's residence, the matter will be deferred to the competent authority which will proceed according to Principle 3:14.

At the time the CEFL Principles regarding Parental Responsibilities were drafted, none of the jurisdictions surveyed had legislated the concept of shared or alternating residence which entails that the child lives with both parents on an alternate basis for a specific period of time.⁶ Other terms that are commonly used to indicate this situation are: joint custody, joint parental responsibility, shared care, shared parenting, co-parenting and residential co-parenting. It started some 20 years ago. Ex-partners who had a very co-operative relationship with each other shared the daily care of the child due to flexible work times and the geographical proximity of their residences. However, when fathers (and fathers' rights organizations) were starting to see alternating residence less as an alternative way of arranging post-separation care, and more as an equality issue, the call for more arrangements regarding alternative residence, even in less appropriate situations, increased.⁷ Principle 3:20(2) deals with alternating residence. Whether an alternating residence should be the rule or an exception is not decided by Principle 3:20(2). It merely establishes that an alternating residence should be possible if this is agreed upon by the holders of parental responsibilities and the competent authority approves such an agreement. The criteria which should be considered by the competent authority are factors such as (a) the age and opinion of the child; (b) the ability and willingness of the parents to cooperate with each other in matters concerning the child as well as their personal situation and (c) the distance between the residences of the parents and to the child's school. Principle 3:20(2) also contemplates the possibility that an alternating residence will be decided upon by the competent authority failing an agreement by the holders of parental responsibilities, if this is considered to be in the child's best interests taking into account the factors mentioned under Principle 3:20(2). Since the ability and willingness of the holders of parental responsibilities is one of the criteria mentioned, an alternating residence should only be ordered by the competent authority failing an agreement in exceptional cases. Undoubtedly, an alternating residence should only be possible if it is in the best interests of the child. The list of factors provides guidelines for scrutinizing any agreement on an alternating residence for the child between the parents. It is also useful when there is no such agreement, but the competent authority is considering whether to decide on an alternating residence. The factors listed reflect the CEFL's concern that notwithstanding the fact that an alternating residence may promote personal relationships with both parents, it may also deprive the child of a stable environment and thus be

⁶NIKOLINA, *Divided Parents – Shared Children, Legal Aspects of (Residential) Co-Parenting in England, the Netherlands and Belgium*, European Family Law series no. 39, Intersentia 2015.

⁷ANTOKOLSKAIA, *Solomo's oordeel nieuwe stijl: verblijfsco-ouderschap in België en Nederland. Over de rol van de wetenschap, invloed van de politiek, en nattevingerwerk in het wetgevingsproces*, Rede uitgesproken bij de aanvaarding van de Marcel Storme leerstoel te Universiteit Gent op 12 mei 2010, p. 7.

harmful for the child. Each case is different. The final decision is to be taken by the competent authority.

Another issue that at the time of the drafting of the CEFL Principles regarding Parental Responsibilities was not statutorily regulated in any family law system of the jurisdictions surveyed by the CEFL concerns the wish of one of the parents to change the child's residence within or outside the jurisdiction. The CEFL decided to introduce a Principle specifically dealing with relocation in order to respond to an ever-increasing mobility in European society which is closely linked to EU citizenship. Relocation is emerging as an important issue in the context of European integration and the free movement of persons and is likely to lead to many disputes. Changing the child's residence within or outside the jurisdiction is such an important matter that it requires the other parent to be informed in advance. Since the determination of the child's residence is considered to be an important matter requiring that parents should act in agreement, the duty to inform is in fact implicit when parental responsibilities are held jointly by the parents. Principle 3:21(2) partially recalls Principle 3:14. When there is no agreement on relocation, the matter must be deferred to the competent authority. Principle 3:21(3) contains a non-exhaustive list of factors which have to be taken into consideration by the competent authority in order to take a decision on relocation. This decision requires that the competent authority tries to find a balance between the right of the child to maintain personal relationships with the non-residential parent and close relatives and persons with whom the child has a close relationship (Principle 3:25) and the right of the residential parent to move in pursuit of a valid purpose, in order to, for example, improve his or her professional situation or to accompany a new partner (free movement rights). Geographical distance and accessibility as well as the personal, particularly the financial, situation of the holders of parental responsibilities are crucial factors. As always, due weight should be given to the child's opinion, having regard to his or her age and maturity.

4.8 Procedural Issues

All five Principles in the Chapter on Procedure are based on the common core. These concern the following issues: It is generally acknowledged and practised that in deciding on or intervening in matters of parental responsibilities the situation of the child should be investigated. To that end, the competent authority should, where necessary, appoint any suitable person or body in order to obtain a clear view of the child's situation. In addition to this more traditional approach the increasing importance of alternative dispute resolution, which is being recognized by all national laws, is acknowledged by the Principles. Also in this field the common core is apparent. Consequently, in all disputes regarding parental responsibilities alternative dispute resolution mechanisms should be available (Principle 3:36). Principle 3:37 (1) stresses that the child should be heard in the context of proceedings that affect him or her. It is recognized, however, that there are situations where such a hearing

could result in more harm than good. If the authority decides not to hear the child it should give specific reasons for this. In this respect a common core is not available and therefore the best solution was selected instead. There is no uniform approach in the national systems as to whether the hearing of the child should take place directly before the competent authority or indirectly before a person or body appointed by the competent authority. The Principles prefer a direct hearing; the court should use the knowledge of experts but should form its own impression. Additionally, the child should be heard in a manner which is appropriate to his or her age and maturity (Principle 3:37 (3)). No specific age limit is given. It is the common core of the majority of the jurisdictions represented in the CEFL that the child should have a special representative appointed in all cases in which the child's interest could be in conflict with those of the holders of PR or in which the welfare of the child is otherwise at risk. This guarantee is provided in Principle 3:38. The appointment of a special representative should take place *ex officio* by an order of the competent authority or may be requested by the child subject to the condition that he or she has sufficient understanding. Finally, the principle of the expeditious and effective enforcement of a decision by the competent authority or an agreement concerning parental responsibilities is approved in Principle 3:39. This is the main rule. Exceptionally, the enforcement may not take place if it is obviously irreconcilable with the child's best interests. Consequently, and subject to the condition that the child has sufficient understanding, a residence or contact order, for instance, should not be enforced against the wishes of the child.

4.9 Impact of the CEFL Principles

By and large, the Parental Responsibilities Principles form a frame of reference which is useful for any legislator. Comparative research has been carried out in the respective field, the material is easily accessible and widely disseminated, similarities and differences are determined, explanations are provided and, finally, while evaluating the solutions common Principles are proposed. They are based on the comparative findings. CEFL's final goal will have been achieved if in the end the final result will acquire a decent standing within the plethora of international and European instruments addressing the parent-child relationship. Additionally, by the empirical testing of the Principles in a number of legal systems one can demonstrate whether they are indeed acceptable and/or are regarded as an improvement on existing national laws. This has been done by Esin Örüçü and Jane Mair in respect of the Principles discussed in this contribution.⁸ Finally, to date the CEFL Principles regarding Parental Responsibilities inspired the Portuguese (Lei do divórcio 2008), Norwegian (Children Act 2010), Croatian (Family Law Act 2013) and Czech (2014)

⁸ÖRÜCÜ, E./MAIR, J. (eds), *Juxtaposing Legal Systems and the Principles of European Family Law on Parental Responsibilities*, European Family Law Series no. 27, 2010.

legislators in reforming the law of divorce and parental responsibilities respectively. More references to the CEFL Principles are to be expected. Recently, the Estonian legislator has been provided with information about CEFL's Principle on alternating residence, however, only after the general elections there in March 2019 the legislative process will be resumed.

Further research might include more extensive comparisons between national provisions on parental responsibilities which are not represented in CEFL's comparative material and the CEFL Model. Since the latter have only partially been incorporated into the law of a few national jurisdiction, it is not possible to test them as a whole from, for example, a social science perspective. The CEFL Principles as such are black letter rules belonging to the law in the books, whereas national parental responsibilities rules are applied in practice. In respect of these rules, qualitative and/or quantitative research can be undertaken, which might reveal that the law is in accordance with the needs of parents and their children, or that the law should be changed. When the latter is the case, the CEFL Principles might provide a better solution than the national system. For example, regarding the issue of the alternating residence of the child after divorce, or that of the relocation of the child, many national systems have not yet provided any legislative guidelines. It will depend on the courts how each individual case will be decided. This creates uncertainty and inequality. In its Explanatory Memorandum on the Recommendation of 2015 on Preventing and Resolving Disputes on Child Relocation, the Council of Europe has acknowledged this lack of guidance. It rightly refers to the CEFL Principle 3:21 in this respect. As stated in the introduction to this contribution, legislative measures will not be taken by the European Commission, since it lacks competence in the field of substantive family law.

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Appendix: Principles of European Family Law Regarding Parental Responsibilities

Preamble

Recognising that, notwithstanding the existing diversities of national family law systems, there is nevertheless a growing convergence of laws;

Recognising that the free movement of persons within Europe is hindered by the remaining differences;

Desiring to contribute to common European values regarding the child's rights and welfare;

Desiring to contribute to the harmonisation of family law in Europe and to further facilitate the free movement of persons within Europe;

The Commission on European Family Law recommends the following Principles:

Chapter I: Definitions

Principle 3:1 Concept of Parental Responsibilities

Parental responsibilities are a collection of rights and duties aimed at promoting and safeguarding the welfare of the child. They encompass in particular:

- (a) care, protection and education;
- (b) maintenance of personal relationships;
- (c) determination of residence;
- (d) administration of property, and
- (e) legal representation.

Principle 3:2 Holder of Parental Responsibilities

- (1) A holder of parental responsibilities is any person having the rights and duties listed in Principle 3:1 either in whole or in part.
- (2) Subject to the following Principles, holders of parental responsibilities are:
 - (a) the child's parents, as well as
 - (b) persons other than the child's parents having parental responsibilities in addition to or instead of the parents.

Chapter II: Rights of the Child

Principle 3:3 Best Interests of the Child

In all matters concerning parental responsibilities the best interests of the child should be the primary consideration.

Principle 3:4 Autonomy of the Child

The child's autonomy should be respected in accordance with the developing ability and need of the child to act independently.

Principle 3:5 Non-discrimination of the Child

Children should not be discriminated on grounds such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, sexual orientation, disability, property, birth or other status, irrespective of whether these grounds refer to the child or to the holders of parental responsibilities.

Principle 3:6 Child's Right to Be Heard

Having regard to the child's age and maturity, the child should have the right to be informed, consulted and to express his or her opinion in all matters concerning the child, with due weight given to the views expressed by him or her.

Principle 3:7 Conflict of Interests

The interests of the child should be protected whenever they may be in conflict with the interests of the holders of parental responsibilities.

Chapter III: Parental Responsibilities of Parents and Third Persons

Principle 3:8 Parents

Parents, whose legal parentage has been established, should have parental responsibilities for the child.

Principle 3:9 Third Persons

Parental responsibilities may in whole or in part also be attributed to a person other than a parent.

Principle 3:10 Effect of Dissolution and Separation

Parental responsibilities should neither be affected by the dissolution or annulment of the marriage or other formal relationship nor by the legal or factual separation between the parents.

Chapter IV: Exercise of Parental Responsibilities

SECTION A: PARENTS

Principle 3:11 Joint Exercise

Parents having parental responsibilities should have an equal right and duty to exercise such responsibilities and whenever possible they should exercise them jointly.

Principle 3:12 Daily Matters, Important and Urgent Decisions

- (1) Parents having joint parental responsibilities should have the right to act alone with respect to daily matters.
- (2) Important decisions concerning matters such as education, medical treatment, the child's residence, or the administration of his or her property should be taken jointly. In urgent cases a parent should have the right to act alone. The other parent should be informed without undue delay.

Principle 3:13 Agreement on Exercise

- (1) Subject to the best interests of the child, parents having joint parental responsibilities may agree on the exercise of parental responsibilities.
- (2) The competent authority may scrutinize the agreement.

Principle 3:14 Disagreement on Exercise

- (1) Where parents having joint parental responsibilities cannot agree on an important matter they may apply to the competent authority.
- (2) The competent authority should promote agreement between the parents.
- (3) Where agreement cannot be reached the competent authority should divide the exercise of parental responsibilities between the parents or decide the dispute.

Principle 3:15 Sole Exercise upon Agreement or Decision

Subject to the best interests of the child a parent may exercise parental responsibilities alone.

- (a) upon agreement between the parents according to Principle 3:13, or
- (b) upon a decision of the competent authority.

Principle 3:16 Sole Exercise by One Parent

If only one parent has parental responsibilities he or she should exercise them alone.

SECTION B: THIRD PERSONS

Principle 3:17 Exercise in Addition to or Instead of the Parents

A person other than a parent may exercise some or all parental responsibilities in addition to or instead of the parents.

Principle 3:18 Decisions in Daily Matters

The parent's partner living with the child may take part in decisions with respect to daily matters unless the other parent having parental responsibilities objects.

Chapter V: Content of Parental Responsibilities

Section A: The CHILD'S Person and Property

Principle 3:19 Care, Protection and Education

- (1) The holders of parental responsibilities should provide the child with care, protection and education in accordance with the child's distinctive character and developmental needs.
- (2) The child should not be subjected to corporal punishment or any other humiliating treatment.

Principle 3:20 Residence

- (1) If parental responsibilities are exercised jointly the holders of parental responsibilities who are living apart should agree upon with whom the child resides.
- (2) The child may reside on an alternate basis with the holders of parental responsibilities upon either an agreement approved by a competent authority or a decision by a competent authority. The competent authority should take into consideration factors such as:
 - (a) the age and opinion of the child;
 - (b) the ability and willingness of the holders of parental responsibilities to

- cooperate with each other in matters concerning the child, as well as their personal situation;
- (c) the distance between the residences of the holders of the parental responsibilities and to the child's school.

Principle 3:21 Relocation

- (1) If parental responsibilities are exercised jointly and one of the holders of parental responsibilities wishes to change the child's residence within or outside the jurisdiction, he or she should inform the other holder of parental responsibilities thereof in advance.
- (2) If the other holder of parental responsibilities objects to the change of the child's residence, each of them may apply to the competent authority for a decision.
- (3) The competent authority should take into consideration factors such as:
 - (a) the age and opinion of the child;
 - (b) the right of the child to maintain personal relationships with the other holders of parental responsibilities;
 - (c) the ability and willingness of the holders of parental responsibilities to cooperate with each other;
 - (d) the personal situation of the holders of parental responsibilities;
 - (e) the geographical distance and accessibility;
 - (f) the free movement of persons.

Principle 3:22 Administration of the child's Property

- (1) The holders of parental responsibilities should administer the child's property with due care and diligence in order to preserve and where possible increase the value of the property.
- (2) In administering the child's property the holders of parental responsibilities should not make gifts unless the gifts are deemed to be made under a moral obligation.
- (3) The income derived from the child's property which is not needed for the proper management of the property or for the maintenance and education of the child may, where necessary, be used for the needs of the family.

Principle 3:23 Restrictions

- (1) The holders of parental responsibilities should not administer property acquired by a child through a testamentary disposition or a gift, if the testator or the donor so instructed.

- (2) Similarly the earnings by the child should not be administered by the holders of parental responsibilities unless the child is not of sufficient age and maturity to decide himself or herself.
- (3) Where transactions can have significant financial consequences for the child the authorisation of the competent authority should be necessary.

Principle 3:24 Legal Representation

- (1) The holders of parental responsibilities should legally represent the child in matters concerning the child's person or property.
- (2) Legal representation should not take place where there is a conflict of interest between the child and the holders of parental responsibilities.
- (3) Having regard to the child's age and maturity, the child should have the right to self-representation in legal proceedings concerning himself or herself.

SECTION B: MAINTENANCE OF PERSONAL RELATIONSHIPS

Principle 3:25 Contact with Parents and Other Persons

- (1) The child and the parents should have the right to obtain and maintain regular contact with each other.
- (2) Contact should be established between the child and his or her close relatives.
- (3) Contact may be established between the child and persons with whom the child has close personal relations.

Principle 3:26 Content of Contact

- (1) Contact comprises the child staying for a limited period of time with or meeting a parent or person other than a parent with whom he or she is not usually living; and any form of communication between the child and such person.
- (2) Such contact should be in the best interests of the child.

Principle 3:27 Agreement

- (1) Subject to the best interests of the child, the parents and the other persons identified under Principle 3:25(2) and (3) may agree on contact.
- (2) The competent authority may scrutinize the agreement.

Principle 3:28 Restrictions

Contact may be restricted, terminated or made subject to conditions by the competent authority if the best interests of the child so require.

Principle 3:29 Information to Parents

A parent should have the right to be informed about matters concerning the personal situation of the child.

Chapter VI: Termination of Parental Responsibilities

Principle 3:30 Termination

- (1) Parental responsibilities should be terminated in the case of the child:
 - (a) reaching majority;
 - (b) entering into a marriage or registered partnership;
 - (c) being adopted;
 - (d) dying.
- (2) If a parent's partner adopts the child of the parent the parental responsibilities in relation to the other parent should be terminated.

Principle 3:31 Death of the Parents

- (1) If parents have joint parental responsibilities and one of them dies the parental responsibilities should belong to the surviving parent.
- (2) If a parent having sole parental responsibilities dies, responsibilities should be attributed to the surviving parent or a third person upon a decision by the competent authority.
- (3) On the death of both parents, of whom at least one parent had parental responsibilities, the competent authority should take protective measures in respect of the person and the property of the child.

Chapter VII: Discharge and Restoration of Parental Responsibilities

Principle 3:32 Discharge of Parental Responsibilities

The competent authority should discharge the holder of parental responsibilities, wholly or in part, where his or her behaviour or neglect causes a serious risk to the person or the property of the child.

Principle 3:33 Request for Discharge of Parental Responsibilities

- (1) The discharge of parental responsibilities may be requested by:
 - (a) any parent having parental responsibilities;
 - (b) the child, and.
 - (c) any institution protecting the interests of the child.
- (2) **The competent authority may also order the discharge of parental responsibilities of its own motion.**

Principle 3:34 Restoration of Parental Responsibilities

Having regard to the best interests of the child, the competent authority may restore parental responsibilities if the circumstances that led to the discharge no longer exist.

Chapter VIII: Procedure

Principle 3:35 Competent Authority

- (1) All decisions on parental responsibilities should be taken by the competent authority which can either be a judicial or an administrative body.
- (2) Where necessary, the competent authority should appoint any suitable person or body to investigate the child's circumstances.

Principle 3:36 Alternative Dispute Resolution

In all disputes regarding parental responsibilities alternative dispute resolution mechanisms should be available.

Principle 3:37 Hearing of the Child

- (1) Subject to Principle 3:6, the competent authority should hear the child in all proceedings concerning parental responsibilities but if it decides not to hear the child it should give specific reasons.
- (2) The hearing of the child should take place either directly before the competent authority or indirectly before a person or body appointed by the competent authority.
- (3) The child should be heard in a manner appropriate to his or her age and maturity.

Principle 3:38 Appointment of a Special Representative for the Child

In proceedings concerning parental responsibilities in which there could either be a serious conflict of interests between the child and the holders of parental responsibilities or in which the welfare of the child is otherwise at risk, the competent authority should appoint a special representative for the child.

Principle 3:39 Enforcement

- (1) Failing voluntary compliance, a decision by the competent authority and an enforceable agreement concerning parental responsibilities should be enforced without delay.
- (2) Enforcement should not take place if it is manifestly contrary to the best interests of the child.

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