Training module on Parental responsibility in a cross-border context, including child abduction

National sections

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National section

AUSTRIA

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?


In general, both parents are responsible for their child. § 144 ABGB stipulates shared custody for legitimate children whereas § 166 ABGB provides for the sole custody of the mother for an illegitimate child.

This procedure is covered by the Austrian Law on Non-Contentious Jurisdiction (Außerstreitgesetz; AußStrG).

There are a lot of discussions going on at the moment, especially concerning the custody of children born out of wedlock. The current Austrian rule quoted above leads to a lot of criticism.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

The procedure is governed by the Austrian Law on Non-Contentious Jurisdiction (Außerstreitgesetz; AußStrG) which foresees a procedure in a contradictory way within the competence of the district courts (§ 104a Austrian Law on Jurisdiction (Jurisdiktionsnorm; JN). The decisions are immediately enforceable (§ 110 AußStrG). §§ 45 - 61 AußStrG provide for appeals to the Regional Courts, §§ 62 -71 AußStrG for further appeals to the Supreme Court (Oberster Gerichtshof) concerning questions of general interest (§ 62 AußStrG).

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

§ 109 Austrian Law on Jurisdiction (Jurisdiktionsnorm; JN) stipulates the competence of the location of habitual residence of the child, subsidiary the habitual residence of the legal representative, subsidiary the habitual residence of a parent; subsidiary the Vienna Inner City District Court (Bezirksgericht Innere Stadt Wien).

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

§ 107 para 2 Austrian Law on Non-Contentious Jurisdiction (Außerstreitgesetz; AußStrG) provides for the possibility of provisional custody; § 215 para 1 Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) states a competence of the child welfare authority in cases of imminent danger. Then, this authority is competent to take specific measures for the best interest of the child without delay.
5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

Under § 110 para 1 Austrian Law on Non-Contentious Jurisdiction (Außerstreitgesetz; AußStrG) the applicability of the Austrian Act on the Enforcement of Judgments (Exekutionsordnung; EO) is excluded. § 110 para 2 to 4 AußStrG in connection with § 79 AußStrG provide for coercive instruments such as fines, imprisonment and the handing over of the child by force with the active participation of a judicial officer.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

§ 105 Austrian Law on Non-Contentious Jurisdiction (Außerstreitgesetz; AußStrG) provides for the (compulsory) hearing of the child. The hearing can also be done by an expert or the child welfare authority in cases where the child is younger than 10 years, or its state of health/maturity would render it necessary.

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

Bundesministerium für Justiz, Abt. I 10, Museumstraße 7, A-1070 Wien (Vienna)

www.bmj.gv.at

8. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

No.

B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?


2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

§ 64a Austrian Code of Civil Procedure (Zivilprozessordnung; ZPO): If legal aid was granted in one MS, the decision on legal aid will also cover recognition and enforcement procedure.

§ 64 para 1 sub 5 ZPO: Legal aid also covers travel costs of the applicant.
§ 68 para 1a ZPO: If the enforcement procedure has not started one year after the decision was rendered, the court seized for the enforcement procedure has to review *ex officio* whether the conditions for granting legal aid are still met.

§ 64 para 1 sub 3 ZPO: The granting of legal aid will also cover pre-litigation advice.

§ 64b ZPO: Legal aid will also cover extrajudicial dispute resolution in disputes concerning neighbourhood rights.

3. **Is your country a contracting party to any bilateral or international instruments on family law?**

   - **Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children (ESÜ) Europäisches Übereinkommen v 20.5.1980 über die Anerkennung und Vollstreckung von Entscheidungen über das Sorgerecht für Kinder und die Wiederherstellung des Sorgerechts** BGBl 1985/321; Europäisches Sorgerechtsübereinkommen)

   - **Convention on jurisdiction, applicable law and recognition of decrees relating to adoptions (HAdoptÜa Übereinkommen v 15.11.1965 über die behördliche Zusammenarbeit, das anzuwendende Recht und die Anerkennung von Entscheidungen auf dem Gebiet der Annahme an Kindesstatt, BGBl 1978/581)**


4. Are there any databases or online tools providing information on family law matters available in your country?

- The **EJN for civil and commercial matters** provides a lot of information on these issues:
  
  
  
  On maintenance claims: [http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_aus_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_aus_en.htm)
  
  For practical hints and comprehensible explanations of the relevant provisions: [https://www.help.gv.at/Portal.Node/hlpd/public/content/k504/Seite.5040000.html](https://www.help.gv.at/Portal.Node/hlpd/public/content/k504/Seite.5040000.html)
  
  **Federal Ministry of Justice**, list of relevant links:
  
  [http://www.justiz.gv.at/internet/html/default/8ab4a8a422985de30122a913e4486251.de.html](http://www.justiz.gv.at/internet/html/default/8ab4a8a422985de30122a913e4486251.de.html)
  
  
  All **Austrian jurisprudence** of the Supreme Court (and partially of the Courts of Appeal as well as the Regional Courts) is available for free: [https://www.ris.bka.gv.at/Jus/](https://www.ris.bka.gv.at/Jus/)
  
  All provisions of **Austrian law** can be requested for free: [https://www.ris.bka.gv.at/Bundesrecht/](https://www.ris.bka.gv.at/Bundesrecht/)

5. Please provide information on accessing and applying foreign family law in your country.

   a. Austria is party to the European Convention of 1968 on Information on Foreign Law
   
   b. § 4 IPRG: All courts may submit requests to the Federal Ministry of Justice for information on foreign law
   
   c. EJN for civil and commercial matters
   
   Additional Remark: All provisions of Austrian law can be requested for free: [https://www.ris.bka.gv.at/Bundesrecht/](https://www.ris.bka.gv.at/Bundesrecht/)
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

2 Ob 272/05x: entry into force; Art 3 para 2 Br II bis
3 Ob 213/07f: Art 9 Br II bis
7 Ob 171/09m: Art 19 Br II bis
5 Ob 173/09s: Art 10 Br II bis
6 Ob 181/09z, 1 Ob 254/11a: relation between Br II bis and the Hague Convention on Certain Civil Aspects of International Child Abduction
2 Ob 90/10i: competence; Art 10 Br II bis
5 Ob 194/10f, 2 Ob 228/11k: habitual residence; Art 8 Br II bis
2 Ob 19/11z: jurisdiction, competence; Art 14 Br II bis

All quoted Supreme Court decisions can be found under the following link leading to a data base: https://www.ris.bka.gv.at/Jus/

The user of this data base just has to enter the reference number of the file without blanks!
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Kaller, Europaweite Durchsetzung von Obsorge- und Besuchsrecht, FamZ 2006, 37;

Kaller, Zur Kindesentführung in der neuen Brüssel II-VO, FamZ 2006, 178;


Kaller, Der Anwendungsbereich der Verordnung Brüssel IIa, iFamZ 2007, 168;

Schütz, Anerkennung ausländischer Statusentscheidungen, ÖStA 2007, 101;

Nademleinsky/Neumayr, Internationales Familienrecht Rz 08.01 f; 08.29 ff; 08.60 ff;

Holzmann, Brüssel IIa VO: Elterliche Verantwortung und internationale Kindesentführungen (2008);

Ch. Miklau, Gemeinsame Obsorge, Kindesentführung und VO Brüssel IIa, iFamZ 2010, 133;

Nademleinsky, Altes und Neues zur Kindesentführung, EF-Z 2010, 104;

Rechberger/Simotta, Zivilprozessrecht (2011) Rz 149 ff;

Nademleinsky in Gitschthaler/Höllwerth, Ehe- und Partnerschaftsrecht (2011) 886 ff (nur ehelrechtliche Teile);


Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)

Schütz, Zwischenstaatliche Vereinbarungen, die für Familienrichter bedeutsam sein könnten, ÖRZ 2005, 237 f;

Fucik, Kindesentführung und Sorgerecht, iFamZ 2007, 218;

Fucik, Internationales Seminar zur Kindesentführung in Prag am 16. und 17.10.2007, iFamZ 2008, 55;

Schütz/Anzinger in Burgstaller/Neumayr, Internationales Zivilverfahrensrecht, Kap 54;

Kaller, Zur Kindesentführung in der neuen Brüssel II-VO, FamZ 2006, 178;

Mayr/Fucik, Das neue Verfahren außer Streitsachen (2006) Rz 432 – 432g;

Nademleinsky/Neumayr, Internationales Familienrecht Rz 09.01 ff;

Rieck, Kindesentführung und die Konkurrenz zwischen dem HKÜ und der EheEuGVVO 2003 (Brüssel IIa), NJW 2008, 182;

Holzmann, Brüssel IIa VO: Elterliche Verantwortung und internationale Kindesentführungen (2008); Beck, Kindschaftsrecht (2009) Rz 712 f; 724 ff;

Fucik/Miklau, Der Kinderbeistand im Rückstellungsverfahren nach Kindesentführung, in Barth/Deixler-Hübner, Handbuch Kinderbeistandsrecht (2011) 295;

Lehner, Aufgaben des Kinderbeistands im Verfahren nach dem HKÜ, ebd 307.
Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)

Fucik/Kloiber, AußStrG, § 105; Rz 1 ff;
Deixler-Hübner in Rechberger, AußStrG (2006) § 105 Rz 1 ff;
Deixler-Hübner, Die neuen familienrechtlichen Verfahrensbestimmungen, in Ferrari/Hopf, Reform des Kindschaftsrechts (2001) 115;
Fucik, Zur Befragung Minderjähriger nach dem KindRÄG, ÖA 2002, 246
Fucik, Kinderbeistand und Kindesanhörung, IFamZ2010, 229

Family Mediation

Kloiber, Die Mediations-Richtlinie und ihre Umsetzung in Österreich; ZfRV 2008/16;
Roth/Egger, Die EU-Mediationsrichtliche, exolex 2009; 538
Fucik, EU-MediatG und ZivMediatG, ÖJZ 2011/97
National section

BELGIUM

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

- Articles 223 and 371 to 475septies of the Civil Code
- the 8 April 1965 Act on the protection of youth ("Loi du 8 avril 1965 relative à la protection de la jeunesse")
- Articles 138 in fine, 872, 931, 1232 to 1237, 1256, 1280, 1290, 1293, 1294 and 1298 of the Judicial Code

To our knowledge, there are currently no governmental reform proposals. However, reform proposals from individual members of the Federal Parliament are pending before the Parliament. One of those proposals aims at modifying the current procedural law in the area of family law. It has been adopted by one of both chambers of the Parliament and has been pending approval of the other since July 2011.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

The procedure applicable when a court gives a judgment on the return of a child is that provided by Articles 1322bis to 1322quaterdecies and 1034bis to 1034quinquies of the Judicial Code. Such procedure is introduced by means of an application (Article 1034bis) before the president of the court of first instance (Article 1322bis, § 1, 3°) and is treated as an urgent procedure (Article 1322sexies).

In accordance with Article 1322sexies, al. 2 to 4, of the Judicial Code, no appeal can be lodged against:

- a judgment on non-return given by a Belgian judge in accordance with Article 11.6 of the Brussels IIbis Regulation;
- a judgment given by a Belgian judge ordering provisional measures in accordance with Article 11.4 of Brussels IIbis Regulation; or
- a judgment given by a Belgian judge in accordance with Article 1322decies, § 5, of the Judicial Code.

However, no provision prohibits that an appeal be lodged against a judgment entailing the return of the child. Such a judgment thus can be appealed.

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1 Particular provisions of Belgian Acts cannot be directly accessed through a hyperlink. Most hyperlinks included in the Belgian section therefore lead to a copy of those provisions as in force on 10 August 2012. Possible future legislative changes thus will not appear.

2 The “Loi du 8 avril 1965 relative à la protection de la jeunesse” contains provisions for the protection of a child both in general and in the case where a child is suspected of having committed a criminal offense. The protection of a child suspected of having committed a criminal offense does not fall under the scope of the Brussels IIbis Regulation and shall not be examined in the present Section.

3 Such proposals are less likely to be passed than a governmental proposal.

3. **In case no court of a member state has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?**

According to **Article 33 of the Belgian Code of Private International Law**, Belgian courts have jurisdiction to hear a cross-border parental responsibility case when:

- the defendant has his domicile or his habitual residence in Belgium;
- proceedings abroad are impossible or unreasonable to ask for and the case is closely connected to Belgium;
- the child has his habitual residence in Belgium or has Belgian nationality at the time of the filing of the claim;
- if the case is about the administration of the child’s property: when that property is located in Belgium (and only to the extent that it is located in Belgium);
- if the case is about the exercise of custody or the right of the parents to have a relationship with their children: when the Belgian courts have jurisdiction over a case about divorce, separation or nullity of a marriage;
- in urgent cases, when the person concerned is on the Belgian territory\(^5\).

4. **Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?**

Belgian law does not provide a list of the provisional, including protective, measures that can be ordered in urgent cases to protect the child’s best interests. **Articles 387bis and 387ter of the Civil Code** provide the possibility, for a judge, to order provisional measures in the area of parental responsibility. However, no list of such measures is provided.

Article 52 of the **“Loi du 8 avril 1965 relative à la protection de la jeunesse”** provides a list of provisional measures that can be ordered by a judge for the protection of a child, during the course of proceedings on the protection of that child pending before the same judge only.

5. **Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.**

According to **Article 387ter of the Civil Code**, when one of the parents refuses to comply with a judgment on a right of access or on the custody of a child, the judge can:

- authorise the victim of such failure to comply to have recourse to the measures of constraint that he indicates in the child’s interest; and

\(^5\) Some of the grounds of jurisdiction provided by Article 33 are the same as those provided by the Regulation. When faced with a case where such a ground is available, a Belgian court must of course exercise its jurisdiction in accordance with the Regulation.
order a periodic penalty payment.

According to Article 1322undecies of the Judicial Code, the judge who orders the return of a child in accordance with Article 11.8 of Brussels IIbis Regulation provides the enforcement modalities of his judgment with regard to the child’s interest and, if necessary, indicates who is authorised to accompany the bailiff for the enforcement. This confirms that a bailiff can be appointed. Besides, a periodic penalty payment can be ordered.

It should be mentioned that Articles 431 and 432 of the Belgian Criminal Code provide that it is an offense to fail to present the child to the person or institution entitled to have custody over him. When the failure lasts for more than 5 days, the offense is considered severe enough to justify a demand for extradition. This, however, does not guarantee the return of the child himself.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

The two main procedures on the hearing of the child under Belgian law are the following.

1) Article 931 of the Judicial Code provides that a child “of discernment” can be heard in all proceedings that concern him, at his request or by order of the judge. When the child asks to be heard, the judge can only refuse to hear him by giving a judgment justified with regard to the capacity of discernment of the child. When it is the judge who decides to hear the child, the child can refuse to be heard. The child can be heard by the judge himself or by a third person appointed by the judge. The child is heard alone except when the judge considers it in his interest to be accompanied by someone. The hearing does not make the child a party to the proceedings. The parties to the proceedings do not receive a transcript of the child’s hearing but have an access to such transcript. The request of the child for being heard is not subject to any formality requirement. The child can simply write a letter to the judge or ask one of his parents to orally pass his request on to the judge. The question of whether the child is “of discernment” is one of fact and one for the judge to decide.

2) Article 56bis of the aforementioned “Loi du 8 avril 1965 relative à la protection de la jeunesse” provides that when several people sharing the custody over a child are opposed in a procedure, the child who is at least 12 years old must be given an opportunity to be heard on the questions concerning:

- the administration of his property;
- the exercise of a right of visit; or
- the appointment of the person who shall replace one or both of his parent(s) in exercising custody.

This provision has a narrower scope than Article 931 of the Judicial Code: it only applies in certain proceedings, on certain questions and for children who are at least 12. When those three requirements are met, it is mandatory for the judge to offer to the child the opportunity to be heard. In such a case, the judge must hear the child himself.
However, Article 931 applies to all civil procedures where a child is concerned, so many cases that do not fall within the scope of Article 56bis do fall under Article 931.

7. **Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?**

   The “Service de la Coopération internationale civile”, which is a part of the Federal Ministry of Justice.

8. **Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

   Not to our knowledge.

**B. Horizontal issues**

1. **How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

   When Directive No 2008/52/EC was adopted, the Belgian State considered that implementing measures were unnecessary since Articles 1724 ff. of the Judicial Code already complied with the Directive requirements.

2. **How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

   The Belgian domestic Acts implementing Directive No 2003/8/EC are:
   - the “Loi du 21 février 2005 modifiant le Code judiciaire en ce qui concerne la médiation”;
   - the “Loi du 23 novembre 1998 relative à l’aide juridique”;
   - the “Loi du 15 juin 2006 modifiant le Code judiciaire en ce qui concerne l’aide judiciaire”; and
   - the “Loi du 1er juillet 2006 modifiant le Code judiciaire en ce qui concerne l’assistance judiciaire”.

   The relevant provisions of those Acts modified or inserted several Articles in the Judicial Code, amongst which the most relevant are the following:
   - **Articles 508/1 ff.** – See especially Articles 508/24 and 508/25; and
   - **Articles 664 ff.** – See especially Article 665, 7°, Article 668, c, Article 699bis and Article 699ter.
3. **Is your country a contracting party to any bilateral or international instruments on family law?**

Yes. Belgium is a party to the following instruments in the area of maintenance:

- the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children;
- the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children.

To our knowledge, Belgium is not a party to any international instrument in the areas of divorce and matrimonial property.

In other areas of family law, Belgium is a party to the following international instruments:

- the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption;
- the Hague Convention of 12 June 1902 relating to the settlement of guardianship of minors;
- the Luxembourg Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;

Belgium is also a party to bilateral instruments about more general matters such as, amongst other things, the recognition of foreign official deeds.

This is of course without prejudice to EU related instruments (such as the 23 November 2007 Protocol, for example).

4. **Are there any databases or online tools providing information on family law matters available in your country?**

The official website for Belgian legislation is the following: [www.ejustice.just.fgov.be/cgi_loi/loi.pl](http://www.ejustice.just.fgov.be/cgi_loi/loi.pl).

The “Belgian Federation of Notaries” provides accessible information on Belgian family law matters on its website “[www.notaire.be](http://www.notaire.be)“.

The “Association for legislation on aliens” provides accessible information on international aspects of family law on its website “[www.adde.be](http://www.adde.be)“.

The “European Judicial Network in Civil and Commercial Matters” provides accessible information on Belgian family law on its website:

- Information on maintenance obligations: [http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_bel_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_bel_en.htm)
The “European Judicial Atlas in Civil and Commercial Matters” provides accessible information on:
Fee-charging legal databases are also available, which are mainly used by lawyers (e.g. [www.jura.be](http://www.jura.be); [www.jurisquare.be](http://www.jurisquare.be)).

5. **Please provide information on accessing and applying foreign family law in your country.**

   Article 15 of the Belgian Code of Private international law provides that the content of the foreign law applicable to a case is determined by the judge and that foreign law is applied according to the way it is interpreted in the relevant foreign country. When the judge cannot determine the content of foreign legislation applicable to a case, he can request the cooperation of the parties. However, when it is clearly impossible to determine the content of the foreign law in due course, Belgian law is applied instead.

   To our knowledge, there is no official institution or mechanism providing access to foreign family law.

   However, the “Association for legislation on aliens” has a documentation centre in which it provides foreign legislation in several areas of law, including family law. The list of the States and areas concerned can be found on the website of the Association (“[www.adde.be](http://www.adde.be)”), along with links to a few foreign websites providing access to foreign legislation, where such websites exist.
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility


The concept of habitual residence covers the place where a person has established the permanent or habitual centre of his interests, with the intention to give it a permanent nature. The Brussels IIbis Regulation does not provide any condition of duration. In the case of a short stay or where a doubt exists, it is the intention to reside in a specific place that is decisive.


The habitual residence is the place where a person has established the permanent or habitual centre of his interests, with the intention to give it a permanent nature. To determine this habitual residence, all factual circumstances should be taken into account. The habitual residence is a factual concept, depending on objective elements that prove that a person has been living for an extended period of time in a place and has established certain professional and personal relationships with that place. Accordingly, registration with the population register is not enough to establish that a person has his habitual residence at the place of registration.


The Belgian court of appeal does not have jurisdiction to hear a father's claim for principal custody since the president of the court of first instance, seized in accordance with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, ordered the return of the child to Portugal because the removal of the child to Belgium by his father was unlawful. According to Article 10 of the Brussels IIbis Regulation, in the case of a wrongful removal, the courts having jurisdiction to decide on custody are those of the member state where the child was habitually resident immediately before the wrongful removal. Since a claim for principal custody has been lodged by the mother in Portugal and the appeal is still pendant, the Belgian judge should have stayed the proceedings in accordance with Article 19.2 of Brussels IIbis Regulation until the establishment of the jurisdiction of the first seized Portuguese court.


Article 15 of the Brussels IIbis Regulation provides a transfer mechanism that allows a judge having jurisdiction to transfer the case to the court of another member state that is “better placed to hear the case” and with which the child has a “particular connection”.

The objective requirements set out in Article 15 of Brussels IIbis Regulation are met in this case. Firstly, the judge first seized has taken the initiative of the transfer, which has been accepted by at least one of the parties (Article 15. 2). Secondly, the “particular connection” between the child and the State of transfer is established by a number of signs: habitual residence, nationality and habitual residence of the
person who holds parental responsibility (Article 15.3). Finally, the transfer has been done taking into account “the best interests of the child”.

- Brussels (juvenile chamber), 5 May 2009, Rev. trim. dr. fam., 2011, liv. 3, p. 707

On parental responsibility, the EU legislator has set the habitual residence of the child at the time when the court is seized as a general criterion of proximity in the best interests of the child. Determination of the place of residence is based on an intentional factor and on a permanency factor, which are to be judged in the light of all relevant factual elements.

In this case, the moving of the child to Poland with the permission of her father had a temporary nature that does not imply a change of the child’s habitual residence. By deciding unilaterally to relocate the child’s residence to Poland, the mother has acted in violation of the rights of custody of the father, who is co-holder of parental responsibility over the child and of the right to choose the child’s place of residence. This is according to both Belgian and Polish law. These facts constitute a wrongful retention under Article 2.11 of the Brussels IIbis Regulation, even if the mother was not aware of it.


According to Article 19 of the Brussels IIbis Regulation, in a case of lis pendens, the court first seized has to decide first on its international jurisdiction, which must be determined at the moment it was seized.

The ground for jurisdiction is the place of habitual residence. This notion, undefined by the Regulation, is applied by the judge as a question of fact and on a case by case basis. The meaning of this expression has to be construed in accordance with the goals and objectives of the Regulation, under the control of the European Court of Justice. The habitual residence does not solely consist in objective criteria; it also carries an intentional element.

- Brussels (juvenile chamber), 28 November 2006, Rev. trim. dr. fam., 2008, liv. 1, p. 90

According to Article 12.3 of the Brussels IIbis Regulation, Belgian courts have jurisdiction to validate an agreement on custody concluded in Morocco regarding a Moroccan child residing in Morocco. This is because the person who has custody holds Belgian citizenship and resides in Belgium, because all parties have accepted the jurisdiction of the Belgian court, and because this is in the best interest of the child since no other court can efficiently intervene.


Claims on parental responsibility fall within the scope of the Brussels IIbis Regulation. This Regulation confers jurisdiction to the courts of the member state in which the child has his habitual residence, i.e., in this case, to the Belgian courts. However, since a claim on the same subject is pending as a part of legal separation proceedings in Italy, Article 19.2 of the Brussels IIbis Regulation is applicable. The fact that the claim before the Belgian court is pending as a part of divorce proceedings does not prevent both claims concerning the children to have the same
cause, namely the dispute of spouses about the exercising of parental responsibility. There is thus a clear risk of conflicting judgments and the Belgian proceedings must be stayed until the Italian court, which is the court first seized, establishes its jurisdiction.


  A Belgian judge seized of a claim to fix the modalities of exercising the rights of custody over two children holding both Dutch and Swedish citizenship as a part of divorce proceedings, while, at the time of the claim, the mother, who was granted the right of principal custody, has her residence in Germany with the children, cannot transfer the case to a German court better placed to hear the case in accordance with Article 15 of the Brussels IIbis Regulation when both parties have firmly opposed to such a transfer.

  Under the Regulation, children must be heard in proceedings that concern them. In a case of urgency, Article 41 of Brussels IIbis Regulation provides the issuing of a certificate to insure that the judgment to be given can be directly enforceable in other member states. However, in a case of urgency, the judgment can be given without any preliminary hearing of the child if the judge did not materially have the time to hear him.


  In an international situation, any Belgian court seized of a dispute about custody and residence has to verify its jurisdiction.

  A change of habitual residence of the child during the proceedings can disrupt the balance of international jurisdictions. Article 15 of the Brussels IIbis Regulation allows the transfer of a case to a court that is better placed to hear the case. The court can raise the question of its jurisdiction *ex officio*. Where the parties have not debated on this question during the proceedings, the court shall reopen the proceedings. Moreover, the agreement of one of the parties is required for the transfer of the case to the foreign court. Finally, the court has to ensure that the foreign court accepts jurisdiction within six weeks.


  The first seized Belgian court shall decide on all aspects of parental responsibility. In accordance with Article 20 of the Brussels IIbis Regulation, its jurisdiction is not limited to taking provisional or protective measures.


  Considering the foreign element in the dispute, this case on parental responsibility falls within the scope of the Brussels IIbis Regulation, which provides that the courts having jurisdiction are those of the State in which the child has his habitual residence, except in cases of wrongful removal, urgency or where the conditions provided in Article 12 are fulfilled.
The jurisdiction of a Belgian judge on parental responsibility, more specifically on right of custody and right of access following Article 2.7 of the Brussels IIbis Regulation, is established according to Article 8.1 of the Regulation. The member state considered as the natural forum for disputes about parental responsibility is the one where the children have their habitual residence. This has to be determined at the time when the court is seized.

Any judgment on the ‘right of access’ is directly recognised and enforceable on the condition that it has been certified in the member state of origin (Article 41.1 of the Brussels IIbis Regulation). The certificate guarantees that certain procedural guarantees have been respected during the proceedings. In this case, all parties have had the opportunity to be heard. Under Belgian law, there is no right to be heard for the minor children involved in this case. Considering their young age, these children do not possess the required “discernment”.

When the ‘right of access’ applies to a cross-border case, the judge issues the certificate ex officio when the judgment becomes enforceable.

The habitual residence is determined at the moment the court is seized and consists in the place where the person has established his permanent or habitual centre of interest, with the intention to give it a permanent nature. To determine the habitual residence of a child, the judge must examine the factual circumstances that show the child’s ties to the member state that is the permanent or habitual centre of his interests (i.e., among others, the place where he lives and goes to school and where his afterschool activities take place). This does not include occasional stays or holidays, even of a long duration.

The Belgian court does not have jurisdiction under Article 8 of the Brussels IIbis Regulation if the child’s habitual place of residence is not located in Belgium. However, the courts of a member state have jurisdiction to take provisional and protective measures concerning the persons on their territory, even when, according to the Regulation, the court of another member state has jurisdiction to hear the merits of the case (Article 20 of the Brussels IIbis Regulation).

Since the child has been living in Germany since his birth and therefore has his habitual residence there, according to Article 8 of the Brussels IIbis Regulation, the German judge has jurisdiction over disputes about parental responsibility over that child. The derogation provided by Article 12 cannot be applied in this case to establish the jurisdiction of the Belgian court because it is not enough that a divorce case is pending in Belgium. The jurisdiction of the court also has to be accepted unequivocally by the spouses, which was not the case here. Moreover, the jurisdiction of the Belgian court to take provisional and protective measures on parental responsibility over the child is not justified by Article 20 since, according to that Article, the courts of a member state can only take provisional and protective measures concerning a person who is on the territory of that State. In this case, the child is in Germany.
The jurisdiction of a Belgian judge on parental responsibility, more specifically on the right of custody and the right of access according to Article 2.7 of the Brussels IIbis Regulation, is established in accordance with Article 8.1 of the Regulation. The member state considered as the natural forum for disputes on parental responsibility is the one where the children have their habitual residence. This has to be determined at the time when the court is seized. The judge having jurisdiction at the moment the court was seized because the child’s residence was located in his country continues to have jurisdiction until the end of the proceedings even if the place of residence is moved to another country during the proceedings.

At the time when the case was brought before the court, the habitual residence of the defendant was located in Belgium. According to an extract of the population register, the child was, at that time, registered with both parties at a Belgian address. Therefore, the domicile of the defendant and her habitual residence, meaning the habitual centre of her interests with the intention to give it a permanent nature, is located in Belgium and has been so for several years.

The exceptions to the above mentioned principle provided by Articles 9, 10 and 12 of Brussels IIbis Regulation are not applicable in this case. The exception provided by Article 9 is subject to strict conditions, among which one that is not satisfied in this case, namely a lawful moving. As regard to the claim that the child now already has her habitual residence in Italy, the member state where the child had his habitual residence just before the wrongful removal keeps its jurisdiction (Article 10.1). Finally, Article 12 cannot be applied in this case, notably because there has not been any agreement between the parties as to jurisdiction.

Any decision on the ‘right of access’ is recognised and directly enforceable in another member state on the condition that it has been certified in the member state of origin (Article 41.1 of the Brussels IIbis Regulation). The certificate guarantees that certain procedural guarantees have been respected during the proceedings. In this case, all parties have had the opportunity to be heard. Under Belgian law, there is no right to be heard for the minor child who, moreover, resides in Italy. Considering her young age, the child does not possess the required “discernment”.

When the right of visit applies to a cross-border case at the time of the judgement, the judge issues the certificate ex officio when the judgment becomes enforceable. For that reason, the certificate in question is annexed to the judgment.

Since the children are living both in Belgium and in Germany, their habitual residence is not clearly determined. The moving of the mother to Germany, accompanied by her children, can therefore not be considered as a wrongful removal of the child under Article 10 of the Brussels IIbis Regulation. Considering the circumstances, the German court first seized was lawfully seized. Therefore, the Belgian court, before which the same claims were brought by the father, stays the proceedings (Articles 8, 10 and 19 of the Brussels IIbis Regulation).
Before her removal to Germany, the child had her habitual residence in Belgium under EU law since she was born in Belgium, had her domicile there and lived there.

It is in violation of the principle of parental responsibility and of the right of custody of the father that the mother decided unilaterally and without the consent of the father to move the place of residence of the child. Consequently, in accordance with Articles 8 and 10 of the Brussels IIbis Regulation, the court of Brussels has jurisdiction to hear the claims about parental responsibility and about the right of custody. Article 9 of Brussels IIbis Regulation is not applicable in this case since it presupposes a lawful moving of the child.

- Cassation Court (2nd chamber), 21 November 2007, Pas., 2007, liv. 11, p. 2084 (http://www.cass.be)

When a court of a member state having jurisdiction is seized about parental responsibility over a child, that court keeps having jurisdiction even when the child’s habitual residence is moved to another member state in the course of the proceedings. To transfer the case to a court of that other member state, the seized court shall apply the cooperation procedure provided by Article 15 of the Brussels IIbis Regulation.

- Court of Mons (2nd Ch.), 27 June 2006, J.T., 2007, liv. 6252, p. 53

According to Article 20 of the Brussels IIbis Regulation, the courts of a member state can take provisional or protective measures on the custody of children present in that member state, even when the court of another member state has jurisdiction under and has already been seized in the same matter to decide on the merits of the case.
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**Family Mediation**


Annex

**Articles 223 of the Civil Code**

Si l'un des époux manque gravement à ses devoirs, le juge de paix ordonne à la demande du conjoint, les mesures urgentes et provisoires relatives à la personne et aux biens des époux et des enfants.

Il en est de même à la demande d'un des époux si l'entente entre eux est sérieusement perturbée.

[Si un époux a commis a l'encontre de l'autre un fait visé aux articles 375, 398 à 400, 402, 403 ou 405 du Code pénal ou a tenté de commettre un fait visé aux articles 375, 393, 394 ou 397 du même Code, ou s'il existe des indices sérieux de tels comportements, l'époux victime se verra attribuer, sauf circonstances exceptionnelles, la jouissance de la résidence conjugale s'il en fait la demande.] <L 2003-01-28/33, art. 3, 014; En vigueur : 22-02-2003>

Le juge de paix peut notamment interdire à l'un des époux, pour la durée qu'il détermine, d'aliéner, d'hypothéquer ou de donner en gage des biens meubles ou immeubles, propres ou communs, sans l'accord de l'autre; il peut interdire le déplacement des meubles ou en attribuer l'usage personnel à l'un ou l'autre des époux.

Sont des actes d'aliénation, tous les actes visés à l'article 1er de la loi du 16 décembre 1851 et à l'article 8 de la loi du 10 février 1908.

Le juge de paix peut obliger l'époux détenteur des meubles à donner caution ou à justifier d'une solvabilité suffisante.

**Articles 371 to 475septies of the Civil Code**

**TITRE IX. - DE [L'AUTORITE PARENTALE]. <L 31-03-1987, <art>. 39>.**

<L 1995-04-13/37, <art>. 5, 003; En vigueur : 03-06-1995>

**Art. 371. <L 1995-04-13/37, <art>. 6, 003; En vigueur : 03-06-1995>**

L'enfant et ses père et mère se doivent, à tout âge, mutuellement le respect.

<L 1995-04-13/37, art. 6, 003; En vigueur : 03-06-1995>  

L'enfant reste sous l'autorité de ses père et mère jusqu'à sa majorité ou son émancipation.

Art. 373. <L 1995-04-13/37, art. 7, 003; En vigueur : 03-06-1995>

Lorsqu’ils vivent ensemble, les père et mère exercent conjointement leur autorité sur la personne de l'enfant.

À l’égard des tiers de bonne foi, chacun des père et mère est réputé agir avec l’accord de l’autre quand il accomplit seul un acte de cette autorité sous réserve des exceptions prévues par la loi.

À défaut d’accord, le père ou la mère peut saisir le tribunal de la jeunesse.
Le tribunal peut autoriser le père ou la mère à agir seul pour un ou plusieurs actes déterminés.

Art. 374. <L 1995-04-13/37, art. 8, 003; En vigueur : 03-06-1995>

[§ 1er.] Lorsque les père et mère ne vivent pas ensemble, l’exercice de l’autorité parentale reste conjoint et la présomption prévue à l’article 373, alinéa 2, s’applique. <L 2006-07-18/38, art. 2, 029; En vigueur : 14-09-2006>

A défaut d’accord sur l’organisation de l’hébergement de l’enfant, sur les décisions importantes concernant sa santé, son éducation, sa formation, ses loisirs et sur l’orientation religieuse ou philosophique ou si cet accord lui paraît contraire à l’intérêt de l’enfant, le juge compétent peut confier l’exercice exclusif de l'autorité parentale à l'un des père et mère.

Il peut aussi fixer les décisions d’éducation qui ne pourront être prises que moyennant le consentement des père et mère.

Il fixe les modalités selon lesquelles celui qui n'exerce pas l'autorité parentale maintient des relations personnelles avec l'enfant. Ces relations ne peuvent être refusées que pour des motifs très graves. Celui qui n'exerce pas l'autorité conserve le droit de surveiller l'éducation de l'enfant. Il pourra obtenir, de l'autre parent ou tiers, toutes informations utiles à cet égard et s'adresser au tribunal de la jeunesse dans l'intérêt de l'enfant.

Dans tous les cas, le juge détermine les modalités d'hébergement de l'enfant et le lieu où il est inscrit à titre principal dans les registres de la population.

[§ 2. Lorsque les parents ne vivent pas ensemble et qu’ils saisissent le tribunal de leur litige, l’accord relatif à l’hébergement des enfants est homologué par le tribunal sauf s’il est manifestement contraire à l’intérêt de l’enfant.

A défaut d’accord, en cas d’autorité parentale conjointe, le tribunal examine prioritairement, à la demande d’un des parents au moins, la possibilité de fixer l'hébergement de l'enfant de manière égalitaire entre ses parents.

Toutefois, si le tribunal estime que l’hébergement égalitaire n’est pas la formule la plus appropriée, il peut décider de fixer un hébergement non-égalitaire.

Le tribunal statue en tout état de cause par un jugement spécialement motivé, en tenant compte des circonstances concrètes de la cause et de l'intérêt des enfants et des parents.] <L 2006-07-18/38, art. 2, 029; En vigueur : 14-09-2006>

Art. 375. <L 31-03-1987, art. 42>.

Si la filiation n'est pas établie à l'égard de l'un des père et mère ou si l'un d'eux est décédé, [présumé absent] ou dans l'impossibilité de manifester sa volonté, l'autre exerce seul cette autorité. <L 2007-05-09/44, art. 36, 9°, 037; En vigueur : 01-07-2007>

[S’il ne reste ni père ni mère en état d’exercer l’autorité parentale, il y aura lieu à ouverture d’une tutelle.] <L 1995-04-13/37, art. 9, 003; En vigueur : 03-06-1995>

Art. 375bis. <inséré par L 1995-04-13, art. 10, 003; En vigueur : 03-06-1995>
Les grands-parents ont le droit d'entretenir des relations personnelles avec l'enfant. Ce même droit peut être octroyé à toute autre personne, si celle-ci justifie d'un lien d'affection particulier avec lui.

A défaut d'accord entre les parties, l'exercice de ce droit est réglé dans l'intérêt de l'enfant par le tribunal de la jeunesse à la demande des parties ou du procureur du Roi.

Art. 376. <L 1995-04-13/37, art. 11, 003; En vigueur : 03-06-1995> Lorsque les père et mère exercent conjointement l'autorité sur la personne de l'enfant, ils administrent ensemble ses biens et le représentent ensemble.

A l'égard des tiers de bonne foi, chacun des père et mère est réputé agir avec l'accord de l'autre quand il accomplit seul un acte de l'administration des biens de l'enfant, sous réserve des exceptions prévues par la loi.

Lorsque les père et mère n'exercent pas conjointement l'autorité sur la personne de l'enfant, celui d'entre eux qui exerce cette autorité a seul le droit d'administrer les biens de l'enfant et de le représenter, sous réserve des exceptions prévues par la loi.

L'autre parent conserve le droit de surveiller l'administration. Il pourra, à ce titre, obtenir de celui qui exerce l'autorité ou de tiers toutes informations utiles et s'adresser au tribunal de la jeunesse dans l'intérêt de l'enfant.

Art. 377. [abroge] <L 1995-04-13/37, art. 12, 003; En vigueur : 03-06-1995>

Art. 378. <L 2001-04-29/39, art. 12, 011; En vigueur : 01-08-2001>

[§ 1.] Sont subordonnés à l'autorisation du juge de paix, [les actes prévus à l'article 410, § 1er, 1° à 6°, 8°, 9° et 11° à 14°] pour lesquels le tuteur doit requérir une autorisation spéciale du juge de paix, sous réserve de ce qui est prévu à l'article 935, alinéa 3. <L 2003-02-13/54, art. 1, 016; En vigueur : 04-04-2003>

[Est compétent :
- le juge de paix du domicile du mineur en Belgique, et à défaut;
- celui de la résidence du mineur en Belgique, et à défaut,
- celui du dernier domicile commun des père et mère en Belgique ou, le échéant, celui du dernier domicile en Belgique du parent qui exerce seul l'autorité parentale, et à défaut,
- celui de la dernière résidence commune des père et mère en Belgique, ou, le cas échéant, celui de la dernière résidence en Belgique du parent qui exerce seul l'autorité parentale.

Le juge de paix compétent conformément à l'alinéa précédent peut, dans l'intérêt du mineur, décider par ordonnance motivée de transmettre le dossier au juge de paix du canton où le mineur a établi sa résidence principale de manière durable.] <L 2003-02-13/54, art. 2, 016; En vigueur : 04-04-2003>

Le juge de paix statue sur la requête signée par les parties ou leur avocat. S'il est saisi par un seul des père et mère, l'autre est entendu ou du moins convoqué par pli judiciaire. Cette convocation le rend partie à la cause.
En cas d'opposition d'intérêt entre les père et mère, ou lorsque l'un d'eux fait défaut, le juge de paix peut autoriser l'un des parents à accomplir seul l'acte pour lequel l'autorisation est demandée.] <L 2003-02-13/54, art. 2, 016; En vigueur : 04-04-2003>

En cas d'opposition d'intérêts entre l'enfant et ses père et mère, le juge de paix désigne un tuteur ad hoc soit à la requête de tout intéressé soit d'office.

§ 2. Les actes visés à l'article 410, § 1er, 7°, ne son pas soumis à l'autorisation prévue au § 1er. En cas d'opposition d'intérêt entre le mineur et ses père et mère, le juge saisi du litige désigne un tuteur ad hoc, soit à la requête de tout intéressé, soit d'office.] <L 2003-02-13/54, art. 2, 016; En vigueur : 04-04-2003>

Art. 379. <L 31-03-1987, art. 46>.

Les père et mère, chargés de l'administration des biens de leurs enfants mineurs, sont comptables quant à la propriété et aux revenus des biens dont ils n'ont pas la jouissance et, quant à la propriété seulement, de ceux dont la loi leur donne jouissance.

Toute décision judiciaire statuant sur des sommes revenant a un mineur ordonne d'office que lesdites sommes soient placées sur un compte ouvert à son nom. Sans préjudice du droit de jouissance légale, ce compte est frappé d'indisponibilité jusqu'à la majorité du mineur.

Lorsque la décision prévue à l'alinéa précédent est passée en force de chose jugée, le greffier la notifie en copie, par lettre recommandée à la poste, aux débiteurs, qui ne peuvent dès lors se libérer valablement qu'a observant la décision du tribunal. Si une tutelle est ouverte, il en adresse également une copie au greffier de la justice de paix dont dépend la tutelle.] <L 2003-02-13/54, art. 3, 016; En vigueur : 04-04-2003>

Art. 380. [Abrogé] <L 15-05-1912, art. 64>.

Art. 381. [Abrogé] <L 15-05-1912, art. 64>.

Art. 382. [Abrogé] <L 15-05-1912, art. 64>.


Art. 384. <L 1995-04-13/37, art. 13, 003; En vigueur : 03-06-1995>

Les père et mère ont la jouissance des biens de leurs enfants jusqu'à leur majorité ou leur émancipation. La jouissance est attachée à l'administration : elle appartient, soit aux père et mère conjointement, soit à celui des père et mère qui a la charge de l'administration des biens de l'enfant.

Art. 385. [abrogé] <L 1995-04-13/37, art. 14, 003; En vigueur : 03-06-1995>

Art. 386. <L 31-03-1987, art. 49>.

Les charges de cette jouissance seront :
1° Celles auxquelles sont tenus les usufruitiers;
2° L'entretien, l'éducation et la formation adéquate des enfants, selon leur fortune;
3° Le paiement des arrérages ou intérêts des capitaux;
4° Les frais funéraires et ceux de dernière maladie.

Art. 387.
Elle ne s'étendra pas aux biens que les enfants pourront acquérir par un travail et une industrie séparés, ni à ceux qui leur seront donnés ou légués sous la condition expresse que les père et mère n'en jouiront pas.

Art. 387bis.
<inséré par L 1995-04-13/37, art. 15, 003; En vigueur : 03-06-1995> Dans tous les cas et, sans préjudice de la compétence du tribunal de première instance statuant en référé à l'article 1280 du Code judiciaire, le tribunal de la jeunesse peut, à la demande des père et mère, de l'un d'eux ou du procureur du Roi, ordonner ou modifier, dans l'intérêt de l'enfant, toute disposition relative à l'autorité parentale.

[Sans préjudice de l'article 1734 du Code judiciaire, le tribunal tente de concilier les parties. Il leur donne toutes informations utiles sur la procédure et en particulier sur l'intérêt de recourir à la médiation telle que prévue à la septième partie du Code judiciaire. S'il constate qu'un rapprochement est possible, il peut ordonner la surséance de la procédure afin de permettre aux parties de recueillir toutes informations utiles à cet égard et d'entamer le processus de médiation. La durée de la surséance ne peut être supérieure à un mois.

Le tribunal peut, même d'office, ordonner une mesure préalable destinée à instruire la demande ou à régler provisoirement la situation des parties pour un délai qu'il détermine.

Lorsqu'il est saisi pour la première fois d'une telle demande, sauf accord de toutes les parties et du procureur du Roi, le tribunal de la jeunesse statue à titre provisionnel. La cause peut être réexaminée à une audience ultérieure, à une date fixée d'office dans le jugement, dans un délai qui ne peut excéder un an, et sans préjudice d'une nouvelle convocation à une date plus rapprochée, ainsi qu'il est indiqué à l'alinéa suivant.

Devant le tribunal de la jeunesse, la cause reste inscrite au rôle jusqu'à ce que les enfants concernés par le litige soient émancipés ou aient atteint l'âge de la majorité légale. En cas d'éléments nouveaux, elle peut être ramenée devant le tribunal par conclusions ou par demande écrite, déposée ou adressée au greffe.

L'article 730, § 2, a) du Code judiciaire n'est pas applicable à ces causes.] <L 2006-07-18/38, art. 3, 029; En vigueur : 14-09-2006>

Art. 387ter.
<Inséré par L 2006-07-18/38, art. 4; ED : 14-09-2006> § 1er. Lorsque l'un des parents refuse d'exécuter les décisions judiciaires relatives à l'hébergement des enfants ou au droit aux relations personnelles, la cause peut être ramenée devant le juge compétent. Par dérogation à l'article 569, 5°, du Code judiciaire, le juge compétent est celui qui a
rendu la décision qui n'a pas été respectée, à moins qu'un autre juge n'ait été saisi depuis, auquel cas la demande est portée devant ce dernier.

Le juge statue toutes affaires cessantes.

Sauf en cas d'urgence, il peut notamment :
- procéder à de nouvelles mesures d'instruction telles qu'une enquête sociale ou une expertise,
- procéder à une tentative de conciliation,
- suggérer aux parties de recourir à la médiation telle que prévue à l'article 387bis.

Il peut prendre de nouvelles décisions relatives à l'autorité parentale ou à l'hébergement de l'enfant.

Sans préjudice des poursuites pénales, le juge peut autoriser la partie victime de la violation de la décision visée à l'alinea 1er à recourir à des mesures de contrainte. Il détermine la nature de ces mesures et leurs modalités d'exercice au regard de l'intérêt de l'enfant et désigne, s'il l'estime nécessaire, les personnes habilitées à accompagner l'huissier de justice pour l'exécution de sa décision.

Le juge peut prononcer une astreinte tendant à assurer le respect de la décision à intervenir, et, dans cette hypothèse, dire que pour l'exécution de cette astreinte, l'article 1412 du Code judiciaire est applicable.

La décision est de plein droit exécutoire par provision.

§ 2. Le présent article est également applicable lorsque les droits des parties sont régulés par une convention telle que prévue à l'article 1288 du Code judiciaire. Dans ce cas, et sans préjudice du § 3, le tribunal est saisi par une requête contradictoire.

§ 3. En cas d'absolue nécessité et sans préjudice du recours à l'article 584 du Code judiciaire, l'autorisation de recourir à des mesures de contrainte visée au § 1er peut être sollicitée par requête unilatérale. Les articles 1026 à 1034 du Code judiciaire sont applicables. La partie requérante doit joindre à l'appui de la requête toutes pièces utiles tendant à établir que la partie récalcitrante a bien été mise en demeure de respecter ses obligations et qu'elle s'est opposée à l'exécution de la décision.

L'inscription de la requête a lieu sans frais. La requête est versée au dossier de la procédure ayant donné lieu à la décision qui n'a pas été respectée, à moins qu'un autre juge n'ait été saisi depuis.

§ 4. Le présent article ne porte pas préjudice aux dispositions internationales liant la Belgique en matière d'enlèvement international d'enfants.

**TITRE X. - DE LA MINORITÉ, DE LA TUTELLE ET DE L'EMANCIPATION.**

**CHAPITRE I. - DE LA MINORITÉ.**


**CHAPITRE II. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> - DE LA TUTELLE.**
Section I. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> - De l'ouverture de la tutelle.

Art. 389. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
La tutelle des enfants mineurs s'ouvre si les père et mère sont décédés, légalement inconnus ou dans l'impossibilité durable d'exercer l'autorité parentale.
A moins qu'elle ne résulte de l'interdiction judiciaire, de la minorité prolongée, de l'absence déclarée ou présumée, cette impossibilité est constatée par le tribunal de première instance conformément à la procédure définie à l'article 1236bis du Code judiciaire.

Section II. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> - De l'organisation de la tutelle.

Art. 390. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Sous réserve de ce qui est prévu à l'article 13, § 2, de la loi du 31 décembre 1851 sur les consulats et la juridiction consulaire, l'organisation et la surveillance de la tutelle incombent au juge de paix du domicile du mineur, tel qu'il est déterminé par l'article 36 du Code judiciaire, ou, à défaut de domicile, au juge de paix de la résidence du mineur.
Le juge de paix tutélaire est immuable.
Toutefois, à la requête du tuteur, ou d'office, le juge de paix tutélaire peut, dans l'intérêt du mineur, ordonner le transfert de la tutelle au lieu du domicile ou de la résidence du tuteur. Cette décision lie le juge auquel la charge est transférée. Elle n'est susceptible d'aucun recours, hormis l'appel du procureur du Roi.

Art. 391. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Quand la tutelle s'ouvre ou devient vacante, le juge de paix ordonne, à la requête de tout intéressé ou même d'office, les mesures urgentes qui sont nécessaires à la protection de la personne du mineur ou à la conservation de ses biens.
La nomination du tuteur ne met pas fin à ces mesures. Elles ne cessent que si le juge les rapporte ou par l'expiration du terme éventuellement fixe par lui.
Le juge de paix est saisi par simple lettre.

Art. 392. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Celui des père et mère qui exerce en dernier lieu l'autorité parentale peut désigner un tuteur, soit par testament, soit par une déclaration devant le juge de paix de son domicile ou devant un notaire.
Les père et mère le peuvent aussi par déclaration devant le juge de paix ou devant notaire, à la condition d'agir conjointement. A tout moment, ils peuvent modifier leur choix en faisant une nouvelle déclaration.
Après le décès d'un des père et mère, la déclaration reste valable aussi longtemps que le parent survivant ne l'a pas révoquée ou n'a pas désigné un tuteur conformément à l'alinéa 1.

Chacun des père et mère peut révoquer la déclaration. La révocation est faite devant le juge de paix ou devant le notaire qui a reçu la déclaration. Si la déclaration a été faite devant un notaire, la révocation est faite devant ce notaire ou devant un autre notaire, à charge pour ce dernier d'en avertir le notaire qui a reçu la déclaration. Mention de la révocation est portée sur la déclaration.

Si la personne désignée conformément aux alinéas 1er et 2 accepte la tutelle, le juge de paix homologue la désignation, à moins que des raisons graves tenant à l'intérêt de l'enfant et précisées dans les motifs de l'ordonnance n'interdisent de suivre le choix du ou des parents.

Art. 393. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Si les parents n'ont pas usé de la faculté que leur accorde l'article précédent ou si leur choix n'a pu être suivi, le juge de paix, dès l'ouverture de la tutelle, choisit un tuteur apte à éduquer le mineur et à gérer ses biens, de préférence parmi les membres de la famille les plus proches. Il le nomme après s'être assuré de son acceptation.

Art. 394. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Si le mineur est âgé de douze ans, le juge l'entend avant de nommer le tuteur ou d'homologuer la désignation du tuteur.

Il entend aussi les ascendants au second degré, les frères et soeurs majeurs du mineur, ainsi que les frères et soeurs des parents du mineur, ou du moins les fait convoquer.

Il lui appartient d'entendre, en outre, toute personne dont l'avis pourrait lui être utile. Les convocations se font par pli judiciaire.

Art. 395. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
§ 1er. Si l'intérêt du mineur l'exige en raison de circonstances exceptionnelles, le juge peut scinder la tutelle en nommant un tuteur à la personne et un tuteur aux biens.

Il règle, sur requête, les différendes qui pourraient s'élever entre eux.

§ 2. L'accord des deux tuteurs est requis pour accomplir les actes juridiques et prendre les décisions qui concernent à la fois la personne et les biens du mineur.

A l'égard de tiers de bonne foi, chaque tuteur est censé agir avec l'accord de l'autre tuteur, lorsqu'il accomplit seul un acte ayant trait à la tutelle, sauf les exceptions prévues par la loi.

Art. 396. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Nul n'est tenu d'accepter les fonctions de tuteur ou de subrogé tuteur.

Si le tuteur justifie de motifs légitimes, le juge de paix peut, au cours de la tutelle, le décharger de sa fonction.
Si personne n'accepte la tutelle, les articles 63 à 68 de la loi du 8 juillet 1976 organique des centres publics d'aide sociale sont d'application. [Le centre public d'aide sociale informe le juge de paix de l'identité du tuteur et du subrogé tuteur dans les huit jours de leur désignation.] <L 2003-02-13/54, art. 4, 016; ED : 04-04-2003>

Art. 397. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> Ne peuvent être tuteurs :

1° ceux qui n'ont pas la libre disposition de leurs biens;
2° ceux à l'égard desquels le tribunal de la jeunesse a ordonné l'une des mesures prévues aux articles 29 à 32 de la loi du 8 avril 1965 sur la protection de la jeunesse [, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait]. <L 2006-05-15/35, art. 23; 026; En vigueur : 16-10-2006>

Art. 398. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> Sont exclus de la tutelle ou destituables s'ils sont en exercice :

1° les personnes d'une inconduite notoire;
2° ceux dont la gestion attesterait l'incapacité ou l'infidélité;
3° ceux qui ont ou dont le conjoint, le cohabitant légal, le cohabitant de fait, un descendant ou un ascendant a avec le mineur un procès dans lequel l'état de celui-ci, sa fortune ou une partie notable de ses biens sont compromis.

Art. 399. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> Toutes les fois qu'il y a lieu à la destitution du tuteur, elle est prononcée par le juge de paix, à la requête du subrogé tuteur, du ministère public ou même d'office.

Art. 400. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> La tutelle est une charge personnelle qui ne passe point aux héritiers du tuteur.

Art. 401. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> Lorsqu'il y a lieu de remplacer le tuteur, la désignation du nouveau tuteur se fait conformément à l'article 393, sans préjudice de l'article 391.

Le nouveau tuteur entre en fonction dès le prononcé de l'ordonnance.

Section III. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> - Du subrogé tuteur.

Art. 402. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> Dans toute tutelle, il y a un subrogé tuteur que le juge de paix nomme après s'être assuré de son acceptation.
Si le tuteur est parent ou allié du mineur dans une ligne, le subrogé tuteur est, de préférence, choisi dans l'autre ligne.

Les articles 395, 396, alinéas 1er et 2, 397, 398 et 399 s'appliquent au subrogé tuteur.
Les fonctions du subrogé tuteur cessent à la même époque que la tutelle.

Art. 403. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Le subrogé tuteur surveille le tuteur. S'il constate que celui-ci commet des fautes dans l'éducation du mineur ou dans la gestion des biens, il en informe sans délai le juge de paix.
Le tuteur doit collaborer pleinement en vue de permettre au subrogé tuteur de le contrôler.

Art. 404. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Le subrogé tuteur représente le mineur lorsque les intérêts de celui-ci sont en opposition avec ceux du tuteur. Si les intérêts du subrogé tuteur sont également en opposition avec ceux du mineur, le juge de paix nomme un tuteur ad hoc à la requête de tout intéressé ou même d'office, ainsi qu'un subrogé tuteur ad hoc.
Le subrogé tuteur ne remplace pas de plein droit le tuteur lorsque la tutelle devient vacante. Il doit, dans ce cas, sous peine d'indemnisation du dommage qui pourrait en résulter pour le mineur, provoquer la nomination d'un nouveau tuteur.

Section IV. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> - Du fonctionnement de la tutelle.

Art. 405. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
§ 1er. Le tuteur prend soin de la personne du mineur. Il l'éduque en se conformant aux principes éventuellement adoptés par les parents, notamment en ce qui concerne les questions visées à l'article 374, alinéa 2.
Il représente le mineur dans tous les actes de la vie civile.
Il gère les biens du mineur en bon père de famille et répond des dommages qui pourraient résulter d'une mauvaise gestion.
Il peut, dans la gestion des biens du mineur, se faire assister de personnes qui agissent sous sa responsabilité, après autorisation expresse du juge de paix.
Le tuteur emploie les revenus du mineur pour assurer l'entretien de celui-ci et lui dispenser des soins, et requiert l'application de la législation sociale dans l'intérêt du mineur.
§ 2. En cas de conflit grave entre le mineur et le tuteur ou, le cas échéant, le subrogé tuteur, le mineur peut, sur simple demande écrite ou verbale, s'adresser au procureur du Roi s'il est âgé de douze ans dans les affaires relatives à sa personne et s'il est âgé de quinze ans dans les affaires relatives à ses biens.
Le procureur du Roi recueille tous les renseignements utiles. S'il estime la demande fondée, il saisit le juge de paix par requête afin qu'il tranche le différend.
Le juge de paix statue après avoir entendu le mineur, le tuteur et le subrogé tuteur.

Art. 406. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
§ 1er. Dans le mois qui suit la notification de sa nomination, le tuteur fait dresser un inventaire assorti d’une estimation de la valeur des immeubles et des meubles, le cas échéant, après avoir requis la levée des scellés s’ils ont été apposés.

L’inventaire est dressé en application des articles 1175 à 1184 du Code judiciaire, à moins que le juge de paix ne décide, par ordonnance motivée, d’autoriser un inventaire sous seing privé. Le juge de paix peut définir, dans cette ordonnance, les conditions que doit remplir cet inventaire sous seing privé.

A la requête du tuteur, le juge de paix peut proroger le délai si des circonstances exceptionnelles, consignées dans les motifs de l’ordonnance, le justifient. Le délai ainsi prorogé ne peut excéder six mois.

Si, dans ce délai, aucun inventaire tel que visé à l’alinéa 1er n’a été établi et communiqué au juge de paix, celui-ci désigne un notaire qui sera tenu de faire l’inventaire.

Les frais sont mis à la charge du tuteur.

§ 2. Le juge de paix décide, par ordonnance motivée, s’il y a lieu de dresser un inventaire reprenant une liste détaillée assortie d’une estimation ou, si, au contraire, une description et une estimation globales de la valeur des meubles suffisent.

L’inventaire se fait, en tout cas, en présence du subrogé tuteur.

Il est, dès sa clôture, déposé au dossier de la procédure.

Si le tuteur est créancier du mineur, il doit, à peine de déchéance, le déclarer au juge de paix, sur la réquisition que celui-ci est tenu de lui en faire. Cette déclaration est consignée en un procès-verbal qui est déposé au dossier de la procédure.

Art. 407. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
§ 1er. Dans le mois qui suit le dépôt de l’inventaire au dossier de la procédure, le juge de paix, après audition du tuteur, du subrogé tuteur et du mineur âgé de quinze ans, fixe par ordonnance motivée :

1° la somme dont le tuteur dispose annuellement pour l'entretien et l'éducation du mineur;

2° la somme dont le tuteur dispose annuellement pour la gestion des biens du mineur;

3° la somme à laquelle commence, pour le tuteur, l'obligation d'employer l'excédent des revenus sur la dépense et le délai passé lequel le tuteur sera, à défaut d'emploi, de plein droit comptable des intérêts;

4° l'établissement agréé par la Commission bancaire et financière ou sont ouverts les comptes sur lesquels sont versés les fonds ou déposés les titres et les valeurs mobilières du mineur;

5° les conditions auxquelles sont subordonnés les retraits des fonds, titres ou valeurs ainsi versés ou déposés;

6° la somme pour laquelle, compte tenu de la nature et de l'importance de l'avoir du mineur, il y a lieu de prendre une inscription hypothécaire sur les immeubles du tuteur,
l'immeuble ou les immeubles sur lesquels l'inscription est prise par le greffier aux frais du mineur ou les garanties à fournir le cas échéant par le tuteur qui n’a pas d'immeuble ou qui est dispensé de l'inscription hypothécaire;

7° les mesures à prendre pour la poursuite, la mise en location, la cession ou la liquidation des commerces et entreprises recueillis par le mineur.

§ 2. Pendant la tutelle, le juge de paix peut, à la demande du tuteur, du subrogé tuteur, du procureur du Roi, de tout autre intéressé ou même d'office, modifier ses décisions antérieures dans les matières énumérées au paragraphe 1er, après avoir entendu le tuteur, le subrogé tuteur et le mineur âgé de quinze ans.

§ 3. Le juge de paix peut confier à l'établissement visé au § 1er, 4°, une mission de gestion des fonds, titres et valeurs mobilières appartenant au mineur et déposés auprès de celui-ci.

Le juge de paix détermine les conditions de cette gestion.

Art. 408. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>

Les titres au porteur et autres valeurs mobilières appartenant au mineur ou qui lui sont acquises durant la tutelle sont déposés sur le compte ouvert en son nom conformément à l'article 407, § 1er, 4°.

Sans préjudice de l'article 409, § 2, alinéa 4, le tuteur renouvelle en valeurs analogues, sans autorisation spéciale, le placement du capital nominal aux échéances.

Art. 409. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>

§ 1er. L'excédent des revenus visé à l'article 407, § 1er, 3°, est employé selon les modalités fixées par le juge de paix dans l'ordonnance prise lors de l'ouverture ou en cours de tutelle, conformément à l'article 407.

§ 2. Le tuteur ne peut donner quittance des capitaux qui échoient au mineur durant la tutelle qu'avec le contresigne du subrogé tuteur.

Ces capitaux sont déposés par lui sur le compte ouvert au nom du mineur conformément à l'article 407, § 1er, 4°.

Le dépôt doit être fait dans un délai de quinze jours à dater de la réception des capitaux; passé ce délai, le tuteur est de plein droit débiteur des intérêts.

A la demande du tuteur, le juge de paix détermine les modalités d'un placement ultérieur plus rémunératrice, après avoir pris l'avis du tuteur, du subrogé tuteur et du mineur âgé de quinze ans.

Art. 410.<L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>

§ 1er. Le tuteur doit être spécialement autorisé par le juge de paix pour :

1° aliéner les biens du mineur, hormis les fruits et objets de rebut, sauf dans le cadre de la gestion confiée à un établissement tel que visé à l'article 407, § 1er, 4°;

2° emprunter;

3° hypothéquer ou donner en gage les biens du mineur;
4° consentir un bail à ferme, un bail commercial ou un bail à loyer de plus de neuf ans ainsi que pour renouveler un bail commercial;

5° renoncer à une succession ou à un legs universel ou a titre universel ou l'accepter, ce qui ne pourra se faire que sous bénéfice d'inventaire;

6° accepter une donation ou un legs à titre particulier;

7° représenter le mineur en justice comme demandeur dans les autres procédures et actes que ceux prévus aux articles 1150, 1180-1° et 1206 du Code judiciaire; [Toutefois, aucune autorisation n'est requise pour une constitution de partie civile [1 ...]1 ;] <L 2003-02-13/54, art. 5, 016; En vigueur : 04-04-2003>

8° conclure un pacte d'indivision;

9° acheter un bien immeuble;

10° [abrogé] <L 2003-02-13/54, art. 5, 016; En vigueur : 04-04-2003>

11° transiger ou conclure une convention d'arbitrage;

12° continuer un commerce recueilli dans une succession légale ou testamentaire. L'administration du commerce peut être confiée à un administrateur spécial sous le contrôle du tuteur. Le juge de paix peut à tout moment retirer son autorisation;

13° aliéner des souvenirs et autres objets à caractère personnel, même s'il s'agit d'objets de peu de valeur.

[14° disposer des biens frappés d'indisponibilité en application d'une décision prise en vertu de l'article 379, en application de l'article 776 ou conformément à une décision prise par le conseil de famille avant l'entrée en vigueur de la loi du 29 avril 2001 modifiant diverses dispositions légales en matière de tutelle des mineurs.] <L 2003-02-13/54, art. 5, 016; En vigueur : 04-04-2003>

§ 2. La vente des biens meubles ou immeubles du mineur est publique. Le tuteur peut toutefois se faire autoriser à vendre de gré à gré les biens meubles ou immeubles.

L'autorisation est accordée si l'intérêt du mineur l'exige. Elle indique expressément la raison pour laquelle la vente de gré à gré sert l'intérêt du mineur. Lorsqu'il s'agit de la vente d'un bien immeuble, celle-ci a lieu conformément au projet d'acte de vente dressé par un notaire et approuvé par le juge de paix.

Le juge de paix s'entoure de tous les renseignements utiles; il peut notamment recueillir l'avis de toute personne qu'il estime apte à le renseigner.

Les souvenirs et autres objets de caractère personnel sont, sauf nécessité absolue, exceptés de l'aliénation et sont gardés à la disposition du mineur jusqu'à sa majorité.

En tout cas, le mineur qui possède le discernement requis est invité pour être entendu, s'il le souhaite, avant que l'autorisation puisse être accordée.

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(1) <L 2010-04-18/06, art. 2, 049; En vigueur : 20-05-2010>

Art. 411. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>

Le tuteur et le subrogé tuteur ne peuvent acquérir les biens du mineur, ni directement ni par personne interposée, sauf dans le cadre de l'application de la loi du 16 mai 1900 apportant des modifications au régime successoral des petits héritages et de celle du 29 août 1988 relative au régime successoral des exploitations agricoles en vue d'en
promouvoir la continuité, d'un partage judiciaire ou amiable approuvé conformément à l'article 1206 du Code judiciaire. Ils ne peuvent prendre à bail les biens du mineur qu'avec l'autorisation du juge de paix obtenue sur requête écrite. Dans ce cas, le juge de paix détermine dans son ordonnance les conditions de cette location et les garanties spéciales liées au bail ainsi consenti.

Art. 412. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Le juge de paix peut prendre toutes mesures pour s'enquérir de la situation familiale, morale et matérielle du mineur, ainsi que de ses conditions de vie.
Il peut notamment demander au procureur du Roi de prendre, à l'intervention du service social compétent, tous renseignements utiles concernant ces différents points.

Section V. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001> - Des comptes et du rapport de la tutelle.

Art. 413. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Chaque année, le tuteur dépose au dossier de la procédure le compte de sa gestion. Ce compte est également remis au subrogé tuteur et au mineur âgé de quinze ans. Le juge de paix peut, d'office ou à la demande du subrogé tuteur, convoquer le tuteur en chambre du conseil pour être entendu en ses explications.
Le Roi détermine la forme et le contenu des comptes de gestion.

Art. 414. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Lorsqu'il y a lieu au remplacement du tuteur, les comptes de tutelle sont arrêtés à la date de l'ordonnance nommant le nouveau tuteur, sans préjudice de l'application de l'article 391.

Art. 415. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Dans le mois de la cessation des fonctions du tuteur, le compte définitif de tutelle est rendu, en vue de son approbation, au mineur devenu majeur ou émancipé, au nouveau tuteur ou au titulaire de l'autorité parentale en présence du juge de paix et du subrogé tuteur, le cas échéant aux frais du mineur ou du tuteur. Le compte de tutelle est également rendu au mineur âgé de quinze ans.
Il est dressé un procès-verbal constatant la reddition du compte, son approbation et la décharge donnée au tuteur.
Toute approbation du compte de tutelle antérieure à la date du procès-verbal prévu à l’alinéa 2 est nulle.
S'il donne lieu à des contestations, le compte est rendu en justice conformément aux articles 1358 et suivants du Code judiciaire.

Art. 416. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Tant que le compte définitif de tutelle n'a pas été approuvé, aucun contrat valable ne peut être conclu entre le mineur et son ancien tuteur.

La mainlevée de la garantie fournie par le tuteur pour sûreté de sa gestion est donnée par le nouveau tuteur ou par le mineur sur production d'une copie certifiée conforme du procès-verbal dressé conformément à l'article 415.

Art. 417. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
L'approbation du compte ne préjudicie point aux actions en responsabilité qui peuvent appartenir au mineur contre le tuteur et le subrogé tuteur.

Art. 418. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
La somme à laquelle s'élève le reliquat dû par le tuteur porte intérêt de plein droit à compter de l'approbation du compte et au plus tard trois mois après la cessation de la tutelle. Les intérêts de ce qui est dû au tuteur par le mineur ne courent que du jour de la sommation de payer qui suit l'approbation du compte.

Art. 419. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Toute action du mineur contre son tuteur ou son subrogé tuteur relative aux faits et comptes de la tutelle se prescrit par cinq ans à compter de la majorité, même lorsqu'il y a eu émancipation.

Art. 420. <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>
Chaque année, le tuteur fait rapport au juge de paix et au subrogé tuteur sur l'éducation et l'accueil du mineur, ainsi que sur les mesures qu'il a prises en vue de l'épanouissement de la personne du mineur. Le rapport est versé au dossier de la procédure.

(Note : art. 421 à 426, abrogés par <L 2001-04-29/39, art. 13, 011; En vigueur : 01-08-2001>.)
(Note : art. 427 à 475, abrogés par <L 2001-04-29/39, art. 13, 012; En vigueur : 01-08-2001>.)

**CHAPITRE IIbis. - DE LA TUTELLE OFFICIEUSE.**

Art. 475bis. <L 31-03-1987, art. 58>.
Lorsqu'une personne âgée d'au moins 25 ans s'engage à entretenir un enfant mineur non émancipé, à l'élever et à le mettre en état de gagner sa vie, elle peut devenir son tuteur officieux, moyennant l'accord de ceux dont le consentement est requis pour l'adoption des mineurs.

Un époux ne peut devenir tuteur officieux qu'avec le consentement de son conjoint.

Art. 475ter. <L 31-03-1987, art. 58>.
La convention établissant la tutelle officieuse et, le cas échéant, le consentement du conjoint du tuteur officieux sont constatés par acte authentique dressé par le juge de paix de la résidence du mineur ou par un notaire.

Cette convention ne produit ses effets qu'après avoir été entérinée par le tribunal de la jeunesse, à la requête du tuteur officieux.

Le tribunal de la jeunesse instruit la demande en chambre du conseil. Il entend ou à tout le moins convoque le tuteur officieux et, le cas échéant, son conjoint, l'enfant s'il est âgé de 15 ans, ses tuteur et subrogé tuteur s'il se trouve sous tutelle et les personnes qui ont donné leur accord à la tutelle officieuse conformément à l'article précédent. [...]. Le procureur du Roi est toujours entendu. <L 2001-04-29/39, art. 14, 013; En vigueur : 01-08-2001>

Art. 475quater. <L 31-03-1987, art. 58>.

Le tuteur officieux administre les biens de son pupille sans en avoir la jouissance et sans pouvoir imputer les dépenses d'entretien sur les revenus du mineur.

Il exerce également le droit de garde sur le pupille pour autant que ce dernier ait sa résidence habituelle avec lui.

[Durant la tutelle officieuse, les père et mère de l'enfant ainsi que les personnes qui l'ont adopté ou ont fait l'adoption plénière, cessent de jouir des biens du mineur.] <L 31-03-1987, art. 59>.

[Pour le surplus, la tutelle officieuse ne déroge pas aux règles relatives à l'exercice des droits et obligations découlant [de l'autorité parentale] ou de la tutelle et notamment au droit de consentir au mariage, à l'adoption ou à l'adoption plénière du mineur et de requérir son émancipation.] <L 19-01-1990,art. 31>. <L 2001-04-29/39, art. 15, 013; En vigueur : 01-08-2001>

Art. 475quinquies. <L 31-03-1987, art. 58>.

La tutelle officieuse prend fin à la majorité du pupille. Néanmoins, si à ce moment le pupille ne se trouve pas en état de gagner sa vie, le tuteur officieux peut être condamné par le tribunal de la jeunesse à l'indemniser. Cette indemnité se résume en secours propre à lui procurer un métier sans préjudice des conventions qui auraient été faites en prévision de ce cas.

La tutelle officieuse prend également fin en cas de décès du tuteur officieux. Si à ce moment le pupille se trouve dans le besoin, la succession du tuteur officieux doit lui fournir, durant sa minorité, des moyens de subsister, dont la qualité et l'espèce, s'il n'y a été antérieurement pourvu par une convention formelle, sont réglées, soit amiablement entre le représentant légal du mineur et les ayants droit à la succession du tuteur officieux, soit par le tribunal de la jeunesse en cas de contestation.

La tutelle officieuse et les obligations du tuteur officieux ou de sa succession prennent également fin en cas de décès du pupille ou lorsque celui-ci vient à être émancipé [ou adopté ou lorsqu’il fait l’objet d’une adoption plénière]. <L 31-03-1987, art. 60>.

Art. 475sexies. <L 2001-04-29/39, art. 16, 013; En vigueur : 01-08-2001>

Il peut être mis fin à la tutelle officieuse par le tribunal de la jeunesse à la requête:
1° soit du tuteur officieux;
2° soit des personnes qui ont donné leur accord à la tutelle officieuse conformément à l'article 475bis, ou de celles qui auront reconnu ou légitimé l'enfant après l'établissement de la tutelle officieuse;
3° soit du procureur du Roi.

Le tribunal de la jeunesse instruit la demande dans les formes prévues à l'article 475ter, alinéa 3.

S'il met fin à la tutelle officieuse, il peut, sur la demande qui lui en est faite, après avoir recueilli l'avis des personnes énumérées à l'alinéa 1er, 1° et 2°, ci-dessus et entendu le procureur du Roi, supprimer ou réduire l'obligation du tuteur officieux d'entretenir l'enfant et de le mettre en état de gagner sa vie.

Art. 475septies. <L 31-03-1987, art. 58>.

Le tuteur officieux qui a eu l'administration de quelque bien de son pupille, doit rendre compte de sa gestion [conformément aux articles 413 a 420]. <L 2001-04-29/39, art. 17, 013; En vigueur : 01-08-2001>
**Article 138 of the Judicial Code**

Art. 138. <L 2006-12-03/41, art. 9, 143; En vigueur : 28-12-2006>

Sous réserve des dispositions de l'article 141, le ministère public exerce l'action publique selon les modalités déterminées par la loi.

Dans chaque ressort de cour d'appel, le procureur général, les procureurs du Roi et les auditeurs du travail veillent, de manière concertée à l'exercice cohérent et intégré de l'action publique. A cette fin, le procureur général réunit au moins une fois par trimestre les procureurs du Roi de son ressort. Il réunit également, s'il y a lieu, les auditeurs du travail.


Les fonctions du ministère public auprès du tribunal correctionnel peuvent être exercées, selon les cas, par un magistrat du parquet général près la cour d'appel ou de l'auditorat général du travail, moyennant l'accord, selon les cas, du procureur du Roi ou de l'auditeur du travail et du procureur général près la cour d'appel. Le magistrat exerce ces fonctions sous la direction et la surveillance du procureur du Roi ou de l'auditeur du travail.

Les dispositions des alinéas 3 et 4 sont applicables aux procédures suivies devant le tribunal de la jeunesse et devant la chambre de la jeunesse de la cour d'appel à l'égard des personnes poursuivies en raison d'un fait qualifié infraction, commis avant l'âge de dix-huit ans accomplis.

**Article 872 of the Judicial Code**

Art. 872. En matière d'exercice de la puissance paternelle et de garde d'enfants, de résidence des époux, de pension alimentaire et d'adoption, le juge peut requérir le ministère public, lorsque l'affaire peut lui être communiquée pour avis, de recueillir des renseignements sur les objets que limitativement il précise.

Les actes de cette information sont déposés au greffe, dans le dossier de la procédure. Les parties en sont averties par le greffier.

**Article 931 of the Judicial Code**

Art. 931. Le mineur âgé de moins de quinze ans révolus ne peut être entendu sous serment. Ses déclarations peuvent être recueillies à titre de simple renseignement.
Les descendants ne peuvent être entendus dans les causes où leurs ascendants ont des intérêts opposés.

(Néanmoins, dans toute procédure le concernant, le mineur capable de discernement peut, à sa demande ou sur décision du juge, sans préjudice des dispositions légales prévoyant son intervention volontaire et son consentement, être entendu, hors de la présence des parties, par le juge ou la personne désignée par ce dernier à cet effet, aux frais partagés des parties s’il y a lieu. La décision du juge n’est pas susceptible d’appel.

Lorsque le mineur en fait la demande soit au juge saisi soit au procureur du Roi, l’audition ne peut être écartée que par une décision spécialement motivée fondée sur le manque de discernement du mineur. Cette décision n’est pas susceptible d’appel.

Lorsque l’audition est décidée par le juge, le mineur peut refuser d’être entendu.

Il est entendu seul sauf le droit pour le juge de prescrire dans l’intérêt du mineur qu’il devra être assisté.

L’audition du mineur ne lui confère pas la qualité de partie à la procédure. L’audition a lieu en tout endroit jugé approprié par le juge. Il en est établi un procès-verbal qui est joint au dossier de la procédure, sans que copie en soit délivrée aux parties.) <L 1994-06-30/33, art. 1, 026; En vigueur : 1994-10-01>

**Articles 1034bis to 1034quinquies of the Judicial Code**

**TITRE Vbis.** <L 1992-08-03/31, art. 40, 020; En vigueur : 01-01-1993> _La requête contradictoire._

Art. 1034bis. <Inséré par L 1992-08-03/31, art. 40, 020; En vigueur : 01-01-1993> Dans les cas où il est dérogé par la loi à la règle générale prévoyant l’introduction des demandes principales au moyen d’une citation, le présent titre est applicable aux demandes introduites par une requête notifiée à la partie adverse, sauf pour les formalités et mentions régies par des dispositions légales non expressément abrogées.

Art. 1034ter. <Inséré par L 1992-08-03/31, art. 40, 020; En vigueur : 01-01-1993> La requête contient à peine de nullité :

1° l’indication des jour, mois et an;

2° les nom, prénom, profession, domicile du requérant, ainsi que, le cas échéant, ses qualités et inscription au registre de commerce ou au registre de l’artisanat;

3° les nom, prénom, domicile et, le cas échéant, la qualité de la personne à convoquer;

4° l’objet et l’exposé sommaire des moyens de la demande;

5° l’indication du juge qui est saisi de la demande;

6° la signature du requérant ou de son avocat.

Art. 1034quater. <Inséré par L 1992-08-03/31, art. 40, 020; En vigueur : 01-01-1993> Il est joint à la requête, à peine de nullité, un certificat de domicile (ou un extrait du registre national des personnes physiques) visées à l’article 1034ter, 3°, sauf lorsque
l’instance a déjà été introduite antérieurement au moyen d’une citation ou en cas d’élection de domicile. <L 2005-12-13/35, art. 6, 1°, 074; En vigueur : 01-09-2007>

Le certificat (ou l’extrait du registre national) ne peut porter une date antérieure de plus de quinze jours à celle de la requête. Ce certificat est délivré par l’administration communale. <L 2005-12-13/35, art. 6, 2°, 074; En vigueur : 01-09-2007>

Art. 1034quinquies. <Inséré par L 1992-08-03/31, art. 40, 020; En vigueur : 01-01-1993> 
La requête, accompagnée de son annexe, est envoyée, en autant d’exemplaires qu’il y a de parties en cause, par lettre recommandée au greffier de la juridiction ou déposée au greffe.

**Articles 1232 to 1237 of the Judicial Code**

**CHAPITRE IX. <L 2001-04-29/39, art. 67, 054; En vigueur : 01-08-2001> - De la tutelle des mineurs.**


Art. 1233. <L 2001-04-29/39, art. 67, 054; En vigueur : 01-08-2001> § 1er. Les articles 1026 à 1034 sont applicables, sous réserve des dispositions suivantes :

1° la requête est signée par la partie ou son avocat;

2° le mineur est convoqué par le juge pour être entendu s’il est âgé de douze ans dans les procédures relatives à sa personne et s’il est âgé de quinze ans dans celles relatives à ses biens. Les dispositions de l’article 931, alinéas 6 et 7, s’appliquent par analogie;

3° en cas d’application de l’article 394, alinéa 2, du Code civil, l’ordonnance contient les nom, prénom et domicile des ascendants et frères et soeurs majeurs du mineur et, des frères et soeurs des parents du mineur. Ceux-ci sont considérés comme parties intervenantes;

4° toute décision est notifiée au ministère public dès son prononcé;

5° un extrait de la décision nommant le tuteur est notifié dans les huit jours du prononcé au bourgmestre de la commune du domicile du mineur.

§ 2. Les dispositions du § 1er, 2° à 5°, ne sont toutefois pas applicables en cas de nomination d’un tuteur ad hoc ou d’un subrogé tuteur ad hoc.

Art. 1234. <L 2001-04-29/39, art. 67, 054; En vigueur : 01-08-2001> Si l’acte désignant un tuteur testamentaire est découvert après la nomination d’un autre tuteur, le juge convoque les deux tuteurs en chambre du conseil et statue.
Art. 1235.<L 2001-04-29/39, art. 67, 054; En vigueur : 01-08-2001> Pour l'application de l'article 399 du Code civil, les dispositions suivantes sont, en outre, applicables :

1° [le tuteur dont la destitution est poursuivie est convoqué à comparaître, d'office ou à la requête motivée du subrogé tuteur ou du procureur du Roi, à l'audience fixé par le juge de paix [1 ...]. La convocation a lieu par pli judiciaire. Le subrogé tuteur est entendu;] <L 2003-02-13/54, art. 9, 063; En vigueur : 04-04-2003>

2° Sans préjudice de l'application de l'article 391 du Code civil, le juge, en prononçant la destitution, pourvoit immédiatement au remplacement du tuteur destitué, conformément à l'article 401 du même Code.

Ces dispositions sont applicables par analogie à la procédure de destitution du subrogé tuteur, le tuteur devant dans ce cas être entendu.

(1)<L 2010-06-02/35, art. 6, 111; En vigueur : 10-07-2010>

Art. 1236. <L 2001 -04-29/39, art. 67, 054; En vigueur : 01- 08-2001> Toute ordonnance du juge de paix est susceptible d'appel. L'appel de cette ordonnance est attribué à une chambre composée de trois juges.

Art. 1236bis.<Inséré par L 2001 -04-29/39, art. 67, 054; En vigueur : 01- 08-2001> § 1er. La demande tendant à la constatation de l'impossibilité durable d'exercer l'autorité parentale est introduite devant le tribunal de première instance par le procureur du Roi. Ce dernier agit d'office ou à la demande de toute personne intéressée.

[Lorsque les père et mère ou le parent exerçant seul l'autorité parentale ont été pourvus d'un administrateur provisoire conformément aux dispositions du livre 1er, titre XI, chapitre 1erbis, du Code civil, le demande tendant à la constatation de l'impossibilité durable d'exercer l'autorité parentale peut également être introduite par l'administrateur provisoire.] <L 2003-02-13/54, art. 10, 063; En vigueur : 04-04-2003>

A la requête sont joints tous les renseignements utiles, et notamment l'avis des père et mère, celui des ascendants au deuxième degré ainsi que celui des frères et soeurs majeurs de l'enfant mineur.

§ 2. Le tribunal ordonne la comparution [1 ...] de toutes les personnes qu'il estime utile d'entendre; il est dressé procès-verbal de leur audition. Si l'une des personnes dont le procureur du Roi a obligatoirement recueilli l'avis a émis un avis défavorable à la mesure envisagée, cette personne est également convoquée et, si elle comparaît, elle peut déclarer par simple acte vouloir intervenir à la cause. Les convocations sont adressées aux intéressés par le greffier sous pli judiciaire.

Le mineur âgé de douze ans est également entendu séparément.

§ 3. S'il fait droit à la demande, le tribunal décide si l'impossibilité durable d'exercer l'autorité parentale entraîne pour le père ou la mère, ou les deux, la perte du droit de jouissance légale fixe à l'article 384 du Code civil.

Une copie certifiée conforme de la décision est notifiée par le greffier au juge de paix compétent territorialement. Celui-ci procède conformément aux règles de la tutelle.

§ 4. L'appel est formé par requête déposée au greffe de la cour d'appel. [1 ...]
Le délai pour interjeter appel et l'appel contre le jugement sont suspensifs, de même que le délai pour se pourvoir en cassation et le pourvoi contre l'arrêt.

§ 5. La demande en mainlevée est introduite par requête des père et mère agissant conjointement ou séparément.

Le greffier transmet la requête au procureur du Roi. Celui-ci recueille tous les renseignements utiles et notamment l'avis des personnes mentionnées au paragraphe 1er, alinéa 2, et celui des tuteur et subrogé tuteur. Le procureur du Roi transmet au tribunal la requête accompagnée de ces renseignements et de son avis.

Le tribunal procède ensuite conformément au § 2.

S'il est fait droit à la demande, une copie conforme de la décision est notifiée par le greffier au juge de paix tutélaire et la tutelle prend fin à la date du procès-verbal prévu à l'article 415, alinéa 2, du Code civil.

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(1)<L 2010-06-02/35, art. 7, 111; En vigueur : 10-07-2010>

Art. 1237. <L 2001-04-29/39, art. 67, 054; En vigueur : 01-08-2001> Un dossier individuel de procédure est ouvert au greffe de la justice de paix pour chaque mineur placé sous tutelle.

Y sont déposés, à leur date, toutes les requêtes, ordonnances et autres actes relatifs à la tutelle.

Au besoin, le greffier établit les copies certifiées conformes des pièces dont le dépôt dans des dossiers distincts se justifie.

Article 1256 of the Judicial Code

Art. 1256. <Rétabli par L 2007-04-27/00, art. 24, 087; En vigueur : 01-09-2007> A tout moment, les parties peuvent demander au juge d'homologuer leurs accords sur les mesures provisoires relatives à la personne, aux aliments et aux biens des époux ou de leurs enfants.

Il peut refuser d'homologuer l'accord s'il est manifestement contraire à l'intérêt des enfants.

A défaut d'accord ou en cas d'accord partiel, la cause est renvoyée, à la demande d'une des parties, à la première audience utile des référés, pour autant qu'elle ne soit pas encore inscrite au rôle des référés. L'article 803 est d'application.

Article 1280 of the Judicial Code

Art. 1280. [Le président du tribunal ou le juge qui en exerce les fonctions] statuant en référé, connaît, [jusqu'à la dissolution du mariage à la demande, soit des parties ou de l'une d'elles, soit du procureur du Roi] en tout état de cause, des mesures provisoires relatives à la personne, aux aliments et aux biens, tant des parties que des enfants. <L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01> <L 1997-05-20/47, art. 8, 1°, 033; En vigueur : 07-07-1997>
Le juge tient compte, le cas échéant, des opinions exprimées par les enfants dans les conditions prévues à l'article 931, alinéas 3 à 7. [L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01]

Le procureur du Roi peut prendre, à l’intervention [du service social compétent], tous renseignements utiles concernant la situation morale et matérielle des enfants. [L 1994-02-02/33, art. 35, 027; En vigueur : 27-09-1994]

[Le président du tribunal ou le juge qui en exerce les fonctions] peut demander au procureur du Roi de procéder à l’information prévue à l’alinéa précédent. [L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01]

L’information est, en tout cas, communiquée aux parties.

[Le président du tribunal ou le juge qui en exerce les fonctions] peut exercer les mêmes pouvoirs que ceux conférés au juge de paix par l’article [221] du Code civil. [1 En ce cas son ordonnance est opposable à tous tiers débiteurs actuels ou futurs après la notification que leur en fait le greffier, par pli judiciaire, à la requête du demandeur. Lorsque l’ordonnance cesse de produire ses effets, les tiers débiteurs en sont informés par le greffier, par pli judiciaire. La notification faite par le greffier indique le montant que le tiers débiteur doit payer ou cesser de payer.] [L 14-7-1976, art. IV] [L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01]

Si un époux a commis à l’endroit de l’autre un fait visé aux articles 375, 398 à 400, 402, 403 ou 405 du Code pénal ou a tenté de commettre un fait visé aux articles 375, 393, 394 ou 397 du même Code, ou s’il existe des indices sérieux de tels comportements, l’époux victime se verra attribuer, sauf circonstances exceptionnelles, la jouissance de la résidence conjugale s’il en fait la demande. [L 2003-01-28/33, art. 6, 060; En vigueur : 22-02-2003]

Les articles 1253sexies, § 1, 1253septies, alinéa premier, et 153octies sont d’application lorsque l’interdiction d’aliéner ou d’hypothéquer des biens susceptibles d’hypothèque est demandée ou ordonnée; est également d’application l’article 224 du Code civil.] [L 14-7-1976, art. IV]

Le président du tribunal ou le juge qui en exerce les fonctions, reste saisi [jusqu’à la dissolution du mariage] durant toute la durée de la procédure en divorce. [L 1997-05-20/47, art. 8, 2°, 033; En vigueur : 07-07-1997]

Sans préjudice d’une nouvelle citation ou d’une comparution volontaire des parties, la cause peut être ramenée devant lui, dans les 15 jours, par simple dépôt au greffe des conclusions d’une des parties.] [L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01]

**DROIT FUTUR**

Art. 1280. [Le président du tribunal ou le juge qui en exerce les fonctions] statuant en référé, connaît, [jusqu’à la dissolution du mariage à la demande, soit des parties ou de l’une d’elles, soit du procureur du Roi] en tout état de cause, des mesures provisoires relatives à la personne, aux aliments et aux biens, tant des parties que des enfants. [L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01] [L 1997-05-20/47, art. 8, 1°, 033; En vigueur : 07-07-1997]

[2 Sauf circonstances exceptionnelles, la comparution personnelle des parties est requise à l’audience en référé au cours de laquelle les demandes portant sur les mesures provisoires relatives à la personne, aux aliments et aux biens des enfants sont examinées, à l’exception des audiences de mise en état où seule la mise en état est...
examinée. L'article 1263 s'applique par analogie. Sans préjudice de l'article 1734, le président du tribunal ou le juge qui en exerce les fonctions tente de concilier les parties. Il leur donne toutes informations utiles sur la procédure et, en particulier, sur l'intérêt de recourir à la médiation telle que prévue à la septième partie. S'il constate qu'un rapprochement est possible, il peut ordonner la surséance à la procédure, afin de permettre aux parties de recueillir toutes informations utiles à cet égard et d'entamer le processus de médiation. La durée de la surséance ne peut être supérieure à un mois.\[2\]

[Le juge tient compte, le cas échéant, des opinions exprimées par les enfants dans les conditions prévues à l'article 931, alinéas 3 à 7.] <L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01>

Le procureur du Roi peut prendre, à l'intervention [du service social compétent], tous renseignements utiles concernant la situation morale et matérielle des enfants. <L 1994-02-02/33, art. 35, 027; En vigueur : 27-09-1994>

[Le président du tribunal ou le juge qui en exerce les fonctions] peut demander au procureur du Roi de procéder à l'information prévue à l'alinéa précédent. <L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01>

L'information est, en tout cas, communiquée aux parties.

[Le président du tribunal ou le juge qui en exerce les fonctions] peut exercer les mêmes pouvoirs que ceux conférés au juge de paix par l'article [221] du Code civil. [1 En ce cas son ordonnance est opposable à tous tiers débiteurs actuels ou futurs après la notification que leur en fait le greffier, par pli judiciaire, à la requête du demandeur. Lorsque l'ordonnance cesse de produire ses effets, les tiers débiteurs en sont informés par le greffier, par pli judiciaire. La notification faite par le greffier indique le montant que le tiers débiteur doit payer ou cesser de payer.]1 <L 14-7-1976, art. IV> <L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01>

[Si un époux a commis à l'encontre de l'autre un fait visé aux articles 375, 398 à 400, 402, 403 ou 405 du Code pénal ou a tenté de commettre un fait visé aux articles 375, 393, 394 ou 397 du même Code, ou s'il existe des indices sérieux de tels comportements, l'époux victime se verra attribuer, sauf circonstances exceptionnelles, la jouissance de la résidence conjugale s'il en fait la demande.] <L 2003-01-28/33, art. 6, 060; En vigueur : 22-02-2003>

[Les articles 1253sexies, § 1, 1253septies, alinéa premier, et 153octies sont d'application lorsque l'interdiction d'aliéner ou d'hypothéquer des biens susceptibles d'hypothèque est demandée ou ordonnée; est également d'application l'article 224 du Code civil.] <L 14-7-1976, art. IV>

[Le président du tribunal ou le juge qui en exerce les fonctions, reste saisi [jusqu'à la dissolution du mariage] durant toute la durée de la procédure en divorce. <L 1997-05-20/47, art. 8, 2°, 033; En vigueur : 07-07-1997>

Sans préjudice d'une nouvelle citation ou d'une comparution volontaire des parties, la cause peut être ramenée devant lui, dans les 15 jours, par simple dépôt au greffe des conclusions d'une des parties.] <L 1994-06-30/33, art. 21, 026; En vigueur : 1994-10-01>

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(1)<L 2010-03-19/05, art. 12, 108; En vigueur : 01-08-2010; voir également l'art. 17>

(2)<L 2011-04-05/17, art. 5, 113; En vigueur : indéterminée, au plus tard le 01-12-2011>
Article 1290 of the Judicial Code

Art. 1290. Le juge fait aux deux époux réunis, et à chacun d'eux en particulier, (...), telles représentations et exhortations qu'il croit convenables; il leur développe toutes les conséquences de leur démarche. <L 1-7-1972, art. 4>

(Sans préjudice de l'article 931, alinéas 3 à 7, il peut proposer aux parties de modifier les dispositions des conventions relatives à leurs enfants mineurs si elles lui paraissent contraires aux intérêts de ces derniers.

Le juge peut, au plus tard lors de la comparution des époux prévue à l'article 1289, décider d'office d'entendre les enfants conformément à l'article 931, alinéas 3 à 7.

(Lorsqu'il fait application des dispositions prévues au deuxième ou au troisième alinéa, le juge fixe, dans le mois du dépôt au greffe du procès-verbal de la première comparution ou de l'audition prévue à l'alinéa précédent, une nouvelle date de comparution des époux.) <L 1997-05-20/47, art. 13, 033; En vigueur : 07-07-1997>

Au cours de cette comparution, le juge peut faire supprimer ou modifier les dispositions qui sont manifestement contraires aux intérêts des enfants mineurs.) <L 1994-06-30/33, art. 33, 026; En vigueur : 1994-10-01>

Article 1293 of the Judicial Code

Art. 1293. <L 1994-06-30/33, art. 35, 026; En vigueur : 1994-10-01>

Lorsque les époux ou l'un deux font état de circonstances nouvelles et imprévisibles, dont la preuve est dûment apportée, modifiant gravement leur situation, celle de l'un deux ou celle des enfants, ils peuvent soumettre ensemble à l'appréciation du juge, une proposition de modification de leurs conventions initiales.

Après avoir pris connaissance de l'avis du procureur du Roi ou après avoir fait application de l'article 931, alinéas 3 à 7, le juge peut convoquer les parties s'il estime souhaitable, pour leur proposer d'adapter les propositions de modification de leurs conventions concernant leurs enfants mineurs, lorsque celles-ci lui semblent contraires aux intérêts de ces derniers.

Le juge peut, au plus tard, lors de la comparution des époux prévue à l'article 1294, décider d'office d'entendre les enfants conformément à l'article 931, alinéas 3 à 7.

(Lorsqu'il fait application des dispositions prévues au deuxième ou au troisième alinéa, le juge fixe, dans le mois du dépôt au greffe du procès-verbal de la comparution prévue au deuxième alinéa ou de l'audition prévue au troisième alinéa, une nouvelle date pour la seconde comparution prévue à l'article 1294.

Au cours de cette comparution, le juge peut faire supprimer ou modifier les dispositions qui sont manifestement contraires aux intérêts des enfants mineurs.) <L 1997-05-20/47, art. 15, 033; En vigueur : 07-07-1997>

Article 1294 of the Judicial Code

Art. 1294. <L 1994-06-30/33, art. 36, 026; En vigueur : 1994-10-01>
Sauf en cas d'application de l'article 1293, les époux comparaissent ensemble en personne (ou représentés par un avocat ou par un notaire) devant le président du tribunal ou devant le juge qui en exerce les fonctions, dans les trois mois à compter du procès-verbal prévu par l'article 1292. <L 2007-04-27/00, art. 35, 087; En vigueur : 01-09-2007>

Ils renouvellent leur déclaration et requièrent du magistrat chacun séparément, en présence néanmoins l'un de l'autre, la prononciation du divorce.

(Le délai de trois mois est suspendu tant que, le cas échéant, la procédure prévue à l'article 931, alinéas 3 à 7, ou à l'article 1290, alinéa 4, n'a pas pris fin.) <L 1997-05-20/47, art. 16, 033; En vigueur : 07-07-1997>

**Article 1298 of the Judicial Code**

Art. 1298. Le tribunal, sur le référé, ne peut faire d'autres vérifications que celles indiquées par l'article 1297. S'il en résulte que, dans l'opinion du tribunal, les parties ont satisfait aux conditions et rempli les formalités déterminées par la loi, il (prononce) le divorce (et homologue les conventions relatives aux enfants mineurs); dans le cas contraire, le tribunal déclare qu'il n'y a pas lieu à (prononcer) le divorce et énonce les motifs de la décision. <L 1994-06-30/33, art. 38, 026; En vigueur : 1994-10-01> <L 1997-05-20/47, art. 17, 033; En vigueur : 07-07-1997>

**Articles 1322bis to 1322quaterdecies of the Judicial Code**

CHAPITRE XIIbis. - (inséré par <L 1998-08-10/A2, art. 3, En vigueur : 04-05-1999>) Des demandes relatives à la protection des droits de garde et de visite transfrontières.

Art. 1322bis. <L 2007-05-10/52, art. 6, 090; En vigueur : 01-07-2007>

§ 1er. Sans préjudice de la procédure prévue à l'article 1322decies, §§ 2 à 7, le président du tribunal de première instance est saisi, selon la procédure prévue aux articles 1034bis à 1034quinquies :

1° des demandes fondées sur la Convention européenne de Luxembourg du 20 mai 1980 sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants;

2° des demandes fondées sur la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants, qui tendent à obtenir le retour immédiat de l'enfant, le respect du droit de garde ou de visite existant dans un autre Etat, ou qui tendent à l'organisation d'un droit de visite;

3° des demandes fondées sur la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants et sur l'article 11 du Règlement (CE) n° 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le Règlement (CE) n° 1347/2000, qui tendent à obtenir, soit le retour de l'enfant, soit la garde de celui-ci à la suite d'une décision de non-retour rendue dans un autre Etat membre de l'Union européenne en application dudit règlement;
4° des demandes fondées sur l'article 48 du Règlement visé au 3°, qui tendent à arrêter les modalités pratiques de l'exercice du droit de visite.

§ 2. Le président du tribunal de première instance est saisi, selon la procédure prévue aux articles 1025 à 1034, des demandes fondées sur l'article 28 du Règlement du Conseil visé au § 1er, 3°, qui tendent à obtenir la reconnaissance et l'exécution des décisions en matière de droit de visite et de retour de l'enfant.

Art. 1322ter. <L 2007-05-10/52, art. 7, 090; En vigueur : 01-07-2007> Sans préjudice de l'article 1322decies, la requête est déposée ou envoyée par lettre recommandée au greffe du tribunal de première instance visé à l'article 633sexies.

Art. 1322quater. (inséré par <L 1998-08-10/A2, art. 3, En vigueur : 04-05-1999>) Les parties sont convoquées par le greffier, sous pli judiciaire, à comparaître dans les huit jours de l'inscription de la requête au rôle, à l'audience fixée par le juge. <L 2006-07-10/39, art. 15, 079; En vigueur : indéterminée et au plus tard : 01-01-2013 (voir L 2010-12-29/01, art. 4)>

Si néanmoins le cas requiert célérité, le président peut permettre par ordonnance de citer à l'audience dans le délai de trois jours.

Art. 1322quinquies. (inséré par <L 1998-08-10/A2, art. 3, En vigueur : 04-05-1999>) (Lorsque la demande est formulée par l'intermédiaire de l'Autorité centrale désignée sur la base de l'une des Conventions ou du Règlement du Conseil visés à l'article 1322bis, la requête est signée et présentée au président du tribunal par le ministère public.) <L 2007-05-10/52, art. 8, 090; En vigueur : 01-07-2007>

En cas de conflit d'intérêts dans le chef de celui-ci, la requête est signée et présentée au président du tribunal par l'avocat désigné par l'autorité centrale.

Art. 1322sexies. (inséré par <L 1998-08-10/A2, art. 3, En vigueur : 04-05-1999>) Saisi dans les affaires visées à l'article 1322bis, le président du tribunal de première instance statue comme en référé.

(Aucun recours ne peut être exercé à l'encontre d'une décision de non-retour rendue en Belgique en application de l'article 11, 6, du Règlement du Conseil visé à l'article 1322bis, 3°.

Aucun recours ne peut être exercé à l'encontre d'une décision arrêtant des mesures protectionnelles en application de l'article 11, 4, du Règlement du Conseil visé à l'article 1322bis, 3°.

Aucun recours ne peut être exercé à l'encontre de l'ordonnance rendue par le président du tribunal en application de l'article 1322decies, § 5.) <L 2007-05-10/52, art. 9, 090; En vigueur : 01-07-2007>

Art. 1322septies. (inséré par <L 1998-08-10/A2, art. 3, En vigueur : 04-05-1999>) Les articles 1038 à 1041 sont applicables sauf en ce que l'article 1039 dispose que les ordonnances de référé ne portent préjudice au principal.
Art. 1322octies. (inséré par <L 1998-08-10/A2, art. 3, En vigueur : 04-05-1999>) Dans le cadre de l'application du présent titre, le défendeur n'est pas admis à former une demande reconventionnelle.

Art. 1322nonies. <Inséré par L 2007-05-10/52, art. 10; En vigueur : 01-07-2007> § 1er. La décision de non-retour de l'enfant, rendue en Belgique en application de la Convention de La Haye et du Règlement du Conseil visé à l'article 1322bis, 3°, ainsi que les documents qui l'accompagnent, qui doivent, en application de l'article 11, 6, dudit Règlement, être transmis à la juridiction compétente ou à l'Autorité centrale de l'État membre dans lequel l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour illicite, sont communiqués par le greffier à l'Autorité centrale belge, dans les trois jours ouvrables à dater du prononcé.

§ 2. Cette Autorité centrale est seule habilitée à assurer la transmission des pièces aux Autorités compétentes de l'Etat requérant.

Art. 1322decies. <Inséré par L 2007-05-10/52, art. 11; En vigueur : 01-07-2007> § 1er. La décision de non-retour de l'enfant rendue à l'étranger, ainsi que les documents qui l'accompagnent, transmis à l'Autorité centrale belge en application de l'article 11, 6, du Règlement du Conseil visé à l'article 1322bis, 3°, sont envoyés par lettre recommandée au greffier du tribunal de première instance qui est établi au siège de la Cour d'appel dans le ressort de laquelle l'enfant avait sa résidence habituelle immédiatement avant son déplacement ou son non-retour illicite.

§ 2. Dès réception des pièces et au plus tard dans les trois jours ouvrables, le greffier notifie par pli judiciaire aux parties et au ministère public, l'information contenue à l'article 11, 7 du Règlement du Conseil visé au § 1er. Le pli judiciaire contient les mentions suivantes :

1° le texte de l'article 11 du Règlement du Conseil visé à l'article 1322bis, 3°;

2° une invitation aux parties à déposer des conclusions au greffe, dans les trois mois de la notification. Le dépôt de ces conclusions opère saisine du président du tribunal de première instance.

§ 3. Si l'une au moins des parties dépose des conclusions, le greffier convoque immédiatement les parties à la première audience utile.

§ 4. La saisine du président du tribunal opère suspension des procédures engagées devant les cours et tribunaux, saisis d'un litige en matière de responsabilité parentale ou d'un litige connexe.

§ 5. A défaut pour les parties de présenter des observations au tribunal dans le délai prévu au § 2, 2°, le président du tribunal rend une ordonnance le constatant, qui est notifiée par le greffier aux parties, à l'Autorité centrale et au ministère public.

§ 6. La décision rendue sur la question de la garde de l'enfant en application de l'article 11, 8 du Règlement du Conseil visé au § 1er, peut également, à la demande de l'une des parties, porter sur le droit de visite dans l'hypothèse où elle ordonnerait le retour de l'enfant en Belgique.

§ 7. La décision visée au § 6 est notifiée par le greffier aux parties, au ministère public et à l'Autorité centrale belge par pli judiciaire.
§ 8. L'autorité centrale belge est seule habilitée à assurer la transmission de la décision et des pièces qui l'accompagnent aux Autorités compétentes de l'Etat dans lequel la décision de non-retour a été rendue.


§ 2. La décision rendue par le tribunal de la jeunesse ainsi que les documents qui l’accompagnent doivent être communiqués à l’Autorité centrale belge dans les trois jours ouvrables du prononcé.

§ 3. Cette Autorité centrale est seule habilitée à assurer la transmission des pièces aux Autorités compétentes de l’Etat requérant.


§ 2. Aux fins de l’application de l'article 56, 4, du Règlement visé au § 1er, l'Autorité centrale belge transmet à l'instance communautaire compétente, l’information qui lui a été communiquée par la juridiction d'un autre Etat membre.

**Article 33 of the Code of Private international law**

*Extrait de la Loi du 16 juillet 2004 portant le Code de droit international privé (M.B., 27 juillet 2004)*

Art. 33. Les juridictions belges sont compétentes pour connaître de toute demande concernant l'autorité parentale ou la tutelle, la détermination de l'incapacité d'un adulte ou la protection de la personne d'un incapable, dans les cas prévus par les dispositions générales de la présente loi et à l'article 32.

Les juridictions belges sont compétentes pour connaître de toute demande concernant l'administration des biens d'un incapable, outre dans les cas prévus par les dispositions générales de la présente loi et à l'article 32, si la demande porte sur des biens situés en Belgique.

Les juridictions belges sont également compétentes pour connaître de toute demande concernant l'exercice de l'autorité parentale et du droit aux relations personnelles des parents avec leurs enfants âgés de moins de dix-huit ans accomplis, lorsqu'elles sont saisies d'une demande en nullité de mariage, de divorce ou de séparation de corps.

Dans les cas d'urgence, les juridictions belges sont également compétentes pour prendre, à l'égard d'une personne se trouvant en Belgique, les mesures que requiert la situation.

**Articles 431 and 432 of the Criminal Code**

*Section V. - De la non-représentation d'enfants.*

Art. 431. Seront punis d'un emprisonnement de huit jours à un an et d'une amende de vingt-six [euros] à cent [euros] ou d'une de ces peines seulement, ceux qui, étant chargés d'un mineur de moins de douze ans, ne le représenteront point aux personnes qui ont le droit de le réclamer. <L 2000-06-26/42, art. 2, En vigueur : 01-01-2002>

Si le coupable cache ce mineur pendant plus de cinq jours à ceux qui ont le droit de le réclamer ou s'il retient indûment ce mineur hors du territoire du Royaume, il sera puni d'un emprisonnement d'un an à cinq ans et d'une amende de vingt-six [euros] à deux cents [euros] ou d'une de ces peines seulement. <L 2000-06-26/42, <art>. 2, En vigueur : 01-01-2002>

Art. 432. § 1er. Seront punis d'un emprisonnement de huit jours à un an et d'une amende de vingt-six [euros] à mille [euros], ou d'une de ces peines seulement : <L 2000-06-26/42, art. 2, En vigueur : 01-01-2002>

Le père ou la mère qui soustraira ou tentera de soustraire son enfant mineur à la procédure intentée contre lui en vertu de la législation relative à la protection de la
jeunesse ou à l'aide à la jeunesse, qui le soustraira ou tentera de le soustraire à la garde des personnes à qui l'autorité compétente l'a confié, qui ne le représentera pas à ceux qui ont le droit de le réclamer, l'enlèvera ou le fera enlever, même de son consentement.

Si le coupable a été déchu de l'autorité parentale en tout ou en partie, l'emprisonnement pourra être élevé jusqu'à trois ans.

§ 2. Si le coupable cache l'enfant mineur pendant plus de cinq jours à ceux qui ont le droit de le réclamer ou s'il retient indûment l'enfant mineur hors du territoire du Royaume, il sera puni d'un emprisonnement d'un an à cinq ans et d'une amende de cinquante [euros] à mille [euros], ou d'une de ces peines seulement. <L 2000-06-26/42, art. 2, En vigueur : 01-01-2002>

Si le coupable a été déchu de l'autorité parentale en tout ou en partie, l'emprisonnement sera de trois ans au moins.

§ 3. Dans les cas où il aura été statué sur la garde de l'enfant mineur soit au cours, soit à la suite d'une instance en divorce ou en séparation de corps, soit dans d'autres circonstances prévues par la loi, les peines prévues aux §§ 1er et 2 seront appliquées au père ou à la mère qui soustraira ou tentera de soustraire son enfant mineur à la garde de ceux à qui il aura été confié en vertu de la décision, qui ne le représenteront pas à ceux qui ont le droit de le réclamer, l'enlèvera ou le fera enlever, même de son consentement.

§ 4. Lorsque la garde de l'enfant mineur aura fait l'objet d'un règlement transactionnel préalable à une procédure par consentement mutuel, les peines prévues aux §§ 1er et 2 seront appliquées au père ou à la mère qui, à dater de la transcription du divorce par consentement mutuel, soustraira ou tentera de soustraire son enfant mineur à la garde de ceux à qui il aura été confié en vertu de la décision ou du règlement transactionnel, qui ne le représentera pas à ceux qui ont le droit de le réclamer, l'enlèvera ou le fera enlever, même de son consentement.

8 AVRIL 1965. - [Loi relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait].

<L 2006-06-13/40, art. 2, 023; En vigueur : 16-10-2006> -

(NOTE : Pour la conversion en euro voir L 2000-06-26/42) -

(NOTE : Consultation des versions antérieures à partir du 30-01-1990 et mise à jour au 18-08-2009)

Publication : 15-04-1965
Entrée en vigueur : 01-09-1966

Titre préliminaire: Principes de l'administration de la justice des mineurs

<Inséré par L 2006-06-13/40, art. 3; En vigueur : 16-10-2006>
Les principes suivants sont reconnus et applicables à l'administration de la justice des mineurs :

1° la prévention de la délinquance est essentielle pour protéger la société à long terme et exige que les autorités compétentes s'attaquent aux causes sous-jacentes de la délinquance des mineurs et qu'elles élaborent un cadre d'action multidisciplinaire;

2° tout acte d'administration de la justice des mineurs est, dans la mesure du possible, assuré par des intervenants, fonctionnaires et magistrats qui ont reçu une formation spécifique et continue en matière de droit de la jeunesse;

3° l'administration de la justice des mineurs poursuit les objectifs d'éducation, de responsabilisation et de réinsertion sociale ainsi que de protection de la société;

4° les mineurs ne peuvent, en aucun cas, être assimilés aux majeurs quant à leur degré de responsabilité et aux conséquences de leurs actes. Toutefois, les mineurs ayant commis un fait qualifié infraction doivent être amenés à prendre conscience des conséquences de leurs actes;

5° les mineurs jouissent dans le cadre de la présente loi, à titre propre, de droits et libertés, au nombre desquels figurent ceux qui sont énoncés dans la Constitution et la Convention internationale relative aux droits de l'enfant, et notamment le droit de se faire entendre au cours du processus conduisant à des décisions qui les touchent et de prendre part à ce processus, ces droits et libertés devant être assortis de garanties spéciales :

   a) les jeunes ont le droit, chaque fois que la loi est susceptible de porter atteinte à certains de leurs droits et libertés, d'être informés du contenu de ces droits et libertés;

   b) les père et mère assument l'entretien, l'éducation et la surveillance de leurs enfants. Par conséquent, les jeunes ne peuvent être entièrement ou partiellement soustraits à l'autorité parentale que dans les cas où des mesures tendant au maintien de cette autorité sont contre-indiquées;

   c) la situation des mineurs ayant commis un fait qualifié infraction requiert surveillance, éducation, discipline et encadrement. Toutefois, l'état de dépendance où ils se trouvent, leur degré de développement et de maturité créent dans leur chef des besoins spéciaux qui exigent écoute, conseils et assistance;

   d) toute intervention comportant une mesure éducative vise à encourager le jeune à intégrer les normes de la vie sociale;

   e) dans le cadre de la prise en charge des mineurs ayant commis un fait qualifié infraction, il est fait recours, lorsque cela est possible, aux mesures, prévues par la loi, de substitution aux procédures judiciaires, et ce, en restant cependant attentif à l'impératif de protection sociale;

   f) dans le cadre de la loi, le droit des jeunes à la liberté ne peut souffrir que d'un minimum d'entraves commandées par la protection de la société, compte tenu des besoins des jeunes, des intérêts de leur famille et du droit des victimes.

**TITRE I. - Protection sociale.**

Article 1. Il est institué au chef-lieu de chaque arrondissement judiciaire un comité de protection de la jeunesse.
Le Roi peut, lorsque l'intérêt de la jeunesse le requiert, créer dans un même arrondissement judiciaire deux ou plusieurs comités de protection de la jeunesse, compte tenu du chiffre de la population et des nécessités, régionales ou linguistiques.

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COMMUNAUTES ET REGIONS
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Art. 1. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1985-06-27/35, art. 32, 1°>

Art. 1. (COMMUNAUTE FRANCAISE)
(Abrogé) <DCFR 1991-03-04/36, art. 62, § 1, 005; En vigueur : 24-12-1991>

Art. 1. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Art. 2. Le comité de protection de la jeunesse est chargé d'intervenir, lorsque la santé, la sécurité ou la moralité d'un mineur est mise en danger soit en raison du milieu où il est élevé, soit par les activités auxquelles il se livre, ou lorsque les conditions de son éducation sont compromises par le comportement des personnes qui en ont la garde.

Il peut, dans ce cas, faire exercer, dans l'intérêt du mineur, une action sociale préventive pour autant que son aide ait été sollicitée ou acceptée par les personnes investies à l'égard du mineur de la puissance paternelle ou qui en assument la garde, en droit ou en fait.

Le comité de protection de la jeunesse a, en outre, pour mission :
1° d'apporter son concours aux autorités compétentes dans les cas et de la manière déterminés par la loi;
2° de signaler aux autorités compétentes les faits de nature à exercer une influence défavorable sur la santé physique ou morale de la jeunesse;
3° de promouvoir, d'orienter et de coordonner sur le plan local ou régional, toutes les initiatives en faveur de la protection de la jeunesse.

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COMMUNAUTES ET REGIONS
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Art. 2. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1985-06-27/35, art. 32>

Art. 2. (COMMUNAUTE FRANCAISE)
(Abrogé) <DCFR 1991-03-04/36, art. 62, § 1, 005; En vigueur : 24-12-1991>

Art. 2. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 2. (Région de Bruxelles-Capitale)
Art. 3. Le comité de protection de la jeunesse se compose de douze à vingt-quatre membres nommés pour un terme renouvelable (cinq ans) par le Ministre de la Justice parmi les représentants de services, d'institutions ou d'organisations s'occupant activement de la jeunesse, de la protection de la jeunesse et de la famille. <L 09-05-1972, art. 1er>

Un tiers de ces membres sont nommés sur proposition du Ministre ayant l'éducation nationale dans ses attributions; un tiers, sur proposition du Ministre ayant la santé publique et la famille dans ses attributions.

Au maximum trois personnes connues pour leur compétence ou leurs mérites en matière de protection de la jeunesse peuvent être cooptées par le comité même à une majorité des deux tiers et pour une durée de (cinq ans). <L 09-05-1972, art. 1er>

Le Ministre de la Justice nomme parmi les membres du comité un président et deux vice-présidents.

Le Roi règle le fonctionnement du comité et fixe les indemnités allouées à ses membres. Il peut créer au sein du comité des sections dont il fixe la composition compte tenu des dispositions ci-dessus.

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Art. 3. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1985-06-27/35, art. 32>

Art. 3. (COMMUNAUTE FRANCAISE)
(Abrogé) <DCFR 1991-03-04/36, art. 62, § 1, 005; En vigueur : 24-12-1991>

Art. 3. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 3. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

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Art. 4. Il est institué un conseil national de protection de la jeunesse.

Ce conseil se compose de vingt et un à vingt-quatre membres nommés pour un terme renouvelable de cinq ans par le Ministre de la Justice selon les règles observées pour la composition des comités de protection de la jeunesse.

Le Ministre de la Justice nomme parmi les membres du conseil un président et deux vice-présidents.

Le Ministre de la Justice et les Ministres qui ont respectivement l'éducation nationale et la santé publique et la famille dans leurs attributions, sont représentés au sein du conseil chacun par un assesseur ou son suppléant ayant voix consultative.
Le directeur général de l’office de la protection de la jeunesse assume les fonctions de secrétaire général du conseil.

Le conseil national de protection de la jeunesse a pour mission :
1° d’animer l’action des comités de protection de la jeunesse, de donner en la matière des avis au Ministre de la Justice et de lui faire des propositions;
2° de donner son avis aux Ministres ayant le droit de présenter des candidats pour la composition du conseil, au sujet de toute question relative à la protection sociale de la jeunesse, et ce, à la demande desdits Ministres ou de sa propre initiative;
3° de faire annuellement rapport sur le développement et les besoins de la protection sociale de la jeunesse.

Le Roi règle le fonctionnement du conseil et du bureau permanent qui est constitué dans son sein. Il fixe les indemnités allouées à leurs membres.

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Art. 4. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1985-06-27/35, art. 32>

Art. 4. (COMMUNAUTE FRANCAISE)
(Abrogé) <DCFR 1991-03-04/36, art. 62, § 1, 005; En vigueur : 24-12-1991>

Art. 4. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 4. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Art. 5. Le Ministre de la Justice organise et met à la disposition des comités de protection de la jeunesse :
1° un secrétariat administratif chargé de préparer les délibérations du comité et d’en assurer l’exécution;
2° une section du service social prévu à l’article 64.

En outre, le Ministre de la Justice met à la disposition des comités, par arrondissement judiciaire ou par province :
1° un centre médico-psychologique;
2° un centre de premier accueil pour l’hébergement des mineurs.

A cet effet, il peut passer convention avec des organismes publics ou privés, ainsi qu’avec des particuliers.

Là où il n’aurait pu conclure de conventions permettant d’assurer, dans les centres existants, les examens indispensables, le Ministre de la Justice prend les mesures en vue d’organiser les consultations nécessaires.

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Art. 5. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1985-06-27/35, art. 32>

Art. 5. (COMMUNAUTE FRANCAISE)
(Abrogé) <DCFR 1991-03-04/36, art. 62, § 1, 005; En vigueur : 24-12-1991>

Art. 5. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 5. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>


Il en est de même des dépenses résultant des mesures prises par les comités qui ne sont pas couvertes par une institution publique ou privée.

Le Roi détermine les conditions dans lesquelles les comités peuvent engager ces dépenses.

La part contributive des mineurs et des personnes qui leur doivent des aliments est fixée par les comités, sous réserve du droit pour les intéressés de former recours par voie de requête adressée au tribunal de la jeunesse.

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Art. 6. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1985-06-27/35, art. 32, 3°, annulé par ACA 30/06/1988 dans la mesure où il abroge l'art. 6, al. 4>

(NOTE : Pour la Communauté flamande, à l'art. 6, le mot " comités " est remplacé par les mots " bureau d'assistance spéciale à la jeunesse " <DCFL 1990-03-28/34, art. 23, 1°, 003; En vigueur : 01-05-1990>)

(NOTA : L'alinéa quatre de l'article 6 est abrogé <DCFL 2008-03-07/38, art. 68; En vigueur : 02-03-2009>

Art. 6. (COMMUNAUTE FRANCAISE)
(Abrogé) <DCFR 1991-03-04/36, art. 62, § 1, 005; En vigueur : 24-12-1991>

Art. 6. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 6. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>
TITRE II. - Protection judiciaire.

CHAPITRE I. - Des tribunaux de la jeunesse et des chambres de la jeunesse des cours d'appel.

Art. 7. (Abrogé) <L 10-10-1967, art. 2, 1er, § 1er, 119°>

Art. 8. Les fonctions du ministère public près le tribunal de la jeunesse sont exercées par un ou plusieurs magistrats du parquet désignés par le procureur du Roi.

Ces magistrats exercent également les fonctions du ministère public près le (tribunal civil) chaque fois que celui-ci est appelé à statuer sur les mesures provisoires relatives à la personne, aux aliments et aux biens d'enfants mineurs non émancipés dont les père et mère sont en instance de divorce ou de séparation de corps. <L 10-10-1967, art. 3, 107>

Art. 9. Un ou plusieurs juges d'instruction désignés par le président du tribunal de première instance sont spécialement chargés des affaires qui sont de la compétence du tribunal de la jeunesse.

Art. 10. <Rétabli par L 2006-06-13/40, art. 4, 023; En vigueur : 16-10-2006> Toute décision, qu'il s'agisse d'une mesure provisoire ou d'une mesure sur le fond, prise par le juge de la jeunesse ou le tribunal de la jeunesse, en première instance ou en degré d'appel, est, par les soins du greffier, transmise le jour même de la décision par simple copie à l'avocat du mineur.

Art. 11. A la cour d'appel, les fonctions du ministère public près les chambres de la jeunesse sont exercées par un ou plusieurs magistrats du parquet général, désignés par le procureur général.

CHAPITRE II. - Dispositions de droit civil relatives aux mineurs.

Art. 12. <Disposition modificative de l'art. 108 du CC>

Art. 13. <Disposition modificative des art. 148 et 160bis du CC>

Art. 14. <Disposition modificative des art. 236, 239, 264, 267 et 268 du CC>

Art. 15. <Disposition modificative des art. 280, 283 et 284 du CC>
Art. 16. <Disposition modificative de l'art. 302 du CC>

Art. 17. <Disposition modificative des art. 307 et 311bis du CC>

Art. 18. <Disposition modificative des art. 355, 356 et 360 du CC>

Art. 19. <Disposition modificative des art. 373, 374, 384 et 386 du CC>

Art. 20. <Disposition modificative des art. 389 et 407 du CC>

Art. 21. <Disposition modificative des art. 477, 478, 479 et 485 du CC>

Art. 22. <Disposition modificative de l'art. 883 du CPC>

Art. 23. <Disposition modificative de L 1925-03-10/01, art. 79>

Art. 24. <Disposition modificative de CCOM, art. 4 et 5>

Art. 25. <Disposition modificative de L 1900-03-10/01, art. 34, art. 35 et art. 36>

Art. 26. (Disposition modificative de L 1928-06-05/01, art. 102)

Art. 27. (Disposition modificative de AL 1944-12-28/01, art. 8, AL 1945-01-10/01, art. 5 et AL 1945-02-07/01, art. 8)

Art. 28. (Disposition modificative de L 14-12-1932, art. 5 et art. 18)

**CHAPITRE III. - Des mesures de protection des mineurs.**

**Section I. - Des mesures à l'égard des parents.**

Art. 29. Lorsque des enfants donnant droit aux prestations familiales ou autres allocations sociales sont élevés dans des conditions d'alimentation, de logement et d'hygiène manifestement et habituellement défectueuses et lorsque le montant des allocations n'est pas employé dans l'intérêt des enfants, le tribunal de la jeunesse peut, sur réquisition du ministère public, désigner une personne chargée de percevoir le
montant de ces allocations et de l’affecter aux besoins exclusifs des enfants et aux dépenses du foyer qui les concernent.

Le Comité de protection de la jeunesse peut être désigné à ces fins.

Lorsque la décision est passée en force de chose jugée, le greffier du tribunal de la jeunesse la signifie en copie, par lettre recommandée à la poste, à l'organisme chargé de la liquidation des allocations, qui ne peut dès lors se libérer valablement que par versement à la personne ou au comité de protection de la jeunesse désigné à cette fin.

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Art. 29. (COMMUNAUTE FLAMANDE)

Lorsque des enfants donnant droit aux prestations familiales ou autres allocations sociales sont élevés dans des conditions d'alimentation, de logement et d'hygiène manifestement et habituellement défectueuses et lorsque le montant des allocations n'est pas employé dans l'intérêt des enfants, le tribunal de la jeunesse peut, sur réquisition du ministère public, désigner une personne chargée de percevoir le montant de ces allocations et de l'affecter aux besoins exclusifs des enfants et aux dépenses du foyer qui les concernent.

(Le Service social de la Communauté flamande près du Tribunal de la jeunesse) peut être désigné à ces fins. <DCFL 1985-06-27/35, art. 33, 1°>

Lorsque la décision est passée en force de chose jugée, le greffier du tribunal de la jeunesse la signifie en copie, par lettre recommandée à la poste, à l'organisme chargé de la liquidation des allocations, qui ne peut dès lors se libérer valablement que par versement à la personne ou au (Service social de la Communauté flamande près du Tribunal de la jeunesse) désigné à cette fin. <DCFL 1985-06-27/35, art. 33, 1°>

Art. 29. (COMMUNAUTE FRANCAISE)

Lorsque des enfants donnant droit aux prestations familiales ou autres allocations sociales sont élevés dans des conditions d'alimentation, de logement et d'hygiène manifestement et habituellement défectueuses et lorsque le montant des allocations n'est pas employé dans l'intérêt des enfants, le tribunal de la jeunesse peut, sur réquisition du ministère public, désigner une personne chargée de percevoir le montant de ces allocations et de l'affecter aux besoins exclusifs des enfants et aux dépenses du foyer qui les concernent.

(Alinéa 2 abrogé) <DCFR 1991-03-04/36, art. 62, § 2, 1°, 005; En vigueur : 24-12-1991>

Lorsque la décision est passée en force de chose jugée, le greffier du tribunal de la jeunesse la signifie en copie, par lettre recommandée à la poste, à l'organisme chargé de la liquidation des allocations, qui ne peut dès lors se libérer valablement que par versement à la personne (...) (désignée) à cette fin. <DCFR 1991-03-04/36, art. 62, § 2, 2°, 005; En vigueur : 24-12-1991>

Art. 29. (COMMUNAUTE GERMANOPHONE)

Lorsque des enfants donnant droit aux prestations familiales ou autres allocations sociales sont élevés dans des conditions d'alimentation, de logement et d'hygiène
manifestement et habituellement défectueuses et lorsque le montant des allocations n'est pas employé dans l'intérêt des enfants, le tribunal de la jeunesse peut, sur réquisition du ministère public, désigner une personne chargée de percevoir le montant de ces allocations et de l'affecter aux besoins exclusifs des enfants et aux dépenses du foyer qui les concernent.

Le (service de l'aide judiciaire à la jeunesse) peut être désigné à ces fins. <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Lorsque la décision est passée en force de chose jugée, le greffier du tribunal de la jeunesse la signifie en copie, par lettre recommandée à la poste, à l'organisme chargé de la liquidation des allocations, qui ne peut dès lors se libérer valablement que par versement à la personne ou au (service de l'aide judiciaire à la jeunesse) désigné à cette fin. <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 29. (Région de Bruxelles-Capitale)

Lorsque des enfants donnant droit aux prestations familiales ou autres allocations sociales sont élevés dans des conditions d'alimentation, de logement et d'hygiène manifestement et habituellement défectueuses et lorsque le montant des allocations n'est pas employé dans l'intérêt des enfants, le tribunal de la jeunesse peut, sur réquisition du ministère public, désigner une personne chargée de percevoir le montant de ces allocations et de l'affecter aux besoins exclusifs des enfants et aux dépenses du foyer qui les concernent.

(alinéa 2 abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Lorsque la décision est passée en force de chose jugée, le greffier du tribunal de la jeunesse la signifie en copie, par lettre recommandée à la poste, à l'organisme chargé de la liquidation des allocations, qui ne peut dès lors se libérer valablement que par versement à la personne (désignée) à cette fin. <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Art. 29bis. <Inséré par L 2006-06-13/40, art. 5; En vigueur : 02-04-2007> (Lorsque le tribunal de la jeunesse a déclaré établi un fait qualifié infraction pour lequel un mineur était poursuivi, il peut, sur réquisition du ministère public ou d'office, ordonner aux personnes qui exercent l'autorité parentale sur ce mineur d'accomplir un stage parental, s'ils manifestent un désintérêt caractérisé à l'égard du comportement délinquant de ce dernier, et que ce désintérêt contribue aux problèmes du mineur.) Ce stage parental peut uniquement être ordonné en tant que mesure complémentaire à une mesure imposée au mineur par le juge de la jeunesse s'il peut être bénéfique pour le mineur délinquant lui-même. <L 2006-12-27/33, art. 87, 024; En vigueur : 01-01-2007>

Art. 30. Lorsque la santé, la sécurité, la moralité ou les conditions d'éducation d'un mineur sont compromises, le tribunal de la jeunesse peut, sur réquisition du ministère public, ordonner une mesure d'assistance éducative à l'égard des personnes qui en ont la garde.

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COMMUNAUTES ET REGIONS
Art. 30. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1990-03-28/34, art. 22, 1°, 003; En vigueur : 27-09-1994>
Art. 30. (COMMUNAUTE FRANCAISE)
(Abrogé) <DCFR 1991-03-04/36, art. 62, § 3, 005; En vigueur : 07-12-1994>
Art. 30. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>
Art. 30. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Art. 31. L'assistance éducative assure aux personnes qui ont la garde du mineur l'aide du comité de protection de la jeunesse ou d'un délégué à la protection de la jeunesse.
Cette mesure peut, en outre, selon les circonstances, comporter pour ces mêmes personnes l'une ou plusieurs des obligations suivantes :
1° soumettre le mineur à la surveillance du comité de protection de la jeunesse ou d'un délégué à la protection de la jeunesse;
2° le soumettre aux directives pédagogiques ou médicales d'un centre d'orientation éducative ou d'hygiène mentale;
3° lui faire fréquenter régulièrement un établissement d'enseignement ordinaire ou spécial;
4° exceptionnellement le placer chez une personne digne de confiance ou dans un établissement approprié, en vue de son hébergement, de son traitement, de son éducation, de son instruction ou de sa formation professionnelle.
Le comité de protection de la jeunesse ou le délégué à la protection de la jeunesse chargé de l'assistance éducative, veille à l'accomplissement de ces obligations sous le contrôle du tribunal de la jeunesse.
L'assistance éducative peut être ordonnée indépendamment de toute procédure à l'égard du mineur.

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Art. 31. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1990-03-28/34, art. 22, 1°, 003; En vigueur : 27-09-1994>
Art. 31. (COMMUNAUTE FRANCAISE)
(Abrogé) <DCFR 1991-03-04/36, art. 62, § 3, 005; En vigueur : 07-12-1994>
Art. 31. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>
Art. 31. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Art. 32. Peut être déchu de (l'autorité parentale), en tout ou en partie, à l'égard de tous ses enfants, de l'un ou de plusieurs d'entre eux : <L 31-03-1987, art. 105>

1° le père ou la mère qui est condamné à une peine criminelle ou correctionnelle du chef de tous faits commis sur la personne ou à l'aide d'un de ses enfants ou descendants;

2° le père ou la mère qui, par mauvais traitements, abus d'autorité, inconduite notoire ou négligence grave, met en péril la santé, la sécurité ou la moralité de son enfant.

Il en est de même pour le père ou la mère qui épouse une personne déchue de (l'autorité parentale). <L 31-03-1987, art. 105>

La déchéance est prononcée par le tribunal de la jeunesse sur réquisition du ministère public.

Art. 33. La déchéance totale porte sur tous les droits qui découlent de (l'autorité parentale). <L 31-03-1987, art. 105>

(Toutefois, elle ne porte sur le droit de consentir à l'adoption de l'enfant que si le jugement le stipule expressément.) <L 2003-04-24/32, art. 8, 017; En vigueur : 01-09-2005>

Elle comprend pour celui qui en est frappé, à l'égard de l'enfant qu'elle concerne et des descendants de celui-ci :

1° l'exclusion du droit de garde et d'éducation;

2° l'incapacité de les représenter, de consentir à leurs actes et d'administrer leurs biens;

3° l'exclusion du droit, de jouissance prévu à l'article 384 du Code civil;

4° l'exclusion du droit de réclamer des aliments;

5° l'exclusion du droit de recueillir tout ou partie de leur succession par application de l'article 746 du Code civil.

(En outre, la déchéance totale entraîne l'incapacité générale d'être tuteur, tuteur officieux, subrogé tuteur ou curateur.) <L 2001-04-29/39, art. 74, 013; En vigueur : 01-08-2001>

La déchéance partielle porte sur les droits que le tribunal détermine.

Art. 34. En prononçant la déchéance totale ou partielle de (l'autorité parentale), le tribunal de la jeunesse désigne la personne qui, sous son contrôle, exercera les droits mentionnés à l'article 33, 1° et 2°, dont les parents ou l'un d'entre eux sont déchus et remplira les obligations qui y sont corélatives, ou confie le mineur au comité de protection de la jeunesse, lequel désigne une personne qui exercera ces droits après que sa désignation aura été homologuée par ce tribunal, sur réquisition du ministère public. <L 31-03-1987, art. 105>

Le père et la mère sont préalablement entendus ou appelés.
Si un seul des parents a encouru la déchéance, le tribunal de la jeunesse désigne, pour le remplacer, le parent non déchu, lorsque l'intérêt du mineur ne s'y oppose pas.

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COMMUNAUTES ET REGIONS
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Art. 34. (COMMUNAUTE FLAMANDE)
En prononçant la déchéance totale ou partielle de (l'autorité parentale), le tribunal de la jeunesse désigne la personne qui, sous son contrôle, exercera les droits mentionnés à l'article 33, 1° et 2°, dont les parents ou l'un d'entre eux sont déchus et remplira les obligations qui y sont corrélatives, ou confie le mineur (au Service social de la Communauté flamande près du Tribunal de la jeunesse), lequel désigne une personne qui exercera ces droits après que sa désignation aura été homologuée par ce tribunal, sur réquisition du ministère public. <L 31-03-1987, art. 105> <DCFL 1985-06-27/35, art. 33>
Le père et la mère sont préalablement entendus ou appelés.
Si un seul des parents a encouru la déchéance, le tribunal de la jeunesse désigne, pour le remplacer, le parent non déchu, lorsque l'intérêt du mineur ne s'y oppose pas.

Art. 34. (COMMUNAUTE FRANCAISE)
En prononçant la déchéance totale ou partielle de (l'autorité parentale), le tribunal de la jeunesse désigne la personne qui, sous son contrôle, exercera les droits mentionnés à l'article 33, 1° et 2°, dont les parents ou l'un d'entre eux sont déchus et remplira les obligations qui y sont corrélatives, ou confie le mineur (au conseiller de l'aide à la jeunesse), lequel désigne une personne qui exercera ces droits après que sa désignation aura été homologuée par ce tribunal, sur réquisition du ministère public. <L 31-03-1987, art. 105> <DCFR 1991-03-04/36, art. 62, § 4, 005; En vigueur : 24-12-1991>
Le père et la mère sont préalablement entendus ou appelés.
Si un seul des parents a encouru la déchéance, le tribunal de la jeunesse désigne, pour le remplacer, le parent non déchu, lorsque l'intérêt du mineur ne s'y oppose pas.

Art. 34. (COMMUNAUTE GERMANOPHONE)
En prononçant la déchéance totale ou partielle de (l'autorité parentale), le tribunal de la jeunesse désigne la personne qui, sous son contrôle, exercera les droits mentionnés à l'article 33, 1° et 2°, dont les parents ou l'un d'entre eux sont déchus et remplira les obligations qui y sont corrélatives, ou confie le mineur au (service de l'aide judiciaire à la jeunesse), lequel désigne une personne qui exercera ces droits après que sa désignation aura été homologuée par ce tribunal, sur réquisition du ministère public. <L 31-03-1987, art. 105> <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>
Le père et la mère sont préalablement entendus ou appelés.
Si un seul des parents a encouru la déchéance, le tribunal de la jeunesse désigne, pour le remplacer, le parent non déchu, lorsque l'intérêt du mineur ne s'y oppose pas.

Art. 34. (Région de Bruxelles-Capitale)
En prononçant la déchéance totale ou partielle de l'autorité parentale, le tribunal de la jeunesse désigne la personne qui, sous son contrôle, exercera les droits mentionnés à l'article 33, 1° et 2°, dont les parents ou l'un d'entre eux sont déchus et remplira les obligations qui y sont corrélatives, ou confie le mineur (aux institutions concernées), lequel désigne une personne qui exercera ces droits après que sa désignation aura été homologuée par ce tribunal, sur réquisition du ministère public. <L 31-03-1987, art. 105> <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Le père et la mère sont préalablement entendus ou appelés.

Si un seul des parents a encouru la déchéance, le tribunal de la jeunesse désigne, pour le remplacer, le parent non déchu, lorsque l'intérêt du mineur ne s'y oppose pas.

Art. 35. Sans préjudice des règles fixées par le Code civil en matière de consentement au mariage, (à l'adoption et à l'adoption plénière)), la personne désignée par application de l'article 34 exerce les droits dont elle est investie en se conformant, le cas échéant, aux dispositions des articles 373 et 374 du Code civil. Elle veille à ce que les revenus du mineur soient employés à l'entretien et à l'éducation de celui-ci. <L 21-03-1969, art. 5.A.1> <L 2001-04-29/39, art. 75, 013; En vigueur : 01-08-2001>

Dans tous les cas, la gestion des biens du mineur est régie par les dispositions du Code civil relatives (au fonctionnement de la tutelle et aux comptes de la tutelle). <L 2001-04-29/39, art. 75, 013; En vigueur : 01-08-2001>

Le parent non déchu n'a le droit de jouissance légale des biens du mineur que s'il est investi des pouvoirs prévus à l'article 34.

Section II. - Des mesures à l'égard des mineurs.

Art. 36. Le tribunal de la jeunesse connaît :

1° des plaintes formées par les personnes investies de la puissance paternelle ou qui assument la garde en droit ou en fait d'un mineur de moins de dix-huit ans qui, par son inconduite ou son indiscipline, donne de graves sujets de mécontentement;

2° des réquisitions du ministère public relatives aux mineurs dont la santé, la sécurité ou la moralité sont mises en danger, soit en raison, du milieu où ils sont élevés, soit par les activités auxquelles ils se livrent, ou dont les conditions d'éducation sont compromises par le comportement des personnes qui en ont la garde;

3° des réquisitions du ministère public relatives à des mineurs âgés de moins de dix-huit ans accomplis trouvés mendiant ou vagabondant ou se livrant habituellement à la mendicité ou au vagabondage;

4° (des réquisitions du ministère public à l'égard des personnes poursuivies du chef d'un fait qualifié infraction, commis avant l'âge de dix-huit ans accomplis.) <L 1992-12-24/30, art. 1, 006; En vigueur : 10-01-1993>

5° (du recours introduit par requête écrite et gratuite contre la décision d'imposer ou de ne pas imposer une sanction administrative prévue à l'article 119bis, § 2, alinéa 2, 1°, de la nouvelle loi communale, à l'égard des mineurs ayant atteint l'âge de seize ans accomplis au moment des faits;) <Rétabli par L 2004-05-07/65, art. 2, 019; En vigueur : 05-07-2004>
(6° du recours introduit par requête écrite et gratuite contre la décision d'imposer une
sanction administrative visée à l'article 24, alinéa 2, de la loi du 21 décembre 1998
relative à la sécurité lors des matches de football, à l'égard des mineurs ayant atteint
l'âge de quatorze ans accomplis au moment des faits.) <L 2004-05-07/65, art. 2, 019; En
vigueur : 05-07-2004>

(alinéa 2 abrogé) <L 2003-04-10/60, art. 47; 016; En vigueur : 01-01-2004>

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COMMUNAUTES ET REGIONS

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Art. 36. (COMMUNAUTE FLAMANDE)

Le tribunal de la jeunesse connaît :

1° (…) <DCFL 1990-03-28/34, art. 22, 2°, 003; En vigueur : 27-09-1994>
2° (…) <DCFL 1990-03-28/34, art. 22, 2°, 003; En vigueur : 27-09-1994>
3° (…) <DCFL 1990-03-28/34, art. 22, 2°, 003; En vigueur : 27-09-1994>
4° (des réquisitions du ministère public à l'égard des personnes poursuivies du chef
d'un fait qualifié infraction, commis avant l'âge de dix-huit ans accomplis.) <L 1992-12-
24/30, art. 1, 006; En vigueur : 10-01-1993>

5° (du recours introduit par requête écrite et gratuite contre la décision d'imposer ou
de ne pas imposer une sanction administrative prévue à l'article 119bis, § 2, alinéa 2, 1°,
de la nouvelle loi communale, à l'égard des mineurs ayant atteint l'âge de seize ans
accomplis au moment des faits;) <Rétabli par L 2004-05-07/65, art. 2, 019; En vigueur :
05-07-2004>

(6° du recours introduit par requête écrite et gratuite contre la décision d'imposer une
sanction administrative visée à l'article 24, alinéa 2, de la loi du 21 décembre 1998
relative à la sécurité lors des matches de football, à l'égard des mineurs ayant atteint
l'âge de quatorze ans accomplis au moment des faits.) <L 2004-05-07/65, art. 2, 019; En
vigueur : 05-07-2004>

(alinéa 2 abrogé) <L 2003-04-10/60, art. 47; 016; En vigueur : 01-01-2004>

Art. 36. (COMMUNAUTE FRANCAISE)

Le tribunal de la jeunesse connaît :

1° (…) <DCFR 1991-03-04/36, art. 62, § 5, 005; En vigueur : 07-12-1994>
2° (…) <DCFR 1991-03-04/36, art. 62, § 5, 005; En vigueur : 07-12-1994>
3° (…) <DCFR 1991-03-04/36, art. 62, § 5, 005; En vigueur : 07-12-1994>
4° (des réquisitions du ministère public à l'égard des personnes poursuivies du chef
d'un fait qualifié infraction, commis avant l'âge de dix-huit ans accomplis.) <L 1992-12-
24/30, art. 1, 006; En vigueur : 10-01-1993>

5° (du recours introduit par requête écrite et gratuite contre la décision d'imposer ou
de ne pas imposer une sanction administrative prévue à l'article 119bis, § 2, alinéa 2, 1°,
de la nouvelle loi communale, à l'égard des mineurs ayant atteint l'âge de seize ans
accomplis au moment des faits;) <Rétabli par L 2004-05-07/65, art. 2, 019; En vigueur :
05-07-2004>
Art. 36. (COMMUNAUTE GERMANOPHONE)

Le tribunal de la jeunesse connaît :

1° (...) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

2° (...) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

3° (...) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

4° (des réquisitions du ministère public à l’égard des personnes poursuivies du chef d’un fait qualifié infraction, commis avant l’âge de dix-huit ans accomplis.) <L 1992-12-24/30, art. 1, 006; En vigueur : 10-01-1993>

5° (du recours introduit par requête écrite et gratuite contre la décision d'imposer ou de ne pas imposer une sanction administrative prévue à l'article 119bis, § 2, alinéa 2, 1°, de la nouvelle loi communale, à l'égard des mineurs ayant atteint l'âge de seize ans accomplis au moment des faits;) <Rétabli par L 2004-05-07/65, art. 2, 019; En vigueur : 05-07-2004>

(6° du recours introduit par requête écrite et gratuite contre la décision d'imposer une sanction administrative visée à l'article 24, alinéa 2, de la loi du 21 décembre 1998 relative à la sécurité lors des matches de football, à l'égard des mineurs ayant atteint l'âge de quatorze ans accomplis au moment des faits.) <L 2004-05-07/65, art. 2, 019; En vigueur : 05-07-2004>

(alinéa 2 abrogé) <L 2003-04-10/60, art. 47; 016; En vigueur : 01-01-2004>

Art. 36. (Région de Bruxelles-Capitale)

Le tribunal de la jeunesse connaît :

1° (abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

2° (abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

3° (abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

4° (des réquisitions du ministère public à l'égard des personnes poursuivies du chef d'un fait qualifié infraction, commis avant l'âge de dix-huit ans accomplis.) <L 1992-12-24/30, art. 1, 006; En vigueur : 10-01-1993>

5° (du recours introduit par requête écrite et gratuite contre la décision d'imposer ou de ne pas imposer une sanction administrative prévue à l'article 119bis, § 2, alinéa 2, 1°, de la nouvelle loi communale, à l'égard des mineurs ayant atteint l'âge de seize ans accomplis au moment des faits;) <Rétabli par L 2004-05-07/65, art. 2, 019; En vigueur : 05-07-2004>

(6° du recours introduit par requête écrite et gratuite contre la décision d'imposer une sanction administrative visée à l'article 24, alinéa 2, de la loi du 21 décembre 1998 relative à la sécurité lors des matches de football, à l'égard des mineurs ayant atteint
Art. 36bis. <Inséré par L 09-05-1972, art. 2> Par dérogation à l'article 36, 4°, et sauf en cas de connexité avec des poursuites du chef d'infractions autres que celles prévues ci-dessous, les juridictions compétentes en vertu du droit commun, connaissent des réquisitions du ministère public à l'égard des (personnes de plus de seize ans et de moins de dix-huit ans) au moment des faits, poursuivis du chef d'infraction : <L 1994-02-02/33, art. 1 a), 007; En vigueur : 27-09-1994>

1° aux dispositions des lois et règlements sur la police du roulage;
2° aux articles 418, 419 et 420 du Code pénal, pour autant qu'elle soit connexe à une infraction aux lois et règlements visés au 1°;
3° (à la loi du 21 novembre 1989) relative à l'assurance obligatoire de la responsabilité civile en matière de véhicule automoteurs. <L 1994-02-02/33, art. 1, b), 007; En vigueur : 27-09-1994>

(...). (Si les débats devant ces juridictions) font apparaître qu'une mesure de garde, de préservation ou d'éducation serait plus adéquate en la cause, ces juridictions peuvent par décision motivée se dessaisir et renvoyer l'affaire au ministère public aux fins de réquisitions devant le tribunal de la jeunesse, s'il y a lieu. <L 1994-02-02/33, art. 1, c) et d), 007; En vigueur : 27-09-1994>

La loi relative à la détention préventive n'est pas applicable aux (personnes visés) par le présent article, sauf s'il y a délit de fuite. <L 1994-02-02/33, art. 1, e), 007; En vigueur : 27-09-1994>

Art. 37. <L 1994-02-02/33, art. 2, 007; En vigueur : 27-09-1994> § 1. Le tribunal de la jeunesse peut ordonner à l'égard des personnes qui lui sont déférées, des mesures de garde, de préservation et d'éducation.

(Pour rendre la décision prévue à l'alinéa 1er, le tribunal de la jeunesse prend en compte les facteurs suivants :
1° la personnalité et le degré de maturité de l'intéressé;
2° son cadre de vie;
3° la gravité des faits, les circonstances dans lesquelles ils ont été commis, les dommages et les conséquences pour la victime;
4° les mesures antérieures prises à l'égard de l'intéressé et son comportement durant l'exécution de celles-ci;
5° la sécurité de l'intéressé;
6° la sécurité publique.

La disponibilité des moyens de traitement, des programmes d'éducation ou de toutes autres ressources envisagées et le bénéfice qu'en retirerait l'intéressé sont également pris en compte.) <L 2006-06-13/40, art. 7, 1°, 023; En vigueur : 16-10-2006>

§ 2. (Il peut, le cas échéant, de façon cumulative:
1° réprimander les intéressés et, sauf en ce qui concerne ceux qui ont atteint l'âge de dix-huit ans, les laisser ou les rendre aux personnes qui en assurent l'hébergement, en enjoignant à ces dernières, le cas échéant, de mieux les surveiller ou les éduquer à l'avenir;

2° les soumettre à la surveillance du service social compétent;

3° les soumettre à un accompagnement éducatif intensif et à un encadrement individualisé d'un éducateur référent dépendant du service désigné par les communautés ou d'une personne physique répondant aux conditions fixées par les communautés;

4° leur imposer d'effectuer une prestation éducative et d'intérêt général en rapport avec leur âge et leurs capacités, à raison de 150 heures au plus, organisée par l'intermédiaire d'un service désigné par les communautés ou par une personne physique répondant aux conditions fixées par les communautés;

5° (DROIT FUTUR) leur imposer de suivre un traitement ambulatoire auprès d'un service psychologique ou psychiatrique, d'éducation sexuelle ou d'un service compétent dans le domaine de l'alcoolisme ou de la toxicomanie; le juge de la jeunesse peut accepter que le traitement soit entamé ou continué chez un médecin psychiatre, un psychologue ou un thérapeute qui lui sera proposé par la personne qui lui est déférée, ou par ses représentants légaux;

6° (DROIT FUTUR) les confier à une personne morale proposant l'encadrement de la réalisation d'une prestation positive consistant soit en une formation soit en la participation d'une activité organisée;

7° les confier à une personne digne de confiance selon les modalités fixées par les communautés ou les placer dans un établissement approprié selon les modalités fixées par les communautés, en vue de leur hébergement, de leur traitement, de leur éducation, de leur instruction ou de leur formation professionnelle;

8° les confier à une institution communautaire publique de protection de la jeunesse, dans le respect des critères de placement visés au § 2quater. En ce qui concerne les personnes visées à l'article 36, 4°, et sans préjudice des dispositions de l'article 60, la décision précise la durée de la mesure et si elle prescrit un régime éducatif fermé organisé par les autorités compétentes en vertu des articles 128 et 135 de la Constitution et de l'article 5, § 1er, II, 6°, de la loi spéciale du 8 août 1980 de réformes institutionnelles, modifiée par la loi du 8 août 1988. Le juge ou le service social compétent rend visite à la personne confiée à une institution communautaire publique de protection de la jeunesse en régime fermé, si le placement excède quinze jours. (En cas de placement dans un régime éducatif fermé, la procédure en matière de sortie de l'établissement visées à l'article 52quater, alinéas 3 à 6, 9 et 10 s'applique); <L 2006-12-27/33, art. 92, 024; En vigueur : 01-03-2007>

9° (DROIT FUTUR) les placer dans un service hospitalier;

10° (DROIT FUTUR) décider le placement résidentiel dans un service compétent en matière d'alcoolisme, de toxicomanie ou de toute autre dépendance, si un rapport médical circonstancié, datant de moins d'un mois, atteste que l'intégrité physique ou psychique de l'intéressé ne peut être protégée d'une autre manière;

11° (DROIT FUTUR) décider le placement résidentiel de l'intéressé soit dans une section ouverte, soit dans une section fermée d'un service pédopsychiatrique, s'il est établi dans un rapport indépendant pédopsychiatrique, datant de moins d'un mois et établi selon les standards minimums déterminés par le Roi, qu'il souffre d'un trouble mental qui
affecte gravement sa faculté de jugement ou sa capacité à contrôler ses actes. Le placement dans une section fermée d'un service pédopsychiatrique n'est possible qu'en application de la loi du 26 juin 1990 relative à la protection de la personne des malades mentaux, conformément à l'article 43.

Seules les mesures visées à l'alinéa 1er, 1°, 2° et 3°, peuvent être ordonnées à l'égard des personnes de moins de douze ans (déférées du chef d'un fait qualifié infraction). En l'absence de mesures appropriées, le tribunal renvoie l'affaire au parquet qui peut à son tour la renvoyer aux services compétents des communautés. <L 2006-12-27/33, art. 88, 024; En vigueur : 01-01-2007>

La préférence doit être donnée en premier lieu à une offre restauratrice, visée aux articles 37bis à 37quinquies. Avant qu'une mesure visée à l'alinéa 1er, 1° à 5° soit imposée, la faisabilité d'un projet proposé par la personne concernée, visé au § 2ter doit être considérée. Les mesures visées à l'alinéa 1er, 1° à 5° sont privilégiées par rapport à une mesure de placement. Enfin, le placement en régime ouvert est privilégié par rapport au placement en régime fermé;

S'il prononce une mesure de placement en institution communautaire publique de protection de la jeunesse en régime ouvert ou fermé, le tribunal précise la durée maximale, qui ne pourra être prorogée que pour des raisons exceptionnelles liées à la mauvaise conduite persistante de l'intéressé et à son comportement dangereux pour lui même ou pour autrui.

Le tribunal peut assortir la mesure de placement d'un sursis pour une durée de 6 mois à compter de la date du jugement, pour autant que l'intéressé s'engage à effectuer une prestation éducative et d'intérêt général à raison de 150 heures au plus.

Si le tribunal prononce, en application du § 2quater, alinéa 1er, 4°, ou alinéa 2, 5°, une mesure de placement en institution communautaire publique de protection de la jeunesse, il en précise la durée, qui est de six mois au plus et ne peut être prolongée.

Si le tribunal impose une autre mesure, il en précise la durée maximale, à l'exception des mesures visées à l'alinéa 1er, 1°. <L 2006-06-13/40, art. 7, 2°, 023; En vigueur : 16-10-2006; voir aussi art. 65 qui donne l'entrée en vigueur de l'art. 7 fixée le 16-10-2006 par AR 2006-09-28/31, art. 3 à l'exception du :

- point 2°, en tant qu'il fait référence au § 2, alinéa 1er, 3°, 5°, 6°, 9°, 10° et 11° de l'article 37 de la loi, à l'alinéa 2 du § 2, de l'article 37 de la loi et à la 1re phrase de l'alinéa 3 du § 2 de l'article 37 de la loi, rédigée comme suit : " La préférence doit être donnée en premier lieu à une offre restauratrice, visée aux articles 37bis à 37quinquies,

En vigueur : indéterminée et au plus tard le 01-01-2011>

(NOTE : l'article 7 point 2° de la loi du 13 juin 2006 (2006-06-13/40), tel que modifié par la loi du 27 décembre 2006 portant des dispositions diverses (2006-12-27/33) et en tant qu'il fait référence à l'article 37, § 2, alinéa 2, et à l'article 37, § 2, alinéa 3, première phrase, rédigée comme suit " La préférence doit être donnée en premier lieu à une offre restauratrice, visée aux articles 37bis à 37quinquies." de la loi du 8 avril 1965 relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait, entre en vigueur le 02-04-2007 par AR 2007-02-25/38, art. 9)

(§ 2bis. A l'égard des personnes de plus de douze ans le tribunal peut subordonner le maintien des personnes qui lui sont déférées dans leur milieu de vie à une ou plusieurs des conditions suivantes dont il peut confier le contrôle du respect au service social compétent :
1° fréquenter régulièrement un établissement scolaire d'enseignement ordinaire ou spécial;

2° accomplir une prestation éducative et d'intérêt général, en rapport avec leur âge et leurs capacités, à raison de 150 heures au plus, sous la surveillance d'un service désigné par les communautés ou d'une personne physique répondant aux conditions fixées par les communautés;

3° accomplir, à raison de 150 heures au plus un travail rémunéré en vue de l'indemnisation de la victime, si l'intéressé est âgé de seize ans au moins;

4° suivre les directives pédagogiques ou médicales d'un centre d'orientation éducative ou de santé mentale;

5° participer à un ou plusieurs modules de formation ou de sensibilisation aux conséquences des actes accomplis et de leur impact sur les éventuelles victimes;

6° participer à une ou plusieurs activités sportives, sociales ou culturelles encadrées;

7° ne pas fréquenter certaines personnes ou certains lieux déterminés qui ont un rapport avec le fait qualifié infraction qui a été commis;

8° ne pas exercer une ou plusieurs activités déterminées au regard des circonstances de l'espèce;

9° le respect d'une interdiction de sortir;

10° respecter d'autres conditions ou interdictions ponctuelles que le tribunal détermine.

Le juge ou le tribunal peut confier le contrôle de l'exécution des conditions visées à l'alinéa 1er, 7° et 9° à un service de police. S'il y procède, le service social compétent sera régulièrement informé par le juge des résultats de ce contrôle.) <L 2006-06-13/40, art. 7, 3°, 023; En vigueur : 16-10-2006>

(§ 2ter. Les personnes visées à l'article 36, 4°, peuvent proposer au tribunal un projet écrit portant, notamment, sur l'un ou plusieurs des engagements suivants :

1° formuler des excuses écrites ou orales;

2° réparer elles-mêmes et en nature les dommages causés, si ceux-ci sont limités;

3° participer à une offre restauratrice visée aux articles 37bis à 37quinquies;

4° participer à un programme de réinsertion scolaire;

5° participer à des activités précises dans le cadre d'un projet d'apprentissage et de formation, à raison de 45 heures de prestation au plus;

6° suivre un traitement ambulatoire auprès d'un service psychologique ou psychiatrique, d'éducation sexuelle ou d'un service compétent dans le domaine de l'alcoolisme ou de la toxicomanie;

7° se présenter auprès des services d'aide à la jeunesse organisés par les instances communautaires compétentes.

Ce projet est remis au plus tard le jour de l'audience. Le tribunal apprécie l'opportunité du projet qui lui est soumis et, s'il l'approve, confie le contrôle de son exécution au service social compétent.

Dans un délai de trois mois à dater de l'approbation du projet, le service social compétent adresse au tribunal un rapport succinct portant sur le respect des engagements du jeune. Si le projet n'a pas été exécuté ou a été exécuté de manière
insuffisante, le tribunal peut ordonner une autre mesure lors d’une audience ultérieure.) <L 2006-06-13/40, art.7, 4°, 023; En vigueur : 16-10-2006; voir aussi art. 65 qui donne l’En vigueur : entrée en vigueur de l’art. 7 fixée le 16-10-2006 par AR 2006-09-28/31, art. 3 à l’exception du :

- point 4°, en tant qu’il fait référence à l’article 37, § 2ter, alinéa 1er, 3°, de la loi, rédigé comme suit : 

"participer à une offre restauratrice visée aux articles 37bis à 37quinquies; ED indéterminée et au plus tard le 01-01-2013> 

(NOTE : entrée en vigueur de l’art. 7, point 4° de la loi du 13 juin 2006 (2006-06-13/40) - en tant qu’il fait référence à l’article 37, § 2ter, 1er alinéa, 3°, de la loi du 8 avril 1965 <L 1965-04-08/03> - fixée au 02-04-2007, par AR 2007-02-25/38, art. 10)

(§ 2quater. Le tribunal ne peut ordonner la mesure de placement en institution communautaire publique de protection de la jeunesse visée au § 2, alinéa 1er, 8°, en régime éducatif ouvert, qu’à l’égard des personnes qui ont douze ans ou plus et qui :

1° soit, ont commis un fait qualifié infraction qui, s’il avait été commis par une personne majeure, aurait été de nature à entraîner, au sens du Code pénal ou des lois particulières, une peine d’emprisonnement correctionnel principal de trois ans ou une peine plus lourde;

2° soit ont commis un fait qualifié coups et blessures;

3° soit ont précédemment fait l’objet d’un jugement définitif ordonnant une mesure de placement au sein d’une institution communautaire publique de protection de la jeunesse à régime éducatif ouvert ou fermé et ont commis un nouveau fait qualifié infraction;

4° soit (font l’objet) d’une révision de la mesure, conformément à l’article 60, pour le motif que la ou les mesures imposées précédemment n’ont pas été respectées par elles, auquel cas le placement peut être imposé pour une période de six mois au plus qui ne peut être prolongée. Au terme de cette période, d’autres mesures peuvent uniquement être imposées après une révision par le tribunal; <L 2006-12-27/33, art. 93, 024; En vigueur : 07-01-2007>

5° soit font l’objet d’une révision telle que visée à l’article 60 et sont placées en institution communautaire publique de protection de la jeunesse à régime éducatif fermé au moment de cette révision.

Le tribunal ne peut ordonner la mesure de placement en institution communautaire publique de protection de la jeunesse visée au § 2, alinéa 1er, 8°, en régime éducatif fermé, qu’à l’égard des personnes qui ont quatorze ans ou plus et qui :

1° soit ont commis un fait qualifié infraction qui, s’il avait été commis par un majeur, aurait été de nature à entraîner, au sens du Code pénal ou des lois particulières, une peine de réclusion de cinq ans à dix ans ou une peine plus lourde;

2° soit ont commis un fait qualifié attentat à la pudeur avec violence, ou une association de malfaiteurs ayant pour but de commettre des crimes, ou menace contre les personnes telle que visée à l’article 327 du Code pénal;

3° soit ont précédemment fait l’objet d’un jugement définitif ordonnant une mesure de placement au sein d’une institution communautaire publique de protection de la jeunesse à régime éducatif ouvert ou fermé, et qui ont commis un nouveau fait qualifié infraction qui soit est qualifié coups et blessures, soit, s’il avait été commis par un majeur, aurait été de nature à entraîner, au sens du Code pénal ou des lois
particulières, une peine d'emprisonnement correctionnel principal de trois ans ou une peine plus lourde;

4° soit ont commis avec préméditation un fait qualifié coups et blessures qui a entraîné une maladie ou une incapacité de travail soit une maladie paraissant incurable, soit la perte complète de l'utilisation d'un organe, soit une mutilation grave, soit ont causé des dégâts à des bâtiments ou des machines à vapeur, commis en association ou en bande et avec violence, par voies de fait ou menaces, soit ont commis une rébellion avec arme et avec violence;

5° soit (font l'objet) d'une révision de la mesure, conformément à l'article 60, pour le motif que la ou les mesures imposées précédemment n'ont pas été respectées par elles, auquel cas le placement peut être imposé pour une période de six mois au plus qui ne peut être prolongée. Au terme de cette période, d'autres mesures peuvent uniquement être imposées après une révision par le tribunal. <L 2006-12-27/33, art. 93, 024; En vigueur : 07-01-2007>

Sans préjudice des conditions énumérées à l'alinéa 2, le tribunal peut ordonner la mesure de placement en institution communautaire publique de protection de la jeunesse visée au § 2, alinéa 1er, 8°, en régime éducatif fermé, à l'égard d'une personne âgée de douze à quatorze ans, qui a gravement porté atteinte à la vie ou à la santé d'une personne et dont le comportement est particulièrement dangereux.) <L 2006-06-13/40, art.7, 5°, 023; En vigueur : 16-10-2006>

§ 2quinquies. Lorsqu'il ordonne une des mesures visées aux §§ 2, 2bis et 2ter, le tribunal motive sa décision au regard des critères visés au § 1er et des circonstances de l'espèce.

S'il ordonne une des mesures visées au § 2, alinéa 1er, 6° à 11°, une combinaison de plusieurs des mesures visées au § 2, une combinaison d'une ou de plusieurs de ces mesures avec une ou plusieurs conditions visées au § 2bis ou une mesure de placement en institution communautaire publique de protection de la jeunesse en régime éducatif fermé, le tribunal doit spécialement motiver ce choix au regard des priorités visées au § 2, alinéa 3.) <L 2006-06-13/40, art.7, 6°, 023; En vigueur : 16-10-2006>

§ 3. Les mesures prévues au (§ 2, 2° à 11°), sont suspendues lorsque l'intéressé se trouve sous les armes. Elles prennent fin lorsque l'intéressé atteint dix-huit ans. <L 2006-06-13/40, art.7, 7°, a, 023; En vigueur : 16-10-2006>

Toutefois, à l'égard des personnes visées à l'article 36, 4°, (et sans préjudice du § 2, alinéa 4, et de l'article 60) : <L 2006-06-13/40, art.7, 7°, b, 023; En vigueur : 16-10-2006>

1° à la requête de l'intéressé (ou, en cas de mauvaise conduite persistante ou de comportement dangereux de l'intéressé, sur réquisition du ministère public), une prolongation de ces mesures peut être ordonnée, par jugement, pour une durée déterminée ne dépassant pas le jour où l'intéressé atteindra l'âge de vingt ans. Le tribunal est saisi de la requête ou de la réquisition dans les trois mois précédant le jour de la majorité de l'intéressé; <L 2006-06-13/40, art.7, 7°, c, 023; En vigueur : 16-10-2006>

2° ces mesures pourront être ordonnées par jugement pour une durée déterminée ne dépassant pas le jour où l'intéressé atteindra (vingt-trois ans), lorsqu'il s'agit de personnes qui ont commis un fait qualifié infraction après l'âge de (seize ans). <L 2006-06-13/40, art.7, 7°, d, 023; En vigueur : indéterminée et au plus tard le 01-01-2013; voir aussi art. 65 qui donne l' En vigueur : entrée en vigueur de l'art. 7 fixée le 16-10-2006 par AR 2006-09-28/31, art. 3 à l'exception du :

- point 7°, d>
(Lorsque l'intéressé a commis entre l'âge de douze ans et de dix-sept ans, un fait qualifié infraction de nature à entraîner une peine de réclusion de plus de 10 ans s'il avait été commis par une personne majeure, et qu'une mesure de placement en institution communautaire publique de protection de la jeunesse a été imposée, le tribunal peut ordonner, par jugement, la prolongation de la mesure de surveillance visée à l'article 42, pour une durée déterminée ne dépassant pas le jour où l'intéressé atteindra l'âge de vingt-trois ans. Le tribunal est saisi à la requête de l'intéressé ou, en cas de mauvaise conduite persistante ou de comportement dangereux, sur réquisition du ministère public.) <L 2006-06-13/40, art.7, 7°, f, 023; En vigueur : indéterminée et au plus tard le 01-01-2013; voir aussi art. 65 qui donne l' En vigueur : entrée en vigueur de l'art. 7 fixée le 16-10-2006 par AR 2006-09-28/31, art. 3 à l’exception du:
- point 7°, f)>

(A l’égard des personnes visées au § 2, alinéa 1er, 11°, le placement résidentiel doit se poursuivre jusqu’à la fin du traitement, pour autant que ce traitement le nécessite.) <L 2006-06-13/40, art.7, 7°, g, 023; En vigueur : 16-10-2006>

En cas d’appel contre ces jugements, la chambre de la jeunesse de la cour d’appel statue d'urgence. L'appel n'est pas suspensif. Les jugements et arrêts prononcés en application de cet article ne sont pas susceptibles d’opposition.

§ 4. La mesure de réprimande prévue au § 2, 1°, est applicable aux personnes qui ont commis un fait qualifié infraction avant l'âge de dix-huit ans, même si elles ont dépassé cet âge au moment du jugement.

Les personnes visées à l’alinéa précédent qui ont atteint l’âge de dix-huit ans au moment du jugement, sont assimilées aux mineurs pour l’application des dispositions du chapitre IV du présent titre, ainsi que de l'article (433bis du Code pénal). <L 2005-08-10/62, art. 9, 021 ; En vigueur : 02-09-2005>

COMMUNAUTES ET REGIONS

Art. 37. (COMMUNAUTE GERMANOPHONE)

(Abrogé pour autant qu’il ne concerne pas des jeunes qui ont commis un fait qualifié infraction) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 37bis.<inséré par L 2006-05-15/35, art. 2; En vigueur : 02-04-2007> § 1er. Le juge ou le tribunal peut faire une offre restauratrice de médiation et de concertation restauratrice en groupe si les conditions suivantes sont remplies :

1° il existe des indices sérieux de culpabilité;
2° la personne qui est présumée avoir commis un fait qualifié infraction déclare ne pas nier être concernée par le fait qualifié infraction;
3° une victime est identifiée.

Une offre restauratrice ne peut être mise en œuvre que si les personnes qui y participent y adhèrent de manière expresse et sans réserve, et ce, tout au long de la médiation ou de la concertation restauratrice en groupe.
§ 2. La médiation permet à la personne qui est présumée avoir commis un fait qualifié infraction, aux personnes qui exercent l'autorité parentale à son égard, aux personnes qui en ont la garde en droit ou en fait ainsi qu'à la victime, d'envisager ensemble, et avec l'aide d'un médiateur neutre, les possibilités de rencontrer les conséquences notamment relationnelles et matérielles d'un fait qualifié infraction.

Le juge ou le tribunal propose, par écrit, aux personnes visées au premier alinéa de participer à une médiation.

§ 3. La concertation restauratrice en groupe permet à la personne qui est présumée avoir commis un fait qualifié infraction, à la victime, à leur entourage social, ainsi qu'à toutes personnes utiles, d'envisager, en groupe et avec l'aide d'un médiateur neutre, des solutions concertées sur la manière de résoudre le conflit résultant du fait qualifié infraction, notamment en tenant compte des conséquences relationnelles et matérielles résultant du fait qualifié infraction.

Le juge ou le tribunal propose une concertation restauratrice en groupe à la personne qui lui est déférée et qui est présumée avoir commis un fait qualifié infraction, aux personnes qui exercent l'autorité parentale à son égard et aux personnes qui en ont la garde en droit ou en fait.

La ou les victimes sont informées par écrit.

§ 4. Le juge ou le tribunal informe les personnes visées au § 2, alinéa 1er, et au § 3, alinéa 2, qu'elles peuvent :

1° être conseillées par leur avocat avant d'accepter l'offre restauratrice;
2° se faire assister d'un avocat dès le moment où l'accord auquel aboutissent les personnes visées aux § 2, alinéa 1er, et § 3, alinéa 2, est fixé.

(NOTE : par son arrêt n° 50/2008 du 13-03-2008 (M.B. 14-04-2008, p. 19886-19893), la Cour Constitutionnelle a annulé l'article 37bis, § 1, 1° et 2°)

Art. 37ter. <inséré par L 2006-05-15/35, art. 3; En vigueur : 02-04-2007> § 1er. Le juge ou le tribunal fait parvenir une copie de sa décision au service de médiation ou au service de concertation restauratrice en groupe, reconnu par les autorités compétentes, organisé par les communautés ou répondant aux conditions fixées par celles-ci. Ce service est chargé de mettre en œuvre l'offre restauratrice.

§ 2. Si les personnes visées à l'article 37bis, § 2, alinéa 1er, et § 3, alinéa 2, ne prennent pas contact, dans les huit jours ouvrables à partir de la proposition du tribunal, avec le service de médiation ou le service de concertation restauratrice en groupe, ce service prend contact avec les personnes citées pour leur faire une offre restauratrice.

§ 3. Le service de concertation restauratrice en groupe contacte, en concertation avec les personnes visées à l'article 37bis, § 3, alinéa 2, les personnes de leur entourage social et toutes autres personnes utiles.

Le service de médiation peut, moyennant l'accord des personnes visées à l'article 37bis, § 2, alinéa 1er, impliquer d'autres personnes ayant un intérêt direct à la médiation.

Art. 37quater. <inséré par L 2006-05-15/35, art. 4; En vigueur : 02-04-2007> § 1er. Si la médiation ou la concertation restauratrice en groupe mène à un accord, l'accord, signé par la personne qui est présumée avoir commis un fait qualifié infraction, par les
personnes qui exercent l'autorité parentale à son égard ainsi que par la victime, est joint au dossier judiciaire.

En cas de concertation restauratrice en groupe, une déclaration d'intention de la personne qui est présumée avoir commis un fait qualifié infraction est également insérée. Elle y explique les démarches concrètes qu'elle entreprendra en vue de restaurer les dommages relationnels et matériels et les dommages subis par la communauté et d'empêcher d'autres faits dans le futur.

L'accord obtenu doit être homologué par le juge ou le tribunal. Celui-ci ne peut modifier son contenu. Le juge ou le tribunal ne peut refuser l'homologation que si l'accord est contraire à l'ordre public.

§ 2. Si l'offre restauratrice n'aboutit pas à un accord, les autorités judiciaires ou les personnes concernées par l'offre restauratrice ne peuvent utiliser ni la reconnaissance de la matérialité du fait qualifié infraction par la personne présumée d'avoir commis un fait qualifié infraction, ni le déroulement ou le résultat de l'offre restauratrice en défaveur du jeune.

Le service de médiation ou de concertation restauratrice en groupe établit un rapport succinct sur le déroulement de l'offre restauratrice en groupe et sur son résultat. Ce rapport est soumis à l'avis des personnes visées à l'article 37bis, § 2, alinéa 1er et § 3, alinéa 2. Il est joint au dossier de la procédure.

§ 3. Les documents établis et les communications faites dans le cadre d'une intervention du service de médiation ou de concertation restauratrice en groupe sont confidentiels, à l'exception de ce que les parties consentent à porter à la connaissance des autorités judiciaires. Ils ne peuvent être utilisés dans une procédure pénale, civile, administrative ou arbitrale ou dans toute autre procédure visant à résoudre des conflits et ne sont pas admissibles comme preuve, même comme aveu extrajudiciaire.

Art. 37quinquies. <inséré par L 2006-05-15/35, art. 5; En vigueur : 02-04-2007> § 1er. Le service de médiation ou le service de concertation restauratrice en groupe établit un rapport succinct sur l'exécution de l'accord et l'adresse au juge ou au tribunal ainsi qu'au service social compétent.

§ 2. Si l'exécution de l'accord selon les modalités prévues intervient avant le prononcé du jugement, le tribunal doit tenir compte de cet accord et de son exécution.

§ 3. Si l'exécution de l'accord selon les modalités prévues intervient après le prononcé du jugement, le tribunal peut être saisi sur la base de l'article 60 en vue d'alléger la ou les mesures définitives ordonnées à l'encontre de la personne ayant commis un fait qualifié infraction.

Art. 38. (Abrogé) <L 2006-05-15/35, art. 6, 022; En vigueur : 01-10-2007>


1° l'article 119bis, § 2, alinéa 2, 1°, de la nouvelle loi communale, si le mineur a atteint l'âge de seize ans accomplis au moment des faits;
2° l'article 24, alinéa 2, de la loi du 21 décembre 1998 relative à la sécurité lors des matches de football, si le mineur a atteint l'âge de quatorze ans accomplis au moment des faits.

Art. 39. Si la mesure prise en vertu de l'article 37 et inopérante en raison de la mauvaise conduite persistante ou du comportement dangereux du mineur, le tribunal de la jeunesse peut décider que le mineur sera mis à la disposition du Gouvernement jusqu'à sa majorité.

(La présente disposition n'est pas applicable aux personnes qui ont commis un fait qualifié infraction.) <L 1994-02-02/33, art. 4, 007; En vigueur : 27-09-1994>

COMMUNAUTES ET REGIONS

Art. 39. (COMMUNAUTE FLAMANDE)

(NOTE : Abrogé pour la Communauté flamande par <DCFL 1990-03-28/34, art. 22, 3e, 003; En vigueur : indéterminée> sauf à l'égard des mineurs poursuivis du chef d'un fait qualifié d'infraction)

Si la mesure prise en vertu de l'article 37 et inopérante en raison de la mauvaise conduite persistante ou du comportement dangereux du mineur, le tribunal de la jeunesse peut décider que le mineur sera mis à la disposition du (Exécutif flamand) jusqu'à sa majorité. <DCFL 1990-03-28/34, art. 23, 2e, 003; En vigueur : 01-05-1990>

(La présente disposition n'est pas applicable aux personnes qui ont commis un fait qualifié infraction.) <L 1994-02-02/33, art. 4, 007; En vigueur : 27-09-1994>

Art. 39. (COMMUNAUTE GERMANOPHONE)

(Abrogé pour autant qu'il ne concerne pas des jeunes qui ont commis un fait qualifié infraction) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 39. (Région de Bruxelles-Capitale)

(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Art. 40. (Abrogé) <L 1990-01-19/30, art. 48, 002; En vigueur : 01-05-1990>

Art. 41. Lorsque le mineur est mis à la disposition du Gouvernement en vertu des articles 39 ou 40, le Ministre de la Justice décide de le soumettre à l'une des mesures prévues à l'article 37, (§ 2, 2e, 7e et 8e et § 2bis), ou de le faire détenir, s'il a plus de seize ans, dans un établissement pénitentiaire où il sera soumis à un régime spécial. <L 2006-06-13/40, art.8, 023; En vigueur : 16-10-2006>

(La présente disposition n'est pas applicable aux personnes qui ont commis un fait qualifié infraction.) <L 1994-02-02/33, art. 5, 007; En vigueur : 27-09-1994>
COMMUNAUTES ET REGIONS

Art. 41. (COMMUNAUTE FLAMANDE)

(NOTE : Abrogé pour la Communauté flamande par <DCFL 1990-03-28/34, art. 22, 3°, 003; En vigueur : indéterminée> sauf à l’égard des mineurs poursuivis du chef d’un fait qualifié d’infraction)

Lorsque le mineur est mis à la disposition (de l’Exécutif flamand) en vertu des articles 39 ou 40, le (Ministre communautaire ayant l’assistance spéciale à la jeunesse dans ses attributions) décide de le soumettre à l’une des mesures prévues à l’article 37, (§ 2, 2°, 7° et 8° et § 2bis), ou de le faire détenir, s’il a plus de seize ans, dans un établissement pénitentiaire où il sera soumis à un régime spécial. <DCFL 1990-03-28/34, art. 23, 3°, 003; En vigueur : 01-05-1990> <L 2006-06-13/40, art.8, 023; En vigueur : 16-10-2006>

(La présente disposition n’est pas applicable aux personnes qui ont commis un fait qualifié infraction.) <L 1994-02-02/33, art. 5, 007; En vigueur : 27-09-1994>

Art. 41. (COMMUNAUTE GERMANOPHONE)

(Abrogé pour autant qu’il ne concerne pas des jeunes qui ont commis un fait qualifié infraction) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 41. (Région de Bruxelles-Capitale)

(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Art. 42. Le mineur qui a fait l’objet d’une des mesures prévues à l’article (37, § 2, alinéa 1er, 6° à 11°), en dehors des cas prévus à l’article 41, est soumis jusqu’à sa majorité à la surveillance du tribunal de la jeunesse. <L 2006-05-15/35, art. 7, 022 ; En vigueur : 16-10-2006>

Le tribunal de la jeunesse désigne pour assurer cette surveillance (le service social compétent). <L 1994-02-02/33, art. 6, 007; En vigueur : 27-09-1994>

Art. 42. (COMMUNAUTE FLAMANDE)

(Abrogé) <DCFL 1990-03-28/34, art. 22, 4°, 003; En vigueur : 01-05-1990>

(NOTE : Par son arrêté n° 40/91 du 19 décembre 1991 (MB 17-01-1992, p. 851) la Cour d’arbitrage a annulé l’article 22, 4°, en tant que cette disposition concerne les mineurs ayant commis un fait qualifié infraction>

Art. 42. (COMMUNAUTE FRANCAISE)
Le mineur qui a fait l'objet d'une des mesures prévues à l'article 37, 3° et 4°, en dehors des cas prévus à l'article 41, est soumis jusqu'à sa majorité à la surveillance du tribunal de la jeunesse.

Le tribunal de la jeunesse (confie cette mission de surveillance au service de protection judiciaire). <DCFR 1991-03-04/36, art. 62, § 7, 005; En vigueur : 24-12-1991>

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Art. 42. (COMMUNAUTE GERMANOPHONE)

(Abrogé pour autant qu'il ne concerne pas des jeunes qui ont commis un fait qualifié infraction) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

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Art. 43. <L 2006-06-13/40, art.9, 023; En vigueur : 16-10-2006> A l'égard des personnes visées à l'article 36, 4°, le juge ou le tribunal de la jeunesse applique les dispositions de la présente loi, sans préjudice de l'application de la loi du 26 juin 1990 relative à la protection de la personne des malades mentaux.

En cas d'application de la loi du 26 juin 1990 précitée aux personnes renvoyées initialement devant le tribunal de la jeunesse sur la base de l'article 36, 4°, la décision du médecin-chef de service de lever la mesure, prise conformément à l'article 12, 3°, ou 19, de la loi du 26 juin 1990 n'est exécutable qu'après un délai de cinq jours ouvrables à compter du jour où le tribunal de la jeunesse en est informé. Dans ce délai, et sans pouvoir le prolonger, le tribunal statue sur toute autre mesure visée à l'article 37, qu'il juge utile.

Art. 43bis. (abrogé) <L 2006-12-27/32, art. 375, 026; En vigueur : 28-12-2006>

**CHAPITRE IV. - De la compétence territoriale et de la procédure.**

Art. 44. <L 1994-02-02/33, art. 7, 007; En vigueur : 27-09-1994> Sans préjudice (des dispositions particulières en matière d'adoption), la compétence territoriale du tribunal de la jeunesse est déterminée par la résidence des parents, tuteurs ou personnes qui ont la garde de la personne de moins de dix-huit ans. <L 2003-04-24/32, art. 9, 017; En vigueur : 01-09-2005>

Lorsque ceux-ci n'ont pas de résidence en Belgique ou lorsque leur résidence est inconnue ou incertaine, le tribunal de la jeunesse compétent est celui du lieu où l'intéressé à commis le fait qualifie infraction, du lieu où il est trouvé ou du lieu où la personne ou l'établissement auquel il a été confié par les instances compétentes à sa résidence ou son siège.

Lorsque le tribunal de la jeunesse est saisi après que l'intéressé a atteint l'âge de dix-huit ans, le tribunal de la jeunesse compétent est celui du lieu de la résidence de l'intéressé, ou, si celle-ci est inconnue ou incertaine, le lieu où le fait qualifié infraction a été commis.

Néanmoins le tribunal de la jeunesse compétent est :

1° celui de la résidence du requérant en cas d'application des articles 477 du Code civil et 63, alinéa 5, de la présente loi;
(2° celui dans la ressort duquel la tutelle a été organisée conformément aux articles (350.10, 354.2,) 478 et 479 du Code civil.) <L 2001-04-29/39, art. 76, 013; En vigueur : 01-08-2001> <L 2003-04-24/32, art. 9, 017; En vigueur : 01-09-2005>

Si les parents, tuteurs ou personnes qui ont la garde d'une personne âgée de moins de dix-huit ans ayant fait l'objet d'une mesure de garde, de préservation ou d'éducation changent de résidence, ils doivent sous peine d'amende d'un à vingt-cinquante francs, en donner avis sans délai au tribunal de la jeunesse à la protection duquel cette personne est confiée.

Le changement de résidence entraîne le dessaisissement de ce tribunal au profit du tribunal de la jeunesse de l'arrondissement où est située la nouvelle résidence. Le dossier lui est transmis par le greffier du tribunal dessaisi.

Le tribunal saisi reste cependant compétent pour statuer en cas de changement de résidence survenant au cours d'instance.

Art. 45. Le tribunal de la jeunesse est saisi :

1. (dans les matières prévues au titre II, chapitre II, de la présente loi (et aux articles 353.10 et 354.2) du Code civil, et (sans préjudice) (des articles 145, 478 et 479 du même Code et des articles 1231-3, 1231-24, 1231-27 et 1231-46 du Code judiciaire), par une requête signée, (selon le cas, par le mineurs, les père,) mère, tuteur, subrogé tuteur, curateur, (…), membre de la famille ou membre (du centre publique d'aide sociale), ou par citation à la requête du ministère public; <L 2006-05-15/35, art. 8, 1°, 2° et 3°, 007; En vigueur : indéterminée et au plus tard En vigueur : 01-01-2011>

2. dans les matières prévues au titre II, chapitre III :

a) par la réquisition du ministère public ou l'ordonnance de renvoi prévue à l'article 49, alinéa 3, en vue de procéder aux investigations prévues à l'article 50 et d'ordonner, s'il échot, les mesures provisoires de garde prévues (à l'article 52); <L 1999-05-04/39, art. 3, 012; En vigueur : 01-01-2002>

b) par la comparution volontaire à la suite d'un avertissement motivé donné par le ministère public ou la citation à la requête du ministère public, en vue de statuer au fond, (ou en vue du dessaisissement prévu à l'article (57bis) les parties entendues en leurs moyens. <L 1994-02-02/33, art. 8, 4°, 007; En vigueur : 27-09-1994> <L 2006-05-15/35, art. 8, 1, 022; En vigueur : 01-10-2007>

(c) par la requête visée aux articles 37, § 3, 1°, (47, alinéa 3,) et 60, les parties étant convoquées, dans ce cas, par pli judiciaire adressé suivant les formes prévues à l'article 46, § 1er, du Code judiciaire.) <L 1994-02-02/33, art. 8, 5°, 007; En vigueur : 27-09-1994> <L 2006-05-15/35, art. 8, 2, 022; En vigueur : indéterminée et au plus tard En vigueur : 01-01-2011>

Art. 45bis. <Inséré par L 2006-06-13/40, art. 11; En vigueur : 02-04-2007> (Lorsque les personnes qui exercent l'autorité parentale sur le mineur qui déclare ne pas nier avoir commis un fait qualifié infraction manifestent un désintérêt caractérisé à l'égard du comportement délinquant de ce dernier, et que ce désintérêt, qui contribue aux problèmes du mineur, le procureur du Roi peut leur proposer d'accomplir un stage parental.) Ce stage parental peut uniquement être proposé s'il peut être bénéfique
pour le mineur délinquant lui-même. <L 2006-12-27/33, art. 89, 025; En vigueur : 01-01-2007>

Art. 45ter. <Inséré par L 2006-06-13/40, art. 12; En vigueur : 16-10-2006> A l’égard des personnes visées à l’article 36, 4°, le procureur du Roi peut adresser à l’auteur présumé du fait qualifié infraction une lettre d'avertissement dans laquelle il indique qu’il a pris connaissance des faits, qu’il estime ces faits établis à charge du mineur et qu’il a décidé de classer le dossier sans suite.

Une copie de la lettre d'avertissement est transmise aux père et mère, au tuteur du mineur ou aux personnes qui en ont la garde en droit ou en fait.

Le procureur du Roi peut toutefois convoquer l’auteur présumé du fait qualifié infraction et ses représentants légaux et leur notifier un rappel à la loi et les risques qu’ils courent.

Art. 45quater.<Inséré par L 2006-06-13/40, art. 13; En vigueur : O2-04-2007> § 1er. Le procureur du Roi informe par écrit la personne soupçonnée d’avoir commis un fait qualifié infraction, les personnes qui exercent l’autorité parentale à son égard, les personnes qui en ont la garde en droit ou en fait et la victime, qu’elles peuvent participer à une médiation et qu’elles ont, dans ce cadre, la possibilité de s’adresser à un service de médiation, organisé par les communautés ou répondant aux conditions fixées par celles-ci, qu’il désigne.

Le procureur du Roi peut faire une telle proposition lorsque les conditions suivantes sont remplies :

1° il existe des indices sérieux de culpabilité;
2° l’intéressé déclare ne pas nier le fait qualifié infraction;
3° une victime est identifiée.

La décision du procureur du Roi d’orienter ou non un dossier vers la procédure de médiation doit être écrite et motivée sauf s’il souhaite classer l’affaire sans suite.

Hormis les cas visés à l’article 49, alinéa 2, l'absence d'une telle motivation entraîne l'irrégularité de la saisine du tribunal de la jeunesse.

Lorsqu’une proposition de médiation est faite, le procureur du Roi informe les personnes concernées qu'elles ont le droit de :

1° solliciter les conseils d'un avocat avant de participer à la médiation;
2° se faire assister par un avocat au moment où l'accord auquel aboutissent les personnes concernées est fixé.

Le procureur du Roi adresse une copie des propositions écrites au service de médiation désigné. Si, dans les huit jours de la réception de la proposition écrite du procureur du Roi, les personnes concernées n'ont fait aucune démarche envers le service de médiation, celui-ci prend contact avec elles.

Une médiation ne peut avoir lieu que si les personnes qui y participent y adhèrent de manière expresse et sans réserve, et ce, tout au long de la médiation.

§ 2. Dans les deux mois de sa désignation par le procureur du Roi, le service de médiation établit un rapport succinct relatif à l’état d’avancement de la médiation.
L'accord auquel auront abouti les personnes concernées par la médiation est signé par la personne qui est (soupçonnée d’) avoir commis un fait qualifié infraction, par les personnes qui exercent l’autorité parentale à son égard, ainsi que par la victime, et doit être approuvé par le procureur du Roi. Celui-ci ne peut en modifier le contenu. Il ne peut refuser d’approuver un accord que s’il est contraire à l’ordre public. <L 2006-12-27/33, art. 90, 025; En vigueur : 07-01-2007>

§ 3. Le service de médiation établit un rapport sur l’exécution de l’accord et l’adresse au procureur du Roi. Ce rapport est joint au dossier de la procédure.

Lorsque (la personne visée à l’article 36, 4°,) a exécuté l’accord de médiation selon les modalités prévues, le procureur du Roi en dresse procès-verbal et en tient compte lorsqu’il décide de classer sans suite ou non l’affaire. Dans ce cas, un classement sans suite a pour effet l’extinction de l’action publique. <L 2006-12-27/33, art. 91, 025; En vigueur : 07-01-2007>

Une copie du procès-verbal est remise à l’auteur du fait qualifié infraction, aux personnes qui exercent l’autorité parentale à son égard, à la victime ainsi qu’au service de médiation. Au cas où cette remise n’a pu avoir lieu, la copie du procès-verbal est notifiée par pli judiciaire.

§ 4. Si la médiation ne donne aucun résultat, ni la reconnaissance de la matérialité des faits par le jeune, ni le déroulement ou le résultat de la médiation ne peuvent être utilisés, par les autorités judiciaires ou toute autre personne, au préjudice du jeune.

Les documents établis et les communications faites dans le cadre d’une intervention du service de médiation sont confidentiels, à l’exception de ce que les parties consentent à porter à la connaissance des autorités judiciaires. Ils ne peuvent être utilisés dans une procédure pénale, civile, administrative ou arbitrale ou dans toute autre procédure visant à résoudre des conflits et ne sont pas admissibles comme preuve, même comme aveu extrajudiciaire.

(Note : par son arrêt n° 50/2008 du 13-03-2008 (M.B. 14-04-2008, p. 19886-19893), la Cour Constitutionnelle a annulé l’article 45quater, § 1, deuxième alinéa, 1° et 2°)

Art. 46. (Note : La Cour d’arbitrage par son arrêt n° 122/98 du 3 décembre 1998 a dit pour droit que cet article viole les articles 10 et 11 de la Constitution, en ce que, dans les procédures visées à l’article 36, 2°, de la loi précitée, les parents d’accueil ne sont pas appelés à la cause et leur intervention n’est pas admise. M.B. 20-01-1999, p. 1632-1635) La citation à la requête du ministère public ou l’avertissement donné par lui doit, à peine de nullité, être adressé aux parents, (parents d’accueil,) tuteurs ou personnes qui ont la garde du mineur et au mineur lui-même si l’action tend à faire révoquer son émancipation ou à faire prendre ou modifier à son égard, une des mesures prévues au titre II, chapitre III, section II, et qu’il est âgé de douze ans au moins. <L 2006-05-15/35, art. 9, 022 ; En vigueur : 16-10-2006>

(Si une personne visée à l’article 36, 4°, a atteint l’âge de dix-huit ans au moment où l’action est intentée, la citation ou l’avertissement visé à l’alinéa précédent est adressé à cette personne qui a fait l’objet de la mesure et aux personnes qui en étaient civilement responsables du fait de sa minorité.

Sans préjudice de l’article 184, alinéa 3, du Code d’instruction criminelle, il y aura au moins un délai de dix jours, sans augmentation en raison de la distance, entre la citation et la comparution, à peine de nullité du jugement qui sera prononcé par
défaut par le tribunal à l'égard de la partie citée.) <L 1994-02-02/33, art. 9, 007; En vigueur : 27-09-1994>

Art. 46bis. <L 1999-04-27/31, art. 2; En vigueur : 12-06-1999> La citation à la requête du procureur du Roi visée à l'article 45, 2, b), peut être faite, à l'égard de la personne visée à l'article 36, 4° qui est amenée ou se présente devant le procureur du Roi, ainsi qu'à l'égard de toute autre personne visée à l'article 46 qui se présente devant lui, par la notification d'une convocation à comparaître devant le tribunal de la jeunesse dans un délai qui ne peut être inférieur à celui prévu à l'article 46, alinéa 3, ni supérieur à deux mois et la remise d'une copie du procès-verbal mentionnant cette notification.

La convocation indique les faits sur lesquels l'action est fondée, ainsi que les lieu, jour et heure de l'audience.

Art. 47. La constitution de partie civile par voie de citation directe devant le tribunal de la jeunesse n'est pas autorisée.

A l'égard des mineurs relevant du tribunal de la jeunesse, les administrations publiques ne peuvent, exercer les poursuites qui leur appartiennent, qu'en formant plainte entre les mains du procureur du Roi qui seul peut saisir le tribunal de la jeunesse.

(L'extinction de l'action publique à l'égard de la personne visée à l'article 36, 4, à la suite de la mise en oeuvre d'une médiation visée à l'article 45quater, ne préjudicie pas aux droits des victimes et des personnes subrogées dans leurs droits d'obtenir une indemnisation, à condition que la victime n'ait pas participé à la médiation ou qu'elle ait participé à une médiation dont l'accord mentionne explicitement qu'il n'a pas été remédié entièrement aux conséquences matérielles du fait qualifié infraction. À leur égard, la faute de l'auteur du fait qualifié infraction est présumée irréfragablement.) <L 2006-05-15/35, art. 10; En vigueur : 02-04-2007>

Art. 48. <L 1994-02-02/33, art. 10, 007; En vigueur : 27-09-1994> § 1. Dans les procédures visées au titre II, chapitre II, section 1er, chaque parent ou personne ayant la garde d'un jeune fait l'objet d'une procédure distincte.

Ces procédures ne peuvent être jointes à d'autres procédures que pendant la procédure préparatoire. Les pièces contenant des informations relatives à chacun des parents ou personnes ayant la garde de l'intéressé doivent être séparées des autres pièces de la procédure. Elles ne peuvent être communiquées aux autres parties.

Pendant la durée de la procédure préparatoire, le ministère public peut refuser la communication de ces pièces aux parties, s'il juge que cette communication serait de nature à nuire aux intérêts des personnes concernées.

§ 2. Dans les procédures visées au titre II, chapitre III, section 2, lorsque le fait qu'aurait commis la personne de moins de dix-huit ans et connexe à une infraction qu'auraient commise une ou plusieurs personnes non justiciables du tribunal de la jeunesse, les poursuites sont disjointes dès que la disjonction peut avoir lieu sans nuire à l'information ou à l'instruction.

Les poursuites peuvent être jointes si le tribunal de la jeunesse s'est dessaisi (conformément à l'article 57bis). <L 2006-12-27/33, art. 94, 025; En vigueur : 01-10-2007>
Art. 48bis. <inséré par L 2006-05-15/35, art. 11 ; ED : 16-10-2006> § 1er. Lorsqu'un mineur est privé de sa liberté suite à son arrestation ou a été mis en liberté contre la promesse de comparaître ou la signature d'un engagement, le fonctionnaire de police responsable de sa privation de liberté doit, dans les meilleurs délais, donner ou faire donner au père et mère du mineur, à son tuteur ou aux personnes qui en ont la garde en droit ou en fait, une information orale ou écrite de l'arrestation, de ses motifs et du lieu dans lequel le mineur est retenu. Si le mineur est marié, l'avis doit être donné à son conjoint plutôt qu'aux personnes susvisées.

§ 2. Au cas où l'avis n'a pas été donné conformément au présent article et aucune des personnes auxquelles il aurait pu être donné ne s'est présentée au tribunal de la jeunesse saisi de l'affaire, celui-ci peut soit ajourner l'affaire et ordonner qu'un avis soit donné à la personne qu'il désigne, soit traiter l'affaire s'il estime qu'un tel avis n'est pas indispensable. Dans ce cas, il mentionne, dans son jugement, les raisons qui motivent sa décision.

Art. 49. Le juge d'instruction n'est saisi par réquisition du ministère public ou ne se saisit d'office en cas de flagrant délit que dans des circonstances exceptionnelles et en cas de nécessité absolue.

(S'il y a urgence, le juge d'instruction peut prendre à l'égard de la personne (ayant commis avant l'âge de dix-huit ans un fait qualifié infraction, même si la réquisition du ministère public est postérieure à la date à laquelle cette personne a atteint l'âge de dix-huit ans,) une des mesures de garde visées (à l'article 52), sans préjudice à en donner avis simultanément et par écrit au tribunal de la jeunesse, qui exerce dès lors ses attributions et statue dans les deux jours ouvrables, conformément aux articles 52ter et 52quater.) (L'intéressé a droit à l'assistance d'un avocat, lors de toute comparution devant le juge d'instruction. Cet avocat est désigné, le cas échéant, conformément à l'article 54bis. Le juge d'instruction peut néanmoins avoir un entretien particulier avec l'intéressé.) <L 1994-02-02/33, art. 11, 1°, 007; En vigueur : 27-09-1994> <L 1999-05-04/39, art. 3, 012; En vigueur : 01-01-2002> <L 2003-01-06/32, art. 2, 014; En vigueur : 02-03-2003> <L 2006-06-13/40, art. 15, 023; En vigueur : 16-10-2006>

L'instruction terminée, le juge d'instruction rend, sur la réquisition du ministère public, une ordonnance de non-lieu ou une ordonnance de renvoi devant le tribunal de la jeunesse.

(Cette ordonnance est prononcée après un débat contradictoire et après que la personne de moins de dix-huit ans, les père et mère et les parties civiles aient pu prendre connaissance du dossier relatif aux faits, déposé au greffe 48 heures au moins avant les débats.) <L 1994-02-02/33, art. 11, 2°, 007; En vigueur : 27-09-1994>

(L’alinéa 3 ne fait pas obstacle à ce que le ministère public saisisse le tribunal de la jeunesse d’une réquisition tenant au dessaisissement prévu (à l'article 57bis). Le tribunal statue en l'état de la procédure.) <L 1994-02-02/33, art. 11, 3°, 007; En vigueur : 27-09-1994> <L 2006-06-13/40, art. 14, 023; En vigueur : 01-10-2007>

Art. 50. <L 1994-02-02/33, art. 12, 007; En vigueur : 27-09-1994> (...) Le tribunal de la jeunesse effectue toutes diligences et fait procéder à toutes investigations utiles pour connaître la personnalité de l'intéressé, le milieu où il est élevé, déterminer son intérêt.
et les moyens appropriés à son éducation ou à son traitement. <L 2006-05-15/35, art. 12, 022; En vigueur : 01-10-2007>

Il peut faire procéder à une étude sociale par l'intermédiaire du service social compétent et soumettre l'intéressé à un examen médico-psychologique, lorsque le dossier qui lui est soumis, ne lui paraît pas suffisant.

Lorsque le tribunal de la jeunesse fait procéder à une étude sociale, il ne peut, sauf en cas d'extrême urgence, prendre ou modifier sa décision, qu'après avoir pris connaissance de l'avis du service social compétent, à moins que cet avis ne lui parvienne pas dans le délai qu'il a fixé et qui ne peut dépasser septante-cinq jours.

(Alinéa 4 abrogé) <L 2006-05-15/35, art. 15, 022; En vigueur : 01-10-2007>
§ 2. (...) <L 2006-05-15/35, art. 12, 022; En vigueur : 01-10-2007>

Art. 51. (§ 1er. Dès qu'il est saisi d'un fait qualifié infraction, le tribunal informe les personnes qui exercent l'autorité parentale à l'égard de l'intéressé et, le cas échéant, les personnes qui en ont la garde en droit ou en fait, (…), en vue de leur permettre d'être présents.) <L 2006-06-13/40, art. 16, 1°, 023; En vigueur : 16-10-2006> <L 2006-12-27/33, art. 95°, 025; En vigueur : 01-01-2007>

(§ 2.) (Le tribunal de la jeunesse, une fois saisi, peut en tout temps convoquer l'intéressé, les parents, tuteurs, personnes qui en ont la garde, ainsi que toute autre personne, sans préjudice de l'article 458 du Code pénal, de l'article 156 du Code d'instruction criminelle et de l'article 931 du Code judiciaire.) <L 1994-02-02/33, art. 13, 1°, 007; En vigueur : 27-09-1994> <L 2006-06-13/40, art. 16, 1°, 023; En vigueur : 16-10-2006>

Dans les matières prévues (aux articles 145, 148, 302, 353-10, 354-2), 373, 374, (375, 376, 377, 379), et 477 du Code civil, les père et mère et éventuellement la personne à qui la garde de l'enfant a été confiée, sont convoqués devant le tribunal par le greffier. Dans les matières prévues aux articles 485 du Code civil, (…), (43, 45, 46 et 46bis de la loi du 3 juillet 1978 sur les contrats de travail, modifiée par la loi du 30 mars 1981), le requérant, les père, mère ou tuteur et le mineur sont convoqués devant le tribunal par le greffier; une copie conforme de la demande est jointe à la convocation adressée à celui ou ceux d'entre eux qui n'ont pas présenté requête. <L 21-03-1969, art. 5.A.6> <L 1994-02-02/33, art. 13, 2°, 3°, 4° et 5°, 007; En vigueur : 27-09-1994> <L 2003-04-24/32, art. 11, 017; En vigueur : 01-09-2005>

(Dans les autres matières, si, sur l'invitation à comparaître, l'intéressé ou les personnes investies de l'autorité parentale à l'égard du mineur ne comparaissent pas et que ces personnes ne peuvent justifier leur non-comparution, elles peuvent être condamnées, par le tribunal de la jeunesse, à une amende d'un euro à cent cinquante euros.) <L 2006-06-13/40, art. 16, 2°, 023; En vigueur : 16-10-2006>

(Les personnes visées à l'alinéa 3 qui ont été condamnées à une amende et qui, sur une seconde invitation à comparaître, produisent devant le juge de la jeunesse ou le tribunal de la jeunesse des excuses légitimes, peuvent, sur avis du ministère public, être déchargées de l'amende.) <L 2006-06-13/40, art. 16, 3°, 023; En vigueur : 16-10-2006>

( NOTE: par son arrêt n° 49/2008 du 13-03-2008 (M.B. 14-04-2008, p. 19854-19863), la Cour Constitutionnelle a annulé dans l'article 51, § 2, alinéa 3, tel qu'il a été modifié par la loi du 13 juin 2006, les mots " l'intéressé ou " )
Art. 52. Pendant la durée d'une procédure tendant à l'application d'une des mesures prévues au titre II, chapitre III, le tribunal de la jeunesse prend provisoirement à l'égard (de la personne visée à l'article 36, 4°,) les mesures de garde nécessaires. <L 2006-05-15/35, art. 15, 022; En vigueur : 02-04-2007>

(Il peut soit le laisser dans son milieu de vie et le soumettre, le cas échéant, à la surveillance prévue à l'article 37, § 2, alinéa 1er, 2°, ou à une condition énumérée à l'article 37, § 2bis, excepté 2° et 3°, soit prendre provisoirement une des mesures prévues à l'article 37, § 2, alinéa 1er, 7° à 11°, le cas échéant de façon cumulative.

La mesure prévue à l'article 37, § 2, alinéa 1er, 9°, est prise en vue d'établir un bilan médico-psychologique.

Afin de permettre la réalisation des mesures d'investigations visées à l'article 50, le tribunal peut assortir la mesure de garde provisoire consistant à laisser l'intéressé dans son milieu et à le soumettre à la surveillance prévue à l'article 37, § 2, alinéa 1er, 2°, de la condition d'accomplir une prestation d'intérêt général en rapport avec son âge et ses capacités. La prestation d'intérêt général ordonnée en application du présent article ne peut dépasser 30 heures.

Afin de prendre la décision visée à l'alinéa 2, le tribunal de la jeunesse tient compte des facteurs visés à l'article 37, § 1er, alinéa 2. La disponibilité des moyens de traitement, des programmes d'éducation ou de toutes autres ressources envisagées et le bénéfice qu'en retirerait l'intéressé sont également pris en considération.

Ces mesures provisoires ne peuvent être prises que pour une durée aussi brève que possible, lorsqu'il existe suffisamment d'indices sérieux de culpabilité et que la finalité de la mesure provisoire ne peut être atteinte d'une autre manière.

Aucune mesure provisoire ne peut être prise en vue d'exercer une sanction immédiate ou toute autre forme de contrainte.) <L 2006-06-13/40, art. 17, 1°, 023; En vigueur : 16-10-2006>

(Lorsque le tribunal de la jeunesse prend provisoirement une des mesures prévues à l'article (37, § 2, alinéa premier, 8°), à l'égard d'une personne ayant commis un fait qualifié infraction, il peut, pour les nécessités de l'information ou de l'instruction et pour un délai renouvelable de (trois jours civils) au plus, interdire au jeune par décision motivée de communiquer librement avec les personnes nommément désignées, autres que son avocat. <L 2006-06-13/40, art. 17, 2°, 023; En vigueur : 16-10-2006>

(Lorsque le tribunal de la jeunesse est saisi du cas d'une personne ayant commis avant l'âge de dix-huit ans un fait qualifié infraction, il peut, même si la réquisition du ministère public est postérieure à la date à laquelle cette personne a atteint l'âge de dix-huit ans, ordonner ou maintenir des mesures provisoires jusqu'à que l'intéressé ait atteint l'âge de vingt ans.) <L 2003-01-06/32, art. 3, 014; En vigueur : 02-03-2003>

(Les dispositions du présent article ne sont pas applicables aux enfants de personnes dont la déchéance de l'autorité parentale est poursuivie.) <L 1994-06-30/44, art. 1, 008; En vigueur : 27-09-1994>

(NOTE : par son arrêt n° 49/2008 du 13-03-2008 (M.B. 14-04-2008, p. 19854-19863), la Cour Constitutionnelle a annulé dans l'article 52, alinéa 6, les mots " il existe suffisamment d'indices sérieux de culpabilité et que ")

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Art. 52. (COMMUNAUTE FLAMANDE)
(Abrogé sauf à l'égard des mineurs poursuivis du chef d'un fait qualifié d'infraction) <DCFL 1990-03-28/34, art. 22, 5°, 003; En vigueur : 27-09-1994>

Art. 52. (COMMUNAUTE FRANCAISE)
(Abrogé en ce qui concerne les mineurs en danger, ceux qui sont l'objet de plainte en correction parentale et ceux qui sont trouvés mendians ou vagabonds, en ce compris les enfants de personnes dont la déchéance de l'autorité parentale est poursuivi.) <DCFR 1991-03-04/36, art. 62, § 9, 005; En vigueur : 07-12-1994>

(NOTE : Par son arrêté n° 4/93 du 21 janvier 1993 (M.B. 04-02-1993, p. 2260) la Cour d'arbitrage annule les mots " en ce compris les enfants de personnes dont la déchéance de l'autorité parentale est poursuivie)"

Art. 52. (COMMUNAUTE GERMANOPHONE)
(Abrogé pour autant qu'il ne concerne pas des jeunes qui ont commis un fait qualifié infraction) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 52bis. <Inséré par L 1994-02-02/33, art. 15; En vigueur : 27-09-1994> Hors les cas visés à l'(article 52quater, alinéas 7 et 8), la durée de la procédure préparatoire est limitée à six mois à partir de la réquisition prévue à l'article 45.2.a), jusqu'à la communication du dossier au ministère public après clôture des investigations. Le ministère public dispose alors d'un délai de deux mois pour citer l'intéressé à comparaître devant le tribunal de la jeunesse. <L 2006-12-27/33, art. 96, 025; En vigueur : 01-03-2007>

Le délai de six mois est suspendu entre l'acte d'appel et l'arrêt.

Art. 52ter. <Inséré par L 1994-02-02/33, art. 16; En vigueur : 27-09-1994> Dans les cas prévus à l'article 52, le jeune ayant atteint l'âge de douze ans doit être entendu personnellement par le juge de la jeunesse avant toute mesure, sauf s'il n'a pu être trouvé, si son état de santé s'y oppose ou s'il refuse de comparaître.

L'intéressé a droit à l'assistance d'un avocat, lors de toute comparution devant le tribunal de la jeunesse. Cet avocat est désigné, le cas échéant, conformément à l'article 54bis. Hors les cas où le tribunal de la jeunesse est saisi conformément à l'article 45.2.b) ou c), le juge de la jeunesse peut néanmoins avoir un entretien particulier avec l'intéressé.

L'ordonnance contient un résumé des éléments touchant à sa personnalité ou à son milieu, qui justifient la décision et, le cas échéant, un résumé des faits reprochés. Elle mentionne également l'audition ou les raisons pour lesquelles l'intéressé n'a pu être entendu.

Une copie de l'ordonnance est remise à l'intéressé après son audition, de même qu'à (...) ses père et mère, tuteurs ou personnes qui ont la garde de l'intéressé si ceux-ci sont présents à l'audience. Au cas où cette remise n'a pu avoir lieu, la décision est notifiée par pli judiciaire (La copie de l'ordonnance indique les voies de recours ouvertes contre
celle-ci ainsi que les formes et délais à respecter). Le délai d'appel court à partir de la remise de la copie ou à partir du jour où l'intéresse a eu connaissance de la notification par pli judiciaire. \(<L\ 2006-05-15/35,\ art.\ 13,\ 022;\ En\ vigueur:\ 16-10-2006>\ <L\ 2006-06-13/40,\ art.\ 18,\ 023;\ En\ vigueur:\ 16-10-2006>\ <L\ 2006-12-27/33,\ art.\ 97,\ 025;\ En\ vigueur:\ 01-01-2007>

Les mesures visées à l'article 52 ne sont pas susceptibles d'opposition.

En cas d'appel, la chambre de la jeunesse de la cour d'appel statue dans les deux mois au plus tard à compter de l'acte d'appel.

Art. 52quater.<Inséré par L 1994-02-02/33, art. 17; En vigueur : 27-09-1994> En ce qui concerne les personnes visées à l'article 36, 4°, le juge ou le tribunal de la jeunesse, selon le cas, peut, dans les cas visés aux articles 52, 52bis et 52ter, ordonner une mesure de garde pour une période de trois mois au plus, en régime éducatif fermé, organisé par les instances compétentes.

(Cette décision ne peut être prise que si les conditions suivantes sont réunies :

1° il existe des indices sérieux de culpabilité;
2° l'intéressé a un comportement dangereux pour lui-même ou pour autrui;
3° il existe de sérieuses raisons de craindre que l'intéressé, s'il était remis en liberté, commette de nouveaux crimes ou délits, se soustraire à l'action de la justice, tente de faire disparaître des preuves ou entre en collusion avec des tiers.) \(<L\ 2006-06-13/40,\ art.\ 19,\ 023;\ En\ vigueur:\ 16-10-2006>

(En outre, les sorties de l’intéressé de l’établissement sont soumises aux conditions suivantes :

1° les sorties de l’établissement pour des comparutions judiciaires des besoins médicaux ou pour assister aux funérailles en Belgique en cas de décès d’un membre de la famille jusqu’au deuxième degré inclus, ne nécessitent pas une autorisation du juge de la jeunesse ou du tribunal de la jeunesse. Par contre, l’établissement informe le juge de la jeunesse ou le tribunal de la jeunesse préalablement par voie de télécopie de toute sortie dans ce sens. Le Roi peut par arrêté royal délibéré en Conseil des ministres élargir cette règle à d’autres types de sorties;

2° les types de sorties décrites dans le projet pédagogique que l’institution communautaire publique de protection de la jeunesse communiquera avec mention des types d’encadrement par type de sorties, peuvent être interdites par le juge de la jeunesse ou le tribunal de la jeunesse par décision motivée pour une ou plusieurs des raisons décrites à l’alinéa 4. L’interdiction peut également ne porter que sur certains types d’activités et peut être liée à un encadrement insuffisant;

3° les sorties dans le cadre d’activités ne faisant pas explicitement partie du projet pédagogique de l’institution communautaire publique de protection de la jeunesse font l’objet d’une demande au cas par cas auprès du juge de la jeunesse ou du tribunal de la jeunesse en précisant le type d’encadrement prévu. La demande est faite au plus tard cinq jours ouvrables avant le début de l’activité. Le juge de la jeunesse ou le tribunal de la jeunesse se prononce dans un délai de quatre jours ouvrables. Copie de la demande est sans délai communiquée au ministère public par le greffe.

La décision du juge ou du tribunal de la jeunesse est notifiée par voie de télécopie à l’institution communautaire publique de protection de la jeunesse. Copie de la décision
est communiquée dans les 24 heures au ministère public par le greffe. En cas d’interdiction de sortir de l’établissement, le juge ou le tribunal de la jeunesse mentionne les motifs de cette interdiction qui sont basés sur une ou plusieurs des raisons suivantes :

1° l’intéressé a un comportement dangereux pour lui-même ou pour autrui;

2° il existe de sérieuses raisons de craindre que l’intéressé, s’il était remis en liberté, commette de nouveaux crimes ou délits, se soustraire à l’action de la justice, tente de faire disparaître des preuves ou entre en collusion avec des tiers;

3° l’intérêt d’une victime ou de son entourage nécessite cette interdiction. Le juge de la jeunesse ou tribunal de la jeunesse peut demander au service d’accueil aux victimes de rédiger une fiche victimes.

L’appel du ministère public contre une sortie mentionné à l’alinéa 3, 2° ou 3° est suspensif durant les quinze jours qui suivent l’acte d’appel. L’appel contre une sortie mentionnée à l’alinéa 3, 2°, doit être interjeté dans un délai de quarante-huit heures, qui court à compter de la communication de la décision du juge de la jeunesse ou du tribunal de la jeunesse de confier le jeune à une institution communautaire publique de protection de la jeunesse, en régime éducatif fermé. Le ministère public en informe sans délai l’institution communautaire publique de protection de la jeunesse concernée.

Le juge de la jeunesse ou le tribunal de la jeunesse peut, en tout temps, soit d’office, soit à la demande du ministère public, modifier la décision mentionnée à l’alinéa 3, 2° et 3°. <L 2006-12-27/33, art. 97, 025; En vigueur : 01-03-2007>

Les mesures précitées peuvent néanmoins être prolongées de mois en mois par décision motivée du juge ou du tribunal de la jeunesse selon le cas. La décision devra être justifiée par des circonstances graves et exceptionnelles se rattachant aux exigences de la sécurité publique ou propres à la personnalité de l’intéressé, et qui nécessitent le maintien de ces mesures. L’intéressé, son conseil et le directeur de l’établissement seront préalablement entendus.

L’appel contre les ordonnances ou jugements prévus aux alinéas précédents doit être interjeté dans un délai de quarante-huit heures qui court à l’égard du ministère public à compter de la communication de l’ordonnance ou du jugement et à l’égard des autres parties en cause à compter de l’accomplissement des formalités prévues à l’article 52ter, alinéa 4. Le recours peut être formé par déclaration au directeur de l’établissement ou à la personne qu’il déléguée. Le directeur inscrit les recours dans un registre coté et paraphé. Il en avise immédiatement le greffe du tribunal compétent et lui adresse un extrait du registre par lettre recommandée.

La chambre de la jeunesse de la cour d’appel instruit la cause et se prononce dans les quinze jours ouvrables à compter de l’acte d’appel. Passe ce délai, la mesure cesse d’être d’application. Le délai est suspendu pendant la durée de la remise accordée à la demande de la défense.

(Le délai de citation devant la Cour est de trois jours.) <L 1994-06-30/45, art. 1, 009; En vigueur : 27-09-1994>

(NOTE : par son arrêt n° 49/2008 du 13-03-2008 (M.B. 14-04-2008, p. 19854-19863), la Cour Constitutionnelle a annulé dans l’article 52quater, alinéa 2, 1°, les mots " il existe des indices sérieux de culpabilité ")

(NOTE : par son arrêt n° 49/2008 du 13-03-2008 (M.B. 14-04-2008, p. 19854-19863), la Cour Constitutionnelle a annulé les alinéas 3 à 6 de l’article 52quater)
Art. 52quinquies. <Inséré par L 2006-06-13/40, art. 20; En vigueur : 02-04-2007>

Durant une procédure visant l’application d’une des mesures visées au titre II, chapitre III, le juge de la jeunesse ou le tribunal de la jeunesse peut proposer une médiation conformément aux modalités prévues aux articles 37bis à 37quinquies.

Art. 53. (NOTE : abrogé à l’égard des mineurs qui sont poursuivis en raison d’un fait qualifié infraction, par <L 1999-05-04/39, art. 2, 012; En vigueur : 01-01-2002>) S’il est matériellement impossible de trouver un particulier ou une institution en mesure de recueillir le mineur sur-le-champ et qu’ainsi les mesures prévues à l’article 52 ne puissent être exécutées, le mineur peut être gardé provisoirement dans une maison d’arrêt pour un terme qui ne peut dépasser quinze jours.

(La mesure prévue à l’alinéa 1er n’est applicable qu’à l’égard des personnes qui sont soupçonnées d’avoir commis un fait punissable d’une peine d’emprisonnement correctionnel principal d’un an ou d’une peine plus grave aux termes du Code pénal ou des lois complémentaires et pour autant qu’elles aient atteint l’âge de quatorze ans au moins au moment des faits.

En cas d’appel, les dispositions de l’article 52quater, alinéas 6 et 7, sont applicables, sauf que le délai dans lequel la décision d’appel doit intervenir est ramené à cinq jours ouvrables à compter de l’acte d’appel. (Le délai de citation devant la Cour est d’un jour.) <L 1994-06-30/45, art. 2, 009; En vigueur : 27-09-1994>

La mesure de garde visée à l’alinéa premier ne peut être ordonnée qu’une seule fois par le juge de la jeunesse au cours de la même procédure, sauf la possibilité du tribunal de la jeunesse d’ordonner d’autres mesures provisoires.

Cet article est applicable aux personnes visées à l’article 37, § 3, 2°.) <L 1994-02-02/33, art. 18, 007; En vigueur : 27-09-1994>

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COMMUNAUTES ET REGIONS

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Art. 53. (COMMUNAUTE FLAMANDE)

(Abrogé sauf à l’égard des mineurs poursuivis du chef d’un fait qualifié d’infraction) <DCFL 1990-03-28/34, art. 22, 5°, 003; En vigueur : indéterminée>

Art. 53. (COMMUNAUTE FRANCAISE)

(Abrogé en ce qui concerne les mineurs en danger, ceux qui sont l’objet de plainte en correction parentale et ceux qui sont trouvés mendions ou vagabonds, en ce compris les enfants de personnes dont la déchéance de l’autorité parentale est poursuivi.) <DCFR 1991-03-04/36, art. 62, § 9, 005; En vigueur : 07-12-1994>

(NOTE : Par son arrêté n° 4/93 du 21 janvier 1993 (M.B. 04-02-1993, p. 2260) la Cour d’arbitrage annule les mots “en ce compris les enfants de personnes dont la déchéance de l’autorité parentale est poursuivie)

Art. 53. (COMMUNAUTE GERMANOPHONE)
(Abrogé pour autant qu'il ne concerne pas des jeunes qui ont commis un fait qualifié infraction) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

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Art. 53bis. (abrogé) <L 2006-12-27/32, art. 375, 026; En vigueur : 28-12-2006>

Art. 54. (Sauf dans les cas prévus au titre II, chapitre III, (...) où elles doivent comparaître en personne, les parties peuvent se faire représenter par un avocat.) <L 1994-02-02/33, art. 20, 007; En vigueur : 27-09-1994> <L 2003-04-24/32, art. 12, 017; En vigueur : 01-09-2005>

Le tribunal de la jeunesse peut, en tout temps, ordonner la comparution personnelle des parties. Il peut, de même, convoquer toutes les personnes qui ont la garde du mineur.

Art. 54bis. <Inséré par L 1994-02-02/33, art. 21; ED : 27-09-1994> § 1. Lorsqu'une personne de moins de dix-huit ans est partie à la cause et qu'elle n'a pas d'avocat, il lui en est désigné un d'office.

Lorsque le tribunal de la jeunesse est saisi en application de l'article 45.2.a) ou b), ou de l'article 63ter, a) ou c), le ministère public en avise immédiatement le bâtonnier de l'ordre des avocats. Cet avis est, selon le cas, envoyé en même temps que la réquisition la citation ou l'avertissement motivé. Le bâtonnier ou le bureau de consultation et de défense procède à la désignation au plus tard dans les deux jours ouvrables à compter de cet avis.

§ 2. Le ministère public adresse au tribunal de la jeunesse saisi, copie de l'avis informant le bâtonnier de la saisine.

§ 3. Le bâtonnier ou le bureau de consultation et de défense veille, lorsqu'il y a contradiction d'intérêts, à ce que l'intéressé soit assisté par un avocat autre que celui auquel auraient fait appel ses père et mère, tuteurs, ou personnes qui en ont la garde ou qui sont investies d'un droit d'action.

Art. 55. <L 1994-02-02/33, art. 22, 007; En vigueur : 27-09-1994> Lorsqu'une affaire visée au titre II, chapitre III, est portée devant le tribunal de la jeunesse, les parties et leur avocat sont informés du dépôt au greffe du dossier dont ils peuvent prendre connaissance à partir de la notification de la citation.

Les parties et leur avocat peuvent également prendre connaissance du dossier lorsque le ministère public requiert une mesure visée aux articles 52 et 53, ainsi que durant le délai d'appel des ordonnances imposant de telles mesures.

Toutefois, les pièces concernant la personnalité de l'intéressé et le milieu où il vit ne peuvent être communiquées ni à l'intéressé ni à la partie civile. Le dossier complet, y compris ces pièces, doit être mis à la disposition de l'avocat de l'intéressé lorsque ce dernier est partie au procès.

Art. 56. (Dans les affaires visées au titre II, chapitre III, section première, les mineurs intéressés ne sont pas considérés comme parties au débat, sauf lorsque sont prises à
leur égard des mesures prévues à l'article 52.) <L 1994-02-02/33, art. 23, 007; En vigueur : 27-09-1994>

Dans les affaires visées au titre II, chapitre III, section II, le cas de chaque mineur est examiné séparément en l'absence de tout autre mineur, sauf pendant le temps nécessaire à d'éventuelles confrontations.

Art. 56bis. <Inséré par L 1994-02-02/33, art. 24; ED : 27-09-1994> Le tribunal de la jeunesse doit convoquer la personne de douze ans au moins aux fins d'audition, dans les litiges qui opposent les personnes investies à son égard de l'autorité parentale, lorsque sont débattus des points qui concernent le gouvernement de sa personne, l'administration de ses biens, l'exercice du droit de visite, ou la désignation de la personne visée à l'article 34.

Art. 57. Le tribunal de la jeunesse peut à tout moment, au cours des débats, se retirer en chambre du conseil pour entendre, sur la personnalité (de la personne visée à l'article 36, 4°), les experts et les témoins, les parents, tuteurs ou personnes qui ont la garde (de la personne visée à l'article 36, 4°). <L 2006-05-15/35, art. 15, 022; En vigueur : 02-04-2007>

(La personne visée à l'article 36, 4°,) n'assiste pas aux débats en chambre du conseil. Le tribunal peut cependant le faire appeler s'il l'estime opportun.

Les débats en chambre du conseil ne peuvent avoir lieu qu'en présence de l'avocat (de la personne visée à l'article 36, 4°). <L 2006-05-15/35, art. 15, 022; En vigueur : 02-04-2007>

Art. 57bis.<Inséré par L 2006-06-13/40, art. 21; En vigueur : indéterminée et au plus tard : 01-01-2013> § 1er. Si la personne déférée au tribunal de la jeunesse en raison d'un fait qualifié infraction était âgée de seize ans ou plus au moment de ce fait et que le tribunal de la jeunesse estime inadéquate une mesure de garde, de préservation ou d'éducation, il peut, par décision motivée, se dessaisir et renvoyer l'affaire au ministère public aux fins de poursuite devant, soit, si la personne concernée est soupçonnée d'avoir commis un délit ou crime correctionnalisable, une chambre spécifique au sein du tribunal de la jeunesse qui applique le droit pénal commun et la procédure pénale commune, s'il y a lieu, [1 soit, si la personne concernée est soupçonnée d'avoir commis un crime non correctionnalisable, une cour d'assises composée conformément aux dispositions de l'article 119, alinéa 2, du Code Judiciaire, s'il y a lieu]1. Le tribunal de la jeunesse ne peut toutefois se dessaisir que si en outre une des conditions suivantes est remplie :

- la personne concernée a déjà fait l'objet d'une ou de plusieurs mesures visées à l'article 37, § 2, § 2bis ou § 2ter ou d'une offre restauratrice telle que visée aux articles 37bis à 37quinquies;

- il s'agit d'un fait visé aux articles 373, 375, 393 à 397, 400, 401, 417ter, 417quater, 471 à 475 du Code pénal ou de la tentative de commettre un fait visé aux articles 393 à 397 du Code pénal.

La motivation porte sur la personnalité de la personne concernée et de son entourage et sur le degré de maturité de la personne concernée.
La présente disposition peut être appliquée même lorsque l'intéressé a atteint l'âge de dix-huit ans au moment du jugement. Il est dans ce cas assimilé à un mineur pour l'application du présent chapitre.

§ 2. Sans préjudice de l'article 36bis, le tribunal de la jeunesse ne peut se dessaisir d'une affaire en application du présent article qu'après avoir fait procéder à l'étude sociale et à l'examen médico-psychologique prévus à l'article 50, alinéa 2.

L'examen médico-psychologique a pour but d'évaluer la situation en fonction de la personnalité de la personne concernée et de son entourage, ainsi que de degré de maturité de la personne concernée. La nature, la fréquence et la gravité des faits qui lui sont reprochés, sont prises en considération dans la mesure où elles sont pertinentes pour l'évaluation de sa personnalité. Le Roi fixe les modalités selon lesquelles l'examen médico-psychologique doit avoir lieu.

Toutefois,

1° le tribunal de la jeunesse peut se dessaisir d'une affaire sans disposer du rapport de l'examen médico-psychologique, lorsqu'il constate que l'intéressé se soustrait à cet examen ou refuse de s'y soumettre;

2° le tribunal de la jeunesse peut se dessaisir d'une affaire sans devoir faire procéder à une étude sociale et sans devoir demander un examen médico-psychologique, lorsqu'une mesure a déjà été prise par jugement à l'égard d'une personne de moins de dix-huit ans en raison d'un ou plusieurs faits visés aux articles 323, 373 à 378, 392 à 394, 401 et 468 à 476 du Code pénal, commis après l'âge de seize ans, et que cette personne est à nouveau poursuivie pour un ou plusieurs de ces faits commis postérieurement à la première condamnation. Les pièces de la procédure antérieure sont jointes à celles de la nouvelle procédure;

3° le tribunal de la jeunesse statue dans les mêmes conditions sur la demande de dessaisissement à l'égard d'une personne de moins de dix-huit ans qui a commis un fait qualifié crime punissable d'une peine supérieure à la réclusion de vingt ans, commis après l'âge de seize ans et qui n'est poursuivi qu'après qu'il ait atteint l'âge de dix-huit ans.

§ 3. Le tribunal de la jeunesse ne peut se dessaisir d'une affaire que dans le respect de la procédure suivante.

Dès le dépôt au greffe de l'étude sociale et de l'examen médico-psychologique, le juge de la jeunesse communiqué, dans les trois jours ouvrables, le dossier au procureur du Roi. Lorsqu'en application du § 2, alinéa 3, 1°, un examen médico-psychologique n'est pas requis, le tribunal communiqué le dossier au procureur du Roi dans les trois jours ouvrables du dépôt au greffe de l'étude sociale. Lorsqu'en application du § 2, alinéa 3, 2° et 3°, le tribunal peut statuer sans devoir faire procéder à une étude sociale et sans devoir demander un examen médico-psychologique, il communiqué le dossier sans délai au procureur du Roi.

Celui-ci cite les personnes visées à l'article 46 dans les trente jours de la réception du dossier en vue de la plus prochaine audience utile. La citation doit mentionner qu'un dessaisissement est requis. Le tribunal statue sur le dessaisissement dans les trente jours ouvrables de l'audience publique.

En cas d'appel, le procureur général dispose d'un délai de vingt jours ouvrables à dater de la fin du délai d'appel pour citer devant la chambre de la jeunesse de la cour d'appel. Cette chambre statue sur le dessaisissement dans les quinze jours ouvrables de l'audience.
§ 4. A dater de la citation en dessaisissement, l’intéressé confié à une institution visée à l’article 37, § 2, alinéa 1er, 8°, en régime éducatif fermé peut être transféré à la section éducation d’un centre fédéral fermé pour mineurs ayant commis un fait qualifié infraction. Ce transfert ne peut avoir lieu que sur décision du juge de la jeunesse, cette décision étant spécialement motivée quant aux circonstances particulières.

Les jugements qui ordonnent le placement visé à l’alinéa 1er sont susceptibles d’appel selon la procédure visée à l’article 52quater, alinéas 6, 7 et 8.

Le tribunal de la jeunesse qui n’ordonne pas le dessaisissement met immédiatement fin au placement dans le centre fédéral fermé pour mineurs ayant commis un fait qualifié infraction et prend à l’égard de l’intéressé toute autre mesure qu’il juge utile.

§ 5. Toute personne qui a fait l’objet d’une décision de dessaisissement prononcée en application du présent article devient, à compter du jour où cette décision est devenue définitive, justiciable de la juridiction ordinaire pour les poursuites relatives aux faits commis après le jour de la citation de dessaisissement.

§ 6. A la suite d’une décision de dessaisissement ordonnée en application de la présente disposition, le tribunal de la jeunesse ou, le cas échéant, la chambre de la jeunesse de la cour d’appel, transmet sans délai au ministère public l’intégralité du dossier de la personne concernée en vue de le joindre, en cas de poursuite, au dossier répressif.

(Note : entrée en vigueur de l’art. 21 de la loi du 13 juin 2006 (2006-06-13/40) fixée au 01-10-2007, par AR 2007-02-25/38, art. 7, en tant qu’il fait référence à l’article 57bis, §§ 1, 2, 3, 5 et 6, de la loi du 8 avril 1965 relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé pour ce fait <L 1965-04-08/03>)

(Note : par son arrêt n° 49/2008 du 13-03-2008 (M.B. 14-04-2008, p. 19854-19863), la Cour Constitutionnelle a annulé l’article 57bis, § 1er, en ce qu’il dispose que « si la personne concernée est soupçonnée d’avoir commis un crime non correctionnalisable », l’affaire est renvoyée au ministère public aux fins de poursuite devant la juridiction compétente en vertu du droit commun)

(1)<L 2009-07-31/12, art. 3, 027; En vigueur : 28-08-2009>


Les jugements rendus dans les matières prévues au titre II, chapitre II, ne sont pas susceptibles d’opposition. L’appel est formé par voie de requête déposée au greffe de la cour d’appel (...); (...). Le greffier de la chambre de la jeunesse convoque devant celle-ci les parties qui avaient été convoquées devant le tribunal de la jeunesse; il joint aux convocations destinées aux autres parties que le requérant, une copie conforme de la requête. <L 15-07-1970, art. 50> <L 1998-05-18/43, art. 2, 010; En vigueur : 25-07-1998>

Le ministère des avoués à la cour n’est pas requis.
Le tribunal de la jeunesse peut ordonner l'exécution provisoire de ses décisions, sauf quant aux dépens.

Art. 59. Le juge saisi de l'appel peut prendre les mesures provisoires prévues (à l'article 52). <L 1999-05-04/39, art. 3, 012; En vigueur : 01-01-2002>

Les mesures provisoires prises antérieurement par le tribunal de la jeunesse sont maintenues tant qu'elles n'ont pas été modifiées par la juridiction d'appel.

Art. 60. Le tribunal de la jeunesse peut, en tout temps, soit d'office, soit à la demande du ministère public, (ou à la demande des instances compétent visées (à l'article 37, § 2, alinéa 1er, 7° à 11°)) rapporter ou modifier les mesures prises tant à l'égard des père, mère ou personne, (...), et agir dans les limites de la présente loi au mieux des intérêts (de la personne visée à l'article 36, 4°). <L 1994-02-02/33, art. 26, 1°, et 2°, 007; En vigueur : 27-09-1994> <L 2006-05-15/35, art. 15, 022; En vigueur : 02-04-2007> <L 2006-06-13/40, art. 22, 1°, 023; En vigueur : 16-10-2006>

Le tribunal de la jeunesse peut être saisi aux mêmes fins par requête des père, mère, tuteurs ou personnes qui ont la garde (de la personne visée à l'article 36, 4°) ainsi que (de la personne visée à l'article 36, 4°) qui fait l'objet de la mesure, après l'expiration d'un délai d'un an à compter du jour où la décision ordonnant la mesure est devenue définitive. Si cette requête est rejetée, elle ne peut être renouvelée avant l'expiration d'un an depuis la date à laquelle la décision de rejet est devenue définitive. (Dans les cas prévus à l'article 37quinquies, § 3, le premier délai d'attente d'un an ne s'applique pas.) <L 2006-05-15/35, art. 15, 022; En vigueur : 02-04-2007> <L 2006-06-13/40, art. 22, 2°, 023; En vigueur : 16-10-2006>

Le mineur et ses père, mère, tuteurs ou personnes qui ont la garde en droit ou en fait du mineur peuvent demander, par requête motivée, la révision de la mesure provisoire visée à l'article 52quater après un délai d'un mois à dater du jour où la décision est devenue définitive. (Le greffe adresse sans délai une copie de la requête au ministère public. Le juge entend le jeune et ses représentants légaux (ainsi que le ministère public si ce dernier en formule la demande). Le requérant ne peut introduire une nouvelle requête portant sur le même objet avant l'expiration d'un délai d'un an à compter de la dernière décision de rejet de sa demande.) <L 2006-06-13/40, art. 22, 3°, 023; En vigueur : 16-10-2006> <L 2006-12-27/33, art. 100, 025; En vigueur : 01-01-2007>

(Toute mesure visée (à l'article 37, § 2, alinéa 1er, à l'exception des 1° et 8°), prise par jugement, doit être réexaminée en vue d'être confirmée, rapportée ou modifiée avant l'expiration du délai d'un an à compter du jour où la décision est devenue définitive. Cette procédure est introduite par le ministère public selon les formes prévues à l'article 45, 2 b) et c).

(La mesure visée à l'article 37, § 2, alinéa 1er, 8°, prise par jugement, doit, sans préjudice de l'article 37, § 2, alinéa 4, être réexaminée en vue d'être confirmée, rapportée ou modifiée avant l'expiration du délai de six mois à compter du jour où la décision est devenue définitive. Cette procédure est introduite dans les formes prévues à l'alinéa 4.) <L 2006-06-13/40, art. 22, 5°, 023; En vigueur : 16-10-2006>

Les autorités compétentes visées (à l'article 37, § 2, alinéa 1er, 8°, 10° et 11°), transmettent trimestriellement au tribunal de la jeunesse un rapport d'évaluation relatif à la personne ayant fait l'objet d'une mesure de garde sous un régime éducatif.
Art. 60. (COMMUNAUTE FLAMANDE)

(NOTE : Pour la Communauté flamande, à l’art. 60, premier alinéa, version néerlandaise, les mots " de maatregelen genomen " sont remplacés par les mots " genomen maatregelen ", sauf à l’égard de mineurs poursuivis du chef d’un fait qualifié d’infraction. Dans le même alinéa, les mots " tant à l’égard des père, mère ou personnes qui ont la garde du mineur qu’à l’égard du mineur lui-même " et les mots " ou modifier " ainsi que les mots " à l’exception de la mise à la disposition du Gouvernement " sont abrogés, sauf à l’égard des mineurs poursuivis du chef d’un fait qualifié d’infraction. Le mot " Gouvernement " est remplacé par " Exécutif flamand "

Art. 60. (COMMUNAUTE GERMANOPHONE)

(Abrogé pour autant qu’il ne concerne pas des jeunes qui ont commis un fait qualifié infraction)

Art. 61. Dans le cas où le fait qualifié infraction est établi, le tribunal de la jeunesse condamne (La personne visée à l’article 36, 4°) aux frais et, s’il y a lieu, aux restitutions. La confiscation spéciale peut être prononcée. <L 2006-05-15/35, art. 15, 022; En vigueur : 02-04-2007> <L 2006-12-27/32, art. 377, 002; En vigueur : 28-12-2006>

Dans le même cas, le tribunal de la jeunesse saisi de l’action civile statue sur cette action (ou en reporte l’examen à une date ultérieure). Il statue en même temps sur les dépens. <L 2006-06-13/40, art. 23, A, 023; En vigueur : 16-10-2006>

Les personnes responsables soit en vertu de l’article 1384 du Code civil, soit en vertu d’une loi spéciale, sont citées et tenues solidairement avec (La personne visée à l’article 36, 4°), des frais, des restitutions et des dommages-intérêts. <L 2006-05-15/35, art. 15, 022; En vigueur : 02-04-2007> <L 2006-12-27/32, art. 377, 002; En vigueur : 28-12-2006>

(La victime peut se désister de toute action qui découle du fait qualifié infraction, notamment lorsque l’auteur ou les auteurs au profit duquel ou desquels la victime se désiste, collaborent ou collabore à une offre restauratrice.

La victime mentionne explicitement dans l’accord auquel aboutit l’approche restauratrice, le ou les auteurs qui a ou ont collaboré à une offre restauratrice, auxquels s’applique le désistement d’action visé au quatrième alinéa.

Le désistement d’action tel que visé à l’alinéa 4 implique automatiquement que ce désistement vaut également à l’égard de toutes les personnes qui soit en vertu de l’article 1384 du Code civil, soit en vertu d’une loi spéciale sont responsables du dommage causé par le ou les auteurs au profit duquel ou desquels la victime se désiste.) <L 2006-06-13/40, art. 23, B, 023; En vigueur : 16-10-2006>
Art. 61bis. <inséré par L 2006-05-15/35, art. 14 ; ED : 16-10-2006> Une copie des jugements et arrêts rendus en audience publique est transmise directement, lors du prononcé de ces décisions, au jeune de douze ans ou plus et à ses père et mère, tuteurs ou personnes qui ont la garde en droit ou en fait de l'intéressé, s'ils sont présents à l'audience. Au cas où cette remise n'a pu avoir lieu, la décision est notifiée par pli judiciaire.

La copie des jugements et arrêts indique les voies de recours ouvertes contre ceux-ci ainsi que les formes et délais à respecter.

Art. 62. (NOTE : La Cour d’arbitrage par son arrêt n° 122/98 du 3 décembre 1998 à dit pour droit que cet article viole les articles 10 et 11 de la Constitution, en ce que, dans les procédures visées à l'article 36, 2°, de la loi précitée , les parents d'accueil ne sont pas appelés à la cause et leur intervention n'est pas admise. M.B. 20-01-1999, p. 1632-1635) <L 1994-02-02/33, art. 27, 007; En vigueur : 27-09-1994> Sauf dérogation, les dispositions légales en matière de procédure civile s'appliquent aux procédures visées au titre II, chapitre II, ainsi qu'aux articles 63bis, § 2, et 63ter, alinéa 1er, b), et les dispositions légales concernant les poursuites en matière correctionnelle, aux procédures visées au titre II, chapitre III, et à l'article 63ter, alinéa 1er, a) et c).

Art. 62bis. <Inséré par L 1994-02-02/33, art. 28; ED : 27-09-1994> Dans les cas où les dispositions prises en vertu de l'article 59bis, §§ 2bis et 4bis, de la Constitution et de l'article 5, § 1er, II, 6°, de la loi spéciale du 8 août 1980 de réformes institutionnelles, prévoient que l'exécution d'une mesure du tribunal de la jeunesse n'appartient pas au ministère public, une expédition de la décision est adressée à l'autorité administrative qui en est chargée.

Art. 63. Les déchéances de la (autorité parentale) et les mesures prononcées par application (des articles 37 et 39) à l'égard des mineurs déférés au tribunal de la jeunesse sur base de l'article 36, 1°, 3° et 4°, sont mentionnées au casier judiciaire des intéressés. <L 1994-02-02/33, art. 29, 1° et 2°, 007; En vigueur : 27-09-1994>

Ces déchéances et ces mesures ne peuvent jamais être portées à la connaissance des particuliers.

Elles peuvent être portées à la connaissance des autorités judiciaires.

Elles peuvent également être portées à la connaissance des autorités administratives, des notaires et des huissiers de justice, dans les cas où ces renseignements leur sont indispensables pour l'application d'une disposition légale ou réglementaire. Cette communication se fait sous le contrôle des autorités judiciaires, suivant la procédure qui sera déterminée par le Roi.

Les mentions inscrites au casier judiciaire d'un mineur, par application de la présente loi, peuvent être rayées par décision du tribunal de la jeunesse, sur requête de celui qui en a fait l'objet, lorsque cinq ans se sont écoulés à partir du moment où ces mesures ont pris fin.

La déchéance de la (autorité parentale) est rayée d'office lorsqu'il y a été mis fin par la réintégration. <L 1994-02-02/33, art. 29, 1°, 007; En vigueur : 27-09-1994>


COMMUNAUTES ET REGIONS
Art. 63. (COMMUNAUTE FRANCAISE)

Les déchéances de la (autorité parentale) et les mesures prononcées par application (des articles 37 et 39) à l’égard des mineurs défrères au tribunal de la jeunesse sur base de l’article 36, (...) 4°, sont mentionnées au casier judiciaire des intéressés. <L 1994-02-02/33, art. 29, 1° et 2°, 007; En vigueur : 27-09-1994> <DCFR 1991-03-04/36, art. 62, § 10, 005; En vigueur : 07-12-1994>

Ces déchéances et ces mesures ne peuvent jamais être portées à la connaissance des particuliers.

Elles peuvent être portées à la connaissance des autorités judiciaires.

Elles peuvent également être portées à la connaissance des autorités administratives, des notaires et des huissiers de justice, dans les cas où ces renseignements leur sont indispensables pour l’application d’une disposition légale ou réglementaire. Cette communication se fait sous le contrôle des autorités judiciaires, suivant la procédure qui sera déterminée par le Roi.

Les mentions inscrites au casier judiciaire d’un mineur, par application de la présente loi, peuvent être rayées par décision du tribunal de la jeunesse, sur requête de celui qui en a fait l’objet, lorsque cinq ans se sont écoulés à partir du moment où ces mesures ont pris fin.

La déchéance de la (autorité parentale) est rayée d’office lorsqu’il y a été mis fin par la réintégration. <L 1994-02-02/33, art. 29, 1°, 007; En vigueur : 27-09-1994>

Art. 63. (COMMUNAUTE GERMANOPHONE)

Les déchéances de la (autorité parentale) et les mesures prononcées par application (des articles 37 et 39) à l’égard des mineurs défrères au tribunal de la jeunesse sur base de l’article 36, (...) 4°, sont mentionnées au casier judiciaire des intéressés. <L 1994-02-02/33, art. 29, 1° et 2°, 007; En vigueur : 27-09-1994> <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Ces déchéances et ces mesures ne peuvent jamais être portées à la connaissance des particuliers.

Elles peuvent être portées à la connaissance des autorités judiciaires.

Elles peuvent également être portées à la connaissance des autorités administratives, des notaires et des huissiers de justice, dans les cas où ces renseignements leur sont indispensables pour l’application d’une disposition légale ou réglementaire. Cette communication se fait sous le contrôle des autorités judiciaires, suivant la procédure qui sera déterminée par le Roi.

Les mentions inscrites au casier judiciaire d’un mineur, par application de la présente loi, peuvent être rayées par décision du tribunal de la jeunesse, sur requête de celui qui en a fait l’objet, lorsque cinq ans se sont écoulés à partir du moment où ces mesures ont pris fin.

La déchéance de la (autorité parentale) est rayée d’office lorsqu’il y a été mis fin par la réintégration. <L 1994-02-02/33, art. 29, 1°, 007; En vigueur : 27-09-1994>

Art. 63. (Région de Bruxelles-Capitale)
Les déchéances de la (autorité parentale) et les mesures prononcées par application (des articles 37 et 39) à l'égard des mineurs déferés au tribunal de la jeunesse sur base de l'article 36, (...) 4°, sont mentionnées au casier judiciaire des intéressés. <L 1994-02-02/33, art. 29, 1° et 2°, 007; En vigueur : 27-09-1994> <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Ces déchéances et ces mesures ne peuvent jamais être portées à la connaissance des particuliers.

Elles peuvent être portées à la connaissance des autorités judiciaires.

Elles peuvent également être portées à la connaissance des autorités administratives, des notaires et des huissiers de justice, dans les cas où ces renseignements leur sont indispensables pour l'application d'une disposition légale ou réglementaire. Cette communication se fait sous le contrôle des autorités judiciaires, suivant la procédure qui sera déterminée par le Roi.

Les mentions inscrites au casier judiciaire d'un mineur, par application de la présente loi, peuvent être rayées par décision du tribunal de la jeunesse, sur requête de celui qui en a fait l'objet, lorsque cinq ans se sont écoulés à partir du moment où ces mesures ont pris fin.

La déchéance de la (autorité parentale) est rayée d'office lorsqu'il y a été mis fin par la réintégration. <L 1994-02-02/33, art. 29, 1°, 007; En vigueur : 27-09-1994>

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Art. 63bis. <Inséré par L 1994-02-02/33, art. 30; En vigueur : 27-09-1994> § 1. Les règles de procédure visées au présent chapitre s'appliquent, à l'exception des articles 45.2. et 46, aux dispositions en matière de protection judiciaire prises par les instances compétentes en vertu de l'article 59bis, §§ 2bis et 4bis, de la Constitution et de l'article 5, § 1er, II, 6°, de la loi spéciale du 8 août 1980 de réformes institutionnelles.

§ 2. Toutefois, lorsque la demande tend à voir homologuer la modification d'une décision prise par le tribunal de la jeunesse, la procédure est la suivante :

a) la demande est adressée par requête de l'autorité administrative compétente au greffe de la juridiction qui a rendu la décision;

b) elle est communiquée immédiatement avec le dossier de la procédure au ministère public, pour avis;

c) dans les trois jours ouvrables à compter du dépôt de la requête, le juge de la jeunesse rend une ordonnance sur avis du ministère public. Cette ordonnance est prise sans convocation des parties. Elle est notifiée aux parties et n'est pas susceptible d'opposition. Le refus d'homologation est susceptible d'appel.

Art. 63ter. <Inséré par L 1994-02-02/33, art. 31; En vigueur : 27-09-1994> Dans les procédures judiciaires visées à l'article 63bis, le tribunal de la jeunesse est saisi :

a) par la réquisition du ministère public en vue d'ordonner ou d'autoriser les mesures prévues par ces organes :
   - soit dans le cadre de mesures provisoires avant de statuer au fond,
   - soit dans les cas d'urgence;
b) par requête déposée au greffe du tribunal de la jeunesse par la partie intéressée, afin qu'il soit statué sur une contestation relative à une mesure décidée par les instances compétentes, visées à l'article 37, § 2;

c) dans les autres cas, par la comparution volontaire à la suite d'un avertissement motivé donné par le ministère public ou par citation, à la requête du ministère public en vue de statuer au fond, après avoir entendu les parties en leurs moyens.

Dans les cas visés au b), les parties sont convoquées par le greffier à comparaître à l'audience fixée par le juge. La convocation précise l'objet de la demande. Le greffier transmet copie de la requête au ministère public.

Dans les cas visés au c), la citation ou l'avertissement doivent, à peine de nullité, être adressés aux parents, tuteurs ou personnes qui ont la garde du jeune et à lui-même, s'il est âgé de douze ans au moins, ainsi que, le cas échéant, aux autres personnes investies d'un droit d'action.

Art. 63quater. <Inséré par L 1994-02-02/33, art. 32; En vigueur : 27-09-1994> Les articles 52bis, 52ter et (52quater, alinées 9 et 10), sont mutatis mutandis applicables à toutes les mesures prises suite aux réquisitions visées à l'article 63ter, alinéa 1er, a). <L 2006-12-27/33, art. 101, 025; En vigueur : 01-03-2007>

Art. 63quinquies. <Inséré par L 1994-02-02/33, art. 33; En vigueur : 27-09-1994> Si, dans le cadre des procédures judiciaires visées à l'article 63bis, les mesures prévues le sont pour une durée déterminée, la procédure en prolongation desdites mesures se fait suivant les mêmes formes que celles qui sont prescrites pour la décision initiale.

**TITRE III. - Dispositions générales.**

Art. 64. Il est créé dans chaque arrondissement judiciaire un service social de protection de la jeunesse composé de délégué permanents.

Ce service comporte deux sections :

a) une section dont les délégués sont mis à la disposition des comités de protection de la jeunesse;

b) une section dont les délégués sont mis à la disposition des autorités judiciaires chargées de l'application de la présente loi.

(Les délégués permanents à la protection de la jeunesse sont nommés par le Ministre de la Justice parmi les porteurs d'un diplôme d'auxiliaire social ou d'un diplôme justifiant de connaissances pédagogiques ou sociales suffisantes et dans l'ordre de leur classement au concours de recrutement.

Le Roi fixe le règlement organique et le cadre des délégués permanents à la protection de la jeunesse ainsi que la hiérarchie de leurs fonctions. Il détermine les diplômes faisant foi de connaissances pédagogiques ou sociales suffisantes et règle les modalités du concours de recrutement qui est organisé par le Ministre de la Justice.) <L 25-06-1969, art. 1er>

Les délégués permanents à la protection de la jeunesse sont soumis au statut des agents de l'État et placés administrativement sous l'autorité du Ministre de la Justice.
Ils effectuent sous la responsabilité et la direction des autorités chargées de la protection de la jeunesse à la disposition desquelles ils sont mis, les missions qui leur sont ordonnées par celles-ci.

Des délégués bénévoles peuvent être adjoints à chacune des sections du service social de protection de la jeunesse par les autorités à la disposition desquelles elles sont mises. En matière d'indemnité pour frais de route et de séjour, ils sont assimilés aux délégués permanents à la protection de la jeunesse.

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COMMUNAUTES ET REGIONS

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Art. 64. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1985-06-27/35, art. 32>

Art. 64. (COMMUNAUTE FRANCAISE)
(Abrogé) <DCFR 1991-03-04/36, art. 62, § 11, 005; En vigueur : 24-12-1991>

Art. 64. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 64. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

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Art. 65. (Abrogé) <L 02-12-1982, art. 1er>

Art. 66. Toute personne physique ou morale, toute oeuvre ou tout établissement s'offrant à recueillir collectivement et de façon habituelle des mineurs en vertu de la présente loi, doit avoir été agréé à cette fin par le Ministre de la Justice.

Le Roi arrête, par catégorie d'établissements, les conditions, générales d'agrément, après avoir pris l'avis de la commission prévue à l'article 67; ces conditions peuvent concerner :

a) le personnel des services d'éducation, de formation professionnelle et d'administration;

b) les bâtiments et installations;

c) les soins, l'enseignement, la formation morale et professionnelle ainsi que le régime éducatif des mineurs, sans préjudice de l'application de l'article 6 de la loi du 29 mai 1959 modifiant la législation relative à l'enseignement gardien, primaire, moyen, normal, technique et artistique.

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COMMUNAUTES ET REGIONS

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Art. 66. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1985-06-27/35, art. 32>
Art. 66. (COMMUNAUTE FRANÇAISE)
(Abrogé) <DCFR 14-05-1987, art. 7>

Art. 66. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 66. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Art. 67. Le Ministre de la Justice statue sur les demandes d'agréation par décision motivée, après avoir pris l'avis d'une commission présidée par un juge d'appel de la jeunesse et comprenant, en outre, deux juges de la jeunesse, un fonctionnaire du Ministère de la Justice, un fonctionnaire du Ministère ayant l'éducation nationale dans ses attributions, un fonctionnaire du Ministère ayant la santé publique et la famille dans ses attributions ainsi qu'un représentant de l'Oeuvre Nationale de l'Enfance et quatre personnes représentant les établissements qui hébergent habituellement des mineurs en vertu de la présente loi.

Les membres de la commission sont désignés par le Ministre de la Justice après avis de ses collègues intéressés.

Le Ministre de la Justice nomme les membres représentant les établissements qui hébergent habituellement des mineurs, parmi un nombre triple de candidats présentés par les fédérations d'établissements les plus représentatives.

Il règle les modalités de ces présentations.

Il règle les modalités de fonctionnement de cette commission.

Chaque dossier d'agréation contient, outre les renseignements administratifs, un rapport d'un juge au tribunal de la jeunesse et du procureur du Roi de l'arrondissement où le requérant est établi.

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COMMUNAUTÉS ET RÉGIONS

Art. 67. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1985-06-27/35, art. 32>

Art. 67. (COMMUNAUTE FRANÇAISE)
(Abrogé) <DCFR 14-05-1987, art. 7>

Art. 67. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 67. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

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Art. 68. Lorsqu’il est constaté que la personne physique ou morale, l’œuvre ou l’établissement, ne satisfait plus aux conditions d’agréation, le Ministre de la Justice peut le mettre en demeure de se conformer à ces conditions dans un délai de huit jours à six mois selon le cas, faute de quoi, après consultation de la commission prévue à l’article 67, il peut, par décision motivée, retirer l’agréation.

COMMUNAUTES ET REGIONS

Art. 68. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1985-06-27/35, art. 32>

Art. 68. (COMMUNAUTE FRANCAISE)
(Abrogé) <DCFR 14-05-1987, art. 7>

Art. 68. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 68. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

Art. 69. Le Ministre de la Justice reçoit notification :

a) de toute décision prise en vertu du titre premier de la présente loi lorsqu’elle entraîne des dépenses à charge du budget du Ministère de la Justice;

b) de toute décision prise en vertu du titre II, chapitre III et IV, de la présente loi.

Il fait inspecter les placements, ainsi que les établissements visés à l’article 66, par les fonctionnaires qu’il délègue à cet effet.

COMMUNAUTES ET REGIONS

Art. 69. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1990-03-28/34, art. 22, 6°, 003; En vigueur : 01-05-1990>

Art. 69. (COMMUNAUTE FRANCAISE)

Le Ministre de la Justice reçoit notification :

a) (...) <DCFR 1991-03-04/36, art. 62, § 12, 005; En vigueur : 07-12-1994>

b) de toute décision prise en vertu du titre II, chapitre III et IV, de la présente loi.
(Alinéa 2 abrogé) <DCFR 1991-03-04/36, art. 62, § 12, 005; En vigueur : 07-12-1994>

Art. 69. (COMMUNAUTE GERMANOPHONE)

Le Ministre de la Justice reçoit notification :
Art. 69. (Région de Bruxelles-Capitale)  
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>  

Art. 70. Le Roi fixe annuellement le prix de la journée d'entretien dans les établissements d'observation et d'éducation surveillée de l'Etat.  
Le Roi, après avoir pris l'avis de la commission instituée par l'article 67, fixe le montant des subsides journaliers d'entretien et d'éducation auxquels peuvent prétendre les établissements autres que ceux visés à l'alinea 1er ou les particuliers, pour les placements effectués en vertu du titre I et du titre II, chapitres III et IV, de la présente loi.  
Les subsides journaliers d'entretien et d'éducation constituent un forfait couvrant les dépenses courantes.  
Des subsides destinés au paiement des frais spéciaux peuvent être alloués dans les conditions déterminées par le Roi.  
Tous les subsides servent exclusivement à payer les dépenses d'entretien, d'éducation et de traitement du mineur pour lequel ils sont alloués. Ils ne sont payés qu'à la personne physique ou morale qui élève effectivement le mineur. L'avance en est faite par l'Etat.  

COMMUNAUTES ET REGIONS  

Art. 70. (COMMUNAUTE FLAMANDE)  
(Abrogé) <DCFL 1985-06-27/35, art. 32>  

Art. 70. (COMMUNAUTE FRANCAISE)  
(Abrogé) <DCFR 1991-03-04/36, art. 62, § 13, 005; En vigueur : 07-12-1994>  

Art. 70. (COMMUNAUTE GERMANOPHONE)  
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>  

Art. 70. (Région de Bruxelles-Capitale)  
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>  

Art. 71. Le tribunal de la jeunesse fixe, après enquête sur la solvabilité des intéressés, la part contributive des mineurs et des personnes qui leur doivent des aliments, dans les frais d'entretien, d'éducation et de traitement résultant des mesures prises.
conformément aux dispositions du titre II, chapitres III et IV, de la présente loi. Les débiteurs d’aliments qui ne sont pas à la cause, y sont appelés.

Le tribunal de la jeunesse statue de même sur les recours introduits en vertu de l'article 6, dernier alinéa.

Ces décisions sont susceptibles d'appel et de révision.

La violation des obligations imposées par ces décisions est punis conformément aux dispositions de l'article 391bis du Code pénal.

Le recouvrement des frais mis à charge des intéressés est poursuivi à l'intervention de l'administration de l'enregistrement et de domaines, conformément aux dispositions de l'article 3 de la loi domaniale du 22 décembre 1949. L'action se prescrit par cinq ans conformément aux dispositions de l'article 2277 du Code civil.

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COMMUNAUTES ET REGIONS

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Art. 71. (COMMUNAUTE FLAMANDE)

(…). Les débiteurs d'almiments qui ne sont pas à la cause, y sont appelés. <DCFL 1990-03-28/34, art. 22, 7°, 003; En vigueur : 01-05-1990>

Le tribunal de la jeunesse statue de même sur les recours introduits en vertu de l'article 6, dernier alinéa.

(NOTE : l’alinéa 2 a été abrogé par DCFL 1985-06-27/35, art. 32, 7°, annulé par ACA 30-06-1988)

Ces décisions sont susceptibles d'appel et de révision.

La violation des obligations imposées par ces décisions est punis conformément aux dispositions de l'article 391bis du Code pénal.

Le recouvrement des frais mis à charge des intéressés est poursuivi à l'intervention de l'administration de l'enregistrement et de domaines, conformément aux dispositions de l'article 3 de la loi domaniale du 22 décembre 1949. L'action se prescrit par cinq ans conformément aux dispositions de l'article 2277 du Code civil.

Art. 71. (COMMUNAUTE FRANCAISE)

(Abrogé) <DCFR 1991-03-04/36, art. 62, § 14, 005; En vigueur : 07-12-1994>

Art. 71. (COMMUNAUTE GERMANOPHONE)

(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 71. (Région de Bruxelles-Capitale)

(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

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Art. 72. L'affectation des rémunérations allouées au mineur placé en application du titre Ier ou du titre II, chapitre III ou chapitre IV, de la présente loi est réglée, selon le cas, par le comité de protection de la jeunesse, par le tribunal de la jeunesse ou par le Ministre de la Justice.

Pendant la minorité de l'intéressé les sommes provenant de ces rémunérations et qui auraient été inscrites à un livret de la Caisse Générale d'Epargne et de Retraite, ne peuvent être retirées sans l'autorisation expresse de l'autorité à l'initiative de laquelle le livret d'épargne a été ouvert.

Elles peuvent être retirées par l'intéressé lorsqu'il a atteint l'âge de vingt et un ans. Toutefois, le tribunal de la jeunesse peut, à la demande du ministère public ou des représentants légaux du mineur, décider que ce retrait ne pourra avoir lieu sans l'autorisation expresse du tribunal avant que l'intéressé ait atteint l'âge de vingt-cinq ans. Pareille demande ne peut être introduite que pendant la minorité de l'intéressé.

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COMMUNAUTES ET REGIONS
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Art. 72. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1990-03-28/34, art. 22, 8°, 003; En vigueur : 01-05-1990>

Art. 72. (COMMUNAUTE FRANCAISE)
L'affectation des rémunérations allouées au mineur placé en application du titre Ier ou du titre II, chapitre III ou chapitre IV, de la présente loi est réglée, selon le cas, (...), par le tribunal de la jeunesse ou par le Ministre de la Justice. <DCFR 1991-03-04/36, art. 62, § 15, 005; En vigueur : 24-12-1991>

Pendant la minorité de l'intéressé les sommes provenant de ces rémunérations et qui auraient été inscrites à un livret de la Caisse Générale d'Epargne et de Retraite, ne peuvent être retirées sans l'autorisation expresse de l'autorité à l'initiative de laquelle le livret d'épargne a été ouvert.

Elles peuvent être retirées par l'intéressé lorsqu'il a atteint l'âge de vingt et un ans. Toutefois, le tribunal de la jeunesse peut, à la demande du ministère public ou des représentants légaux du mineur, décider que ce retrait ne pourra avoir lieu sans l'autorisation expresse du tribunal avant que l'intéressé ait atteint l'âge de vingt-cinq ans. Pareille demande ne peut être introduite que pendant la minorité de l'intéressé.

Art. 72. (COMMUNAUTE GERMANOPHONE)
(Abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995

Art. 72. (Région de Bruxelles-Capitale)
L'affectation des rémunérations allouées au mineur placé en application du titre Ier ou du titre II, chapitre III ou chapitre IV, de la présente loi est réglée, selon le cas (...), par le tribunal de la jeunesse ou par le Ministre de la Justice. <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>
Pendant la minorité de l'intéressé les sommes provenant de ces rémunérations et qui auraient été inscrites à un livret de la Caisse Générale d'Epargne et de Retraite, ne peuvent être retirées sans l'autorisation expresse de l'autorité à l'initiative de laquelle le livret d'épargne a été ouvert.

Elles peuvent être retirées par l'intéressé lorsqu'il a atteint l'âge de vingt et un ans. Toutefois, le tribunal de la jeunesse peut, à la demande du ministère public ou des représentants légaux du mineur, décider que ce retrait ne pourra avoir lieu sans l'autorisation expresse du tribunal avant que l'intéressé ait atteint l'âge de vingt-cinq ans. Pareille demande ne peut être introduite que pendant la minorité de l'intéressé.

Art. 73. (Abrogé) <L 27-06-1969, art. 50>

Art. 74. Le comité de protection de la jeunesse fait visiter régulièrement par un de ses délégués, tout mineur placé à son intervention.

Le juge de la jeunesse fait au moins deux fois l'an visite à tout mineur qu'il a placé en vertu d'une des mesures prévues à l'article 37, 3° et 4°. Il peut commettre à cet effet un délégué à la protection de la jeunesse.

A l'occasion des visites au mineur dont le placement a été notifié en vertu de l'article 69, un rapport sur la situation de l'intéressé est adressé au Ministre de la Justice.

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Art. 74. (COMMUNAUTE FLAMANDE)
(Alinéa 1er abrogé) <DCFL 1990-03-28/34, art. 22, 9°, 003; En vigueur : 01-05-1990>

Le juge de la jeunesse fait au moins deux fois l'an visite à tout mineur qu'il a placé en vertu d'une des mesures prévues à l'article 37, 3° et 4°. (...). <DCFL 1990-03-28/34, art. 22, 9°, 003; En vigueur : 01-05-1990>

(Alinéa 3 abrogé) <DCFL 1990-03-28/34, art. 22, 9°, 003; En vigueur : 01-05-1990>

Art. 74. (COMMUNAUTE FRANCAISE)
(Alinéa 1er abrogé) <DCFR 1991-03-04/36, art. 62, § 16, 1°, 005; En vigueur : 24-12-1991>

Le juge de la jeunesse fait au moins deux fois l'an visite à tout mineur qu'il a placé en vertu d'une des mesures prévues à l'article 37, 3° et 4°. Il peut commettre à cet effet (le service de protection judiciaire). <DCFR 1991-03-04/36, art. 62, § 16, 2°, 005; ED : 24-12-1991>

A l'occasion des visites au mineur dont le placement a été notifié en vertu de l'article 69, un rapport sur la situation de l'intéressé est adressé au Ministre de la Justice.

Art. 74. (COMMUNAUTE GERMANOPHONE)
(Alinéa 1er abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>
Le juge de la jeunesse fait au moins deux fois l'an visite à tout mineur qu'il a placé en vertu d'une des mesures prévues à l'article 37, 3° et 4°. Il peut commettre à cet effet le service de l'aide judiciaire à la jeunesse. <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

A l'occasion des visites au mineur dont le placement a été notifié en vertu de l'article 69, un rapport sur la situation de l'intéressé est adressé au Ministre de la Justice.

Art. 74. (Région de Bruxelles-Capitale)

<ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009> Le juge de la jeunesse fait au moins deux fois l'an visite à tout mineur qu'il a placé en vertu d'une des mesures prévues à l'article 37, 3° et 4°.

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Art. 75. <L 1999-003-10/42, art. 2, 011; En vigueur : 30-04-1999> S'ils ne sont pas accompagnés par un parent, leur tuteur ou une personne qui en a la garde, les mineurs n'ayant pas atteint l'âge de quatorze ans accomplis ne peuvent assister aux audiences des cours et tribunaux que pour l'instruction et le jugement des poursuites dirigées contre eux, ou lorsqu'ils ont à comparaître en personne ou à déposer comme témoins, et seulement pendant le temps où leur présence est nécessaire.

Le président peut interdire à tout moment la présence de mineurs à l'audience, notamment en raison du caractère particulier de l'affaire ou des circonstances dans lesquelles l'audience se déroule.

Art. 76. Les autorités judiciaires et administratives ainsi que les personnes physiques ou morales, les œuvres, institutions ou établissements chargés d'apporter leur concours aux mesures prises en exécution de la présente loi, doivent respecter les convictions religieuses et philosophiques et la langue des familles auxquelles les mineurs appartiennent.

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Art. 76. (COMMUNAUTE FLAMANDE)

(Abrogé) <DCFL 1990-03-28/34, art. 22, 10°, 003; En vigueur : 01-05-1990>

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Art. 77. Toute personne qui, à quelque titre que ce soit, apporte son concours à l'application de la présente loi est, de ce fait, dépositaire des secrets qui lui sont confiés dans l'exercice de sa mission et qui se rapportent à celle-ci.

L'article 458 du Code pénal lui est applicable.
Art. 78. Hormis les cas où il existerait une contre-indication médicale, les mineurs placés en vertu des dispositions du titre II, chapitres III et IV, de la présente loi peuvent être soumis à des vaccinations et inoculations préventives, dont le nombre, l'espèce et les modalités d'application sont fixés par le Roi.

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Art. 78. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1990-03-28/34, art. 22, 10°, 003; En vigueur : 01-05-1990>

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Art. 79. Toute personne ou tout établissement, à l'exclusion des internats scolaires et des pensions assimilées, s'offrant à héberger collectivement et de façon habituelle, hors de la résidence de leurs parents en ligne directe ou collatérale ou de leur représentant légal, des mineurs non protégés par la présente loi ou par d'autres dispositions légales, doit préalablement en faire la déclaration au comité de protection de la jeunesse de son arrondissement.

Lorsqu'une condamnation pénale, prononcée à charge d'une personne ou d'un membre du personnel d'un établissement, visés à l'alinéa précédent, ou une enquête faisant suite à une plainte relative aux conditions d'hébergement ou d'éducation des mineurs fait apparaître que leur santé, leur sécurité ou leur moralité est mise en danger, le tribunal de la jeunesse peut, à la demande du ministère public, les intéressés entendus, soumettre, pendant un laps de temps qu'il détermine, la maison ou l'établissement à des visites périodiques et, dans les cas graves, en ordonner la fermeture.

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Art. 79. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1990-03-28/34, art. 22, 10°, 003; En vigueur : 01-05-1990>

Art. 79. (COMMUNAUTE FRANCAISE)
(Alinéa 1 abrogé) <DCFR 1991-03-04/36, art. 62, § 17, 1°, 005; En vigueur : 24-12-1991>

Lorsqu'une condamnation pénale, prononcée à charge d'une personne ou d'un membre du personnel d'un établissement, (à l'exclusion des internats scolaires et des pensions assimilées, s'offrant à héberger collectivement et de façon habituelle, hors de la résidence de leurs parents en ligne directe ou collatérale ou de leur représentant légal, des mineurs non protégés par la présente loi ou par d'autres dispositions légales), ou une enquête faisant suite à une plainte relative aux conditions d'hébergement ou d'éducation des mineurs fait apparaître que leur santé, leur sécurité ou leur moralité est mise en danger, le tribunal de la jeunesse peut, à la demande du ministère public, les intéressés entendus, soumettre, pendant un laps de temps qu'il détermine, la maison ou l'établissement à des visites périodiques et, dans les cas graves, en ordonner la fermeture. <DCFR 1991-3-04/36, art. 62, § 17, 2°, 005; En vigueur : 24-12-1991>
Art. 79. (COMMUNAUTE GERMANOPHONE)
(Alinéa 1 abrogé) <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>
Lorsqu'une condamnation pénale, prononcée à charge d'une personne ou d'un membre du personnel d'un établissement, (à l'exception des internats et pensionnats y assimilés qui hébergent habituellement, de façon collective, des jeunes non protégés par ce décret ou d'autres dispositions légales), ou une enquête faisant suite à une plainte relative aux conditions d'hébergement ou d'éducation des mineurs fait apparaître que leur santé, leur sécurité ou leur moralité est mise en danger, le tribunal de la jeunesse peut, à la demande du ministère public, les intéressés entendus, soumettre, pendant un laps de temps qu'il détermine, la maison ou l'établissement à des visites périodiques et, dans les cas graves, en ordonner la fermeture. <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 79. (Région de Bruxelles-Capitale)
(alinéa 1er abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>
Lorsqu'une condamnation pénale, prononcée à charge d'une personne ou d'un membre du personnel d'un établissement, visés à l'alinéa précédent, ou une enquête faisant suite à une plainte relative aux conditions d'hébergement ou d'éducation des mineurs fait apparaître que leur santé, leur sécurité ou leur moralité est mise en danger, le tribunal de la jeunesse peut, à la demande du ministère public, les intéressés entendus, soumettre, pendant un laps de temps qu'il détermine, la maison ou l'établissement à des visites périodiques et, dans les cas graves, en ordonner la fermeture.

TITRE IV. - Dispositions pénales.

Art. 80. (Abrogé) <L 2005-08-10/62, art. 12, 021 ; ED : 02-09-2005>
(Note : L'article 80 est modifié par <L 2006-06-13/40, art. 24, 023; En vigueur : indéterminée et au plus tard le 01-01-2013> comme suit : Dans l'article 80, alinéa 2, de la même loi, les mots "37, 38, 39, 40 et 43" sont remplacés par les mots "37, 37bis, 38, 39, 43, 45ter, 45quater et 57bis ".)

Art. 81. (Abrogé) <L 2005-08-10/62, art. 12, 021 ; En vigueur : 02-09-2005>

Art. 82. (Abrogé) <L 2005-08-10/61, art. 43, 020; En vigueur : 12-09-2005>

Art. 83. (Abrogé) <L 2005-08-10/62, art. 12, 021 ; En vigueur : 02-09-2005>

Art. 84. Dans tous les cas où le mineur (...) a commis un fait qualifié infraction et quelle que soit la mesure prise à son égard, si le fait a été facilité par un défaut de
surveillance, la personne qui a la garde du mineur peut être condamné à un emprisonnement d'un à sept jours et à une amende d'un à vingt-cinq francs ou à une de ces peines seulement, sans préjudice des dispositions du Code pénal et des lois spéciales concernant la participation. <L 1990-01-19/30, art. 51, 002; En vigueur : 01-05-1990>

Art. 85. <Rétabli par L 2006-06-13/40, art. 25, 023; En vigueur : 02-04-2007> Le tribunal de la jeunesse peut condamner à un emprisonnement d'un à sept jours et à une amende d'un euro à vingt-cinq euros ou à une de ces peines seulement, les personnes investies de l'autorité parentale à l'égard du mineur ayant commis un fait qualifié infraction qui manifestent un désintérêt caractérisé à l'égard de la délinquance de ce dernier et qui refusent d'accomplir le stage parental visé à l'article 29bis, ou qui ne collaborent pas à son exécution.

Art. 86. (Abrogé) <L 2005-08-10/62, art. 12, 021 ; En vigueur : 02-09-2005> COMMUNAUTES ET REGIONS

Art. 86. (COMMUNAUTE FLAMANDE)
Peut être condamné aux peines prévues à l'article 391bis du Code pénal, toute personne qui aura volontairement entravé la tutelle aux prestations familiales ou autres allocations sociales :

- a) en s'abstenant de fournir aux organismes chargés de la liquidation de ces allocations les documents nécessaires;
- b) en faisant des déclarations fausses ou incomplètes;
- c) en modifiant l'affectation que leur aurait donnée la personne ou (le Service social de la Communauté flamande près du Tribunal de la jeunesse) désigné conformément à l'article 29. <DCFL 1985-06-27/35, art. 33>

Art. 86. (COMMUNAUTE FRANCAISE)
Peut être condamné aux peines prévues à l'article 391bis du Code pénal, toute personne qui aura volontairement entravé la tutelle aux prestations familiales ou autres allocations sociales :

- a) en s'abstenant de fournir aux organismes chargés de la liquidation de ces allocations les documents nécessaires;
- b) en faisant des déclarations fausses ou incomplètes;
- c) en modifiant l'affectation que leur aurait donnée la personne (...) (désignée) conformément à l'article 29. <DCFR 1991-03-04/36, art. 62, § 18, 005; En vigueur : 24-12-1991>

Art. 86. (COMMUNAUTE GERMANOPHONE)
Peut être condamné aux peines prévues à l'article 391bis du Code pénal, toute personne qui aura volontairement entravé la tutelle aux prestations familiales ou autres allocations sociales :
a) en s'abstenant de fournir aux organismes chargés de la liquidation de ces allocations les documents nécessaires;

b) en faisant des déclarations fausses ou incomplètes;

c) en modifiant l'affectation que leur aurait donnée la personne ou le (service de l'aide judiciaire à la jeunesse) désigné conformément à l'article 29. <DCG 1995-03-20/34, art. 43, En vigueur : 01-05-1995>

Art. 86. (Région de Bruxelles-Capitale)

Peut être condamné aux peines prévues à l'article 391bis du Code pénal, toute personne qui aura volontairement entravé la tutelle aux prestations familiales ou autres allocations sociales :

a) en s'abstenant de fournir aux organismes chargés de la liquidation de ces allocations les documents nécessaires;

b) en faisant des déclarations fausses ou incomplètes;

c) en modifiant l'affectation que leur aurait donnée la personne (désignée) conformément à l'article 29. <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>

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Art. 87. <Disposition modificative de l'art. 372bis du CPC>

Art. 88. <Disposition modificative de l'art. 377 du CP>

" Dans le cas prévu à l'article 372bis, l'emprisonnement sera d'un an au moins. ".


TITRE V. - Dispositions abrogatoires, modificatives et transitoires.

Art. 90. Sont abrogés :


2° les articles 378, alinéa 2, et 382, alinéa 2, du Code pénal;

3° l'article 4, alinéa 2, de la loi du 28 mai 1888 relative à la protection des enfants employés dans les professions ambulantes.

Art. 91. § 1. <Disposition modificative de l'art. 348 du CC>
§ 2. <Disposition modificative de CP, art. 369bis>
§ 3. (Disposition modificative de L 18-06-1869, art. 225 et 226)
§ 4. <Disposition modificative de L 05-09-1919, art. 13>
§ 5. <Disposition modificative de L 10-03-1925, art. 83>
§ 6. <Disposition modificative de CELECT, art. 7>
§ 7. <Disposition modificative de AR 22-12-1938, art. 123bis>
§ 8. <Disposition modificative de L 19-12-1939, art. 70>
§ 9. <Disposition modificative de L 31-12-1949, art. 55>
§ 10. <Disposition modificative de L 20-08-1957, art. 5, 6, 9, 10, 11 et 12>
§ 11. <Disposition modificative de L 15-07-1960, art. 7 et 9>
§ 12. <Disposition modificative de L 20-07-1964, art. 25>

Art. 92. (Abrogé) <L 2005-08-10/62, art. 12, 021 ; ED : 02-09-2005>

Art. 93. (Abrogé) <L 2005-08-10/62, art. 12, 021 ; En vigueur : 02-09-2005>

Art. 94. (Abrogé) <L 2005-08-10/62, art. 12, 021 ; En vigueur : 02-09-2005>

Art. 95. (Abrogé) <L 2005-08-10/62, art. 12, 021 ; En vigueur : 02-09-2005>

Art. 96. (Abrogé) <L 2005-08-10/62, art. 12, 021 ; ED : 02-09-2005>

Art. 97. (Abrogé) <L 2005-08-10/62, art. 12, 021 ; En vigueur : 02-09-2005>

Art. 98. Les délégués permanents à la protection de l'enfance sont maintenus en fonction et prennent le titre de " délégué permanent à la protection de la jeunesse ".
Ils sont dorénavant soumis au statut des agents de l'Etat et conservent le bénéfice de l'ancienneté acquise.

COMMUNAUTES ET REGIONS

Art. 98. (COMMUNAUTE FLAMANDE)
(Abrogé) <DCFL 1985-06-27/35, art. 32>
Art. 98. (Région de Bruxelles-Capitale)
(abrogé) <ORD 2004-04-09/43, art. 16, 018; En vigueur : 01-10-2009>
Art. 99. (Abrogé) <L 2005-08-10/62, art. 12, 021 ; ED : 02-09-2005>

Art. 100. Le Roi fixe le jour d'entrée en vigueur de tout ou partie des dispositions de la présente loi.

National section

BULGARIA

Bilyana Gyaurova-Wegertseder
Attorney at law, Mediator, Director of BILI Foundation
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

The main provisions are stipulated in Article 59 from the Family Code, as well as in Chapters Nine, Ten and Eleven also from the Family Code. Article 59 regulates the parental rights after a divorce; Chapter Nine regulates the relations between parents and children and the parental rights and obligations thereof; Chapter Ten regulates the Right to Maintenance and Chapter Eleven regulates the regimes of Custody and Guardianship.


Currently, there are no suggestions for reforms.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

According to the Child Protection Act there is a one month term for the court to take a decision on the return of the child, starting from the filing of the request (Article 22c).

With regard to the appeal procedure, each court decision can be appealed at the higher instance. Cases under the Hague Convention are under the jurisdiction of the Sofia City Court only. Its decisions can be appealed at the Sofia Appellate Court. It is a two instance procedure.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

The regional courts (first instance courts) are competent in Bulgaria.
4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

The Child Protection Act envisions the following measures for protection of the child’s best interest:

**Article 4.** (Amended, SG No. 36/2003)

(1) Child protection under this Act shall be carried out through:

1. assistance, support and services rendered in the child’s family environment;
2. placement of the child with relatives or close families;
3. (repealed, SG No. 63/2003, new, SG No. 38/2006) adoption;
4. placement of the child with a foster family;
5. (new, SG No. 14/2009) provision of social services - resident type;
6. (renumbered from Item 5, SG No. 14/2009) placement of the child in a specialised institution;
7. (renumbered from Item 6, SG No. 14/2009) police protection;
8. (renumbered from Item 7, SG No. 14/2009) specialised protection at public places;
9. (renumbered from Item 8, SG No. 14/2009) provision of information with regard to the rights and obligations of children and parents;
10. (renumbered from Item 9, SG No. 14/2009) provision of preventative measures for security and protection of the child;
11. (renumbered from Item 10, SG No. 14/2009) provision of legal assistance by the state;

(2) (New, SG No. 63/2003, amended, SG No. 14/2009) A child may be adopted under the terms and conditions laid down in the Family Code.

(3) (Renumbered from Paragraph (2), SG No. 63/2003, amended, SG No. 14/2009) The criteria and standards for social services for children regarding application of the measures under Items 1, 2, 4 and 6 of Paragraph (1), shall be determined in a Regulation, adopted by the Council of Ministers under a proposal of the Minister of Labour and Social Policy.

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

Regulation is provided again in the Child Protection Act.

Chapter Three A

(New, SG No. 59/2007)
PROCEEDINGS CONCERNING RETURN OF A CHILD OR EXERCISE OF RIGHTS OF ACCESS

Article 22a. (New, SG No. 59/2007) (1) An application for the return of a child or for the exercise of rights of access under the Hague Convention on the Civil Aspects of International Child Abduction, done at The Hague on the 25th day of October 1980 (ratified by law, promulgated in the State Gazette No. 20 of 2003) (Convention promulgated in the State Gazette No. 82 of 2003), hereinafter referred to as “the Hague Convention”, shall be examined by the Sofia City Court in public session with the participation of:

1. the Ministry of Justice or the applicant;
2. the interested parties;
3. a prosecutor.

(2) The Social Assistance Directorate with the municipality wherein the child has its current address shall submit an opinion in the proceeding under Paragraph (1). The court shall hear the child in accordance with Article 15 herein.

(3) The Ministry of Justice shall represent the applicant, where application has been lodged care of the said Ministry. The said Ministry may appoint a representative to act on its behalf.

Article 22b. (New, SG No. 59/2007) The court, acting on a motion as submitted or ex officio, may rule on a suitable provisional measure for the protection of the child for the purpose of avoiding any further dangers to the child or detriment to the parties.

Article 22c. (New, SG No. 59/2007) (1) The court shall render judgment within one month after submission of the application.

(2) In the proceeding under Article 22a (1), the court shall not examine the question of exercise of the rights of custody on the merits.

Article 22d. (New, SG No. 59/2007) (1) The judgment of the Sofia City Court shall be appealable by the persons covered under Article 22a (1) before the Sofia Appellate Court.

(2) Within one month after lodgement of any such appeal, the court shall render judgment which shall be final.

Article 22e. (New, SG No. 59/2007) In this proceeding, the court may collect evidence of its own motion, as well as assist the parties in exercising their procedural rights.

Article 22f. (New, SG No. 59/2007) Where a foreign court applies Article 15 of the Hague Convention, the Bulgarian authority competent to determine that the removal or retention of a child was wrongful shall be the court which has examined or is examining the questions regarding the rights of custody, or the Ministry of Justice, where the said questions have not been subject of a court proceeding.

Article 22g. (New, SG No. 59/2007) (1) The rules of this Chapter shall furthermore apply, mutatis mutandis, in respect of the Convention of 1996 concerning parental responsibility and measures for the protection of children.

(2) In the cases and under the terms of Articles 8, 9 and 13 of the Convention of 1996, the competent court first seised, if it considers that this is in the child's best interests, may decline jurisdiction in favour of a foreign court second seised or accept to examine the case and render judgment, where the foreign court first seised has declined jurisdiction in favour of the said competent court.

(3) In the cases referred to in Paragraph (2), the judgment rendered by the foreign court shall be recognizable and enforceable according to the procedure established by Chapter Three B.
6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

The child is heard in each administrative or court procedure where the child’s rights or interests are concerned and the child has to have completed 10 years, except in cases where the hearing might harm his interests.

In cases where the child has not completed 10 years, he/she can be heard depending on the level of his/hers development. Before the hearing of the child the court or the administrative body has to provide the necessary information which will help him/her form his/hers opinion. Furthermore, they have to inform the child about the eventual circumstances from his/hers desires and opinion, as well as about each decision of the court or the respective administrative body.

The court and the administrative bodies have to provide an appropriate environment for hearing of the child, adjusted to his age. The presence of a social worker from the “Social Assistance” Directorate is obligatory during the hearing and the counseling of the child. If necessary, another appropriate specialist can be present too.

The court or the administrative body can order that the hearing be carried out in the presence of a parent, guardian, trustee or other person taking care of the child, or other relative who the child knows, except in cases when this does not correspond to the interest of the child.

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

The Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation) is the Ministry of Justice, more specifically the department on International Legal Protection of the Child - [http://www.justice.government.bg/new/Pages/Ministry/Default.aspx](http://www.justice.government.bg/new/Pages/Ministry/Default.aspx)

8. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels IIbis?

There are no specific legal instruments/procedures, besides the fact that the court decisions which fall under the scope of Article 21.2 of Regulation (EC) 2201/2003 of the Council which derogates Regulation (EC) 1347/2000, are recognized by the bodies competent for the registration.

B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

No. 27/1.04.2011. The procedural law – the Civil Procedure Code has already have Articles related to the introduction of mediation procedure in divorce and commercial cases) – http://lex.bg/bg/laws/ldoc/2135496713 (in Bulgarian).

The Mediation Act introduces that subject to mediation can be also cross-border disputes (Article 3, 1 MA). With regard to the interpretation of the term “cross-border dispute”, the MA refers directly to the explanations provided in the Directive. Furthermore, the refusal to testify during a court proceeding which has existed before in the Civil Procedure Code is now additionally regulated in the MA saying that “Mediators may not be interrogated as witnesses regarding circumstances which have been confided to them by mediation participants and which are relevant to the resolution of the dispute that is the subject of the mediation, unless having received the explicit consent of the confiding party” (Articles 7, 2 MA). The same article provides also the exception to mediation confidentiality which among others includes protection of the best interests of children and necessity to disclose the content of the mediation agreement in order to implement and/or enforce it (Articles 7, 3 MA). The Directive is further implemented in Article 11 MA regulating the initiation of the mediation process. The law accepts as a beginning of a mediation process the date on which the parties have reached an explicit agreement to commence such a process. In cases where no explicit agreement is available the date of the beginning of the mediation process is the one of the first meeting of all participants with the mediator. These texts are particularly important with regard to determining the limitation period. According to Article 11a MA “No limitation period shall run while the mediation process is ongoing”. The law provides also a term for termination of the mediation procedure – upon expiration of 6 months from its beginning. Additional amendments were adopted and enforced with regard to the mediation agreement. For instance, the parties may include a liability clause in the agreement in case some of the obligations maintained in it are not executed. Probably one of the most important amendments transposing the Mediation Directive is provided in Article 18. It stipulates that any agreement concerning a legal dispute and reached in a mediation process will have the effect of a court settlement and therefore, subject to approval by regional courts (first instance courts) in Bulgaria (Article 18, 1). Once acknowledged by the parties, the court approves the agreement, if it does not contradict with the law or the principles of morality. If, depending on the case a prosecutor is involved, the court has to hear his/hers opinion too, before ruling on the agreement (Article 18, 2).

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

dispute”, being such “where the party applying for legal aid is a citizen of a Member State of the European Union or a person residing lawfully in a Member State of the European Union, and where the dispute is settled by a competent authority in another Member State of the European Union” (Article 41, 2). Furthermore, the Chapter provides that citizens of the European Union or other persons residing legally in an EU member state can also be subjects to legal aid if their property status does not exceed the national social threshold. The latter is provided in the Bulgarian Social Assistance Act.

It is also important to explain that the Bulgarian Ministry of Justice is the authority competent to receive applications for legal aid in cross-border disputes from the competent authorities of Member States of the European Union. It is also the institution which transmits applications for legal aid in cross-border disputes to the competent authorities of Member States of the European Union (Article 43 LAA).

Last but not least, the said Chapter Eight regulates the procedure for applying for legal aid in cross-border disputes and the procedure for appeal in case legal aid is refused. The national authority providing legal aid is the National Legal Aid Office (NLAO).

3. Is your country a contracting party to any bilateral or international instruments on family law?

Without being exhaustive, below is a list of international instruments including family law matters on which Bulgaria is a party. The list shows the type and name of the act and the ratifying/adoption process with the respective time frame.

I. Conventions

1. European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Ratified by law, adopted by the 39th National Assembly on 26.02.2003 - SG No. 21/7.03.2003, Issued by the Ministry of Justice, promulgated, SG No. 104/28.11.2003, effective for Republic of Bulgaria since 1.10.2003);

2. Convention on the Nationality of Married Women (Opened for signature and ratification by General Assembly resolution 1040 (XI) of 29.01.1957, entry into force 11.08.1958, Issued in Collection of international documents, 1992);


6. **Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages** (Opened for signature and ratification by General Assembly resolution 1763 A (XVII) of 7 November 1962. Entry into force: 9 December 1964. Issued in Collection of international documents, 1992);


II. **Bilateral contracts**


7. **Contract between the government of the Republic of Bulgaria and the government of the Republic of Lebanon for legal aid on civil cases** (Ratified


4. **Are there any databases or online tools providing information on family law matters available in your country?**

Perhaps the only specific online database related to family law matters in Bulgaria is the so called Registry on the Property Relations between the Spouses – www.mrra.bg It provides information (in Bulgarian only) related to the different matrimonial property regimes (for more information, see C 1).

Other sources are:

- **European Judicial Atlas on civil matters**
  
  Matrimonial matters and parental responsibility –
  
  

  Maintenance obligations –
  
  http://ec.europa.eu/justice_home/judicialatlascivil/html/mo_competentauthorities_en.jsp?countrySession=26&#statePage3*

  *The European Judicial Atlas uses the term “provincial court” which corresponds to the term “district court” used in the document, i.e. the second instance courts.


- **European Judicial Network in Civil and Commercial Matters**
  
  Divorce –
  
  http://ec.europa.eu/civiljustice/divorce/divorce_bul_bq.htm (in Bulgarian only)

  Parental responsibility –
  
  http://ec.europa.eu/civiljustice/parental_resp/parental_resp_bul_bq.htm

  (in Bulgarian only)

  Maintenance obligations –
  
  http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_bul_bq.htm (in Bulgarian only)
5. Please provide information on accessing and applying foreign family law in your country.

Foreign family law in Bulgaria is accessed and applied according to the rules stipulated in **Part Three Applicable Law, Chapter Four Common Provisions, Articles 43 - 45 from the Private International Law Code**:

**Article 43. Establishment of Content of Foreign Law**

1. The court or another authority applying the law shall of its own motion establish the content of the foreign law. The said court may resort to the methods provided for in international treaties, may request information from the Ministry of Justice or from another body, as well as request opinions from experts and specialized institutions.

2. The parties may present documents establishing the content of the provisions of foreign law on which they base their motions or objections, or otherwise assist the court or another authority applying the law.

3. Upon choice of applicable law, the court or another authority applying the law may order the parties to assist in the establishment of the content of the said law.

**Article 44. Interpretation and Application of Foreign Law**

1. The foreign law shall be interpreted and applied as it is interpreted and applied in the State which created the said law.

2. Non-application of a foreign law, as well as its misinterpretation and misapplication, shall be a ground for appeal.

**Article 45. Public Policy**

1. A provision of a foreign law determined as applicable by this Code shall not apply only if the consequences of such application are manifestly incompatible with Bulgarian public policy.

2. Incompatibility shall be evaluated while taking account of the extent of connection of the relationship with Bulgarian public policy and the significance of the consequences of application of the foreign law.

3. Where an incompatibility referred to in Paragraph (2) is established, another appropriate provision of the same foreign law shall be applied. In the absence of such a provision, a provision of Bulgarian law shall apply, if necessary for settlement of the relationship.

In practice, there are 3 ways in which foreign family law is applied:

1. The parties on a particular case present evidence on the application of a foreign family law;

2. The court can appoint a Bulgarian expert with knowledge on some foreign family law who can then present his/hers expert statement. Usually, there is a list of such experts at the respective court, and
3. Exchanging information on the application of a foreign family law based on the European Convention on Information on Foreign Law. In that case the Ministry of Justice and the Ministry of Foreign Affairs are serving as official bodies for accepting and delivering information.
II. NATIONAL JURISPRUDENCE

Unfortunately, there is not so much jurisprudence on the topics in question. Furthermore, there is no unified way of collecting the jurisprudence in this area. The cases described below are the result of an extensive research performed by the author and do not necessarily present an exhaustive list of the court’s practice in the area subject of the current material.

**Regulation Brussels IIbis in matters of parental responsibility**

INSTRUCTION of the District Court Dobritch on civil case 464/2011 for the issuing of writ of execution for payment of maintenance based on a decision of a Polish court.

DECISION 637/2010 of the Sofia Court of Appeal confirming Instruction on civil case 715/2010 of the District Court Varna

INSTRUCTION 1057/2012 of the District Court Pazardzik on civil case 274/2012 related to payment of maintenance and parental responsibility based on a decision of a Romanian court

RULING of the District Court Dobritch on civil case 299/2012 based on a private claim against Ruling 128/2012 of the regional Court in Dobritch related to the lessening of a maintenance determined by a Polish Court

RULING of the District Court Vratza on private civil case 349/2011 against a protocol Ruling of the Regional Court Vratza on civil case 6299/2010 related to parental responsibility and maintenance where the plaintiffs were two minors with the agreement of their father. The minors were living in Italy and their claim was against their mother.
III. NATIONAL BIBLIOGRAPHY

Provided below is a general list of the existing literature in Bulgaria related to Regulation Brussels IIbis, Preliminary ruling system on family matters, Family Mediation, etc. There is no break down per category as there are not so many books, articles or other publications. This is mainly because most of the legal instruments described in the current paper are relatively new to the legal practice in Bulgaria. Besides the national jurisprudence and other experience are still rather scarce. Most of the listed literature presents legal textbooks which contain texts related to the above mentioned topics.

1. **Тодор Тодоров**, Международно частно право – трето преработено и допълнено издание, издателство Сиби, 2010
   *Todorov Todor*, International private law - third revised and amended version, Sibi publishing house, 2010

2. **Цанка Цанкова, Методи Марков, Анна Станева, Велина Тодорова**, Коментар на новия семеен кодекс, ИК Труд и право, 2009 г.
   *Tzankova Tzanka, Markov Metodi, Staneva Anna, Todorova Welina*, Comment on the new Family Code, PH Trud I Pravo, 2009

   *Natov Nikolai*, Procedural norms in the modern Bulgarian international private law, “Notary bulletin” magazine, issue 1/2009, p. 18 - 59

4. **Николай Натов**, Международно частно право и някои разпоредби на част седма от ГПК в светлината на общносните източници, издателство Сиела, 2008
   *Natov Nikolai*, International private law and some regulations from Part Seven from the CPC in the light of the Community sources, Ciela publishing house, 2008

5. **Боряна Мусева**, Из лабиринта на международната компетентност по граждански търговски дела, сп. „Юридически свят“, бр. 2/2006
   *Musseva Borjana*, Through the labyrinth of the international competence on civil and commercial cases, “Legal world” magazine, issue 2/2006

6. **Весела Станчева-Минчева**, Коментар на Кодекса на международното частно право, първо издание, издателство Сиби, 2010

7. **Валентина Попова**, Актуални проблеми на Европейския граждански процес и част VII на ГПК, издателство Сиела
   *Popova Valentina*, Current problems of the European civil process and Part VII from the CPC, Ciela publishing house
Chapter One
GENERAL PROVISIONS

Subject-matter

Article 1. The Family Code shall regulate the relations based on marriage, kinship and adoption, as well as custody and guardianship.

Principles

Article 2. Family relations shall be settled in accordance with the following principles:

1. protection of marriage and the family by the state and society;
2. gender equality;
3. voluntary nature of matrimony;
4. special protection of children;
5. equal treatment of those born in wedlock, out of wedlock and adopted;
6. respect for the personality in the family;
7. respect, care and support among family members.

Right to Marriage and Family

Article 3. Every person shall have the right to marry and have a family under the terms and conditions set out in this Code.
Article 4. (1) Only the civil marriage entered into in the form prescribed in this Code shall generate the effect associated with marriage by law.

(2) A religious rite shall have no legal effect.

Consent to Marriage

Article 5. Marriage shall be based on the mutual, free and explicit consent of a man and a woman given in person and simultaneously before a registrar.

Marriageable Age

Article 6. (1) Marriage shall be allowed to persons above the age of eighteen.

(2) By way of exception, where compelling reasons warrant it, a person aged sixteen may also get married with the consent of the district judge at the place of permanent residence of this person. Where both partners are minors and have different permanent addresses, the consent shall be given by the district judge at the place of permanent residence of one of the marrying partners at their choice.

(3) The district judge shall hear both marrying partners and the parents or the guardian of the minor. The opinion of the marrying adult, the parents or the guardian may be given also in writing with a notarized signature.

(4) Upon marriage, the minor shall acquire legal competence but may dispose with immovable property only with the consent of the district judge at the place of permanent residence of the minor.

Marriage Prohibitions

Article 7. (1) Marriage shall be prohibited to a person who:

1. is bound by another marriage;

2. is under full judicial interdiction or suffers from a mental disorder or imbecility which provides grounds for imposing full judicial interdiction;

3. suffers from a disease which seriously threatens the life or health of the offspring or the other spouse, unless the latter is aware of such disease.

(2) Marriage shall be prohibited to:

1. ascendants and descendants;

2. siblings, as well as other collateral kin up to four times removed;

3. persons between whom adoption generates relations of ascendants or descendants or siblings.
Place of Marriage

Article 8. (1) Marrying partners shall be free to choose the municipality in which to marry.

(2) Marriage shall take place in public at a location designated by the mayor of the municipality.

(3) Marriage may take place also at another location at the discretion of the registrar provided there exist compelling reasons to do so.

Marriage Documents

Article 9. (1) Each marrying partner shall submit to the registrar:

1. a declaration on the non-existence of the impediments to marriage under Article 7;

2. a medical certificate that the person does not suffer from the diseases laid down in Article 7, paragraph 1, subparagraphs 2 and 3;

3. a declaration that the person is aware of the diseases of the other partner under Article 7, paragraph 1, subparagraphs 2 and 3.

(2) Where they have chosen a property regime, marrying partners shall submit a joint declaration on their choice of regime with notarized signatures. Where a matrimonial contract has been concluded, they shall submit a notarial certificate on the date of the contract and its registration number, as well as the registration of the notary public at the Notary Office and the territory of the notary public.

Marriage Procedure

Article 10. (1) The registrar shall verify the identity and age of the marrying partners, as well as the documents they have submitted under Article 9.

(2) Where no impediments to marriage exist, the registrar shall ask the marrying partners whether they agree to marry each other and, upon an explicit answer in the affirmative, the registrar shall draw up the civil marriage certificate. The civil marriage certificate shall specify the choice of property regime with the details under Article 9, paragraph 2. Where no choice of property regime has been made, the certificate shall indicate statutory regime of community of property.

(3) The certificate shall be signed by the marrying partners, the witnesses and the registrar.

Validity of the Civil Marriage Certificate

Article 11. (1) The marriage shall be deemed valid upon the signing of the civil marriage certificate by the marrying partners and by the registrar.

(2) Marriage shall be valid provided it has taken place before a person who has
performed the functions of a registrar in public without having the capacity of a registrar, where the marrying partners were not aware of that.

Family Name of the Spouses

Article 12. When the civil marriage certificate is drawn up, each marrying partner shall declare whether he or she will keep his or her family name or accept the family name of the spouse or add the family name of the spouse to his or her own name. The family name accepted or added may be the name of the other spouse with which he or she is known to the public.

Chapter Three
PERSONAL RELATIONS BETWEEN SPOUSES

Equality between Spouses

Article 13. Spouses shall have equal rights and obligations in marriage.

Spouse Reciprocity

Article 14. The relations between spouses shall build on mutual respect, shared care of the family and understanding.

Cohabitation of Spouses

Article 15. Spouses shall live together, unless compelling reasons make them live separately.

Individual Freedom

Article 16. Each spouse shall be free to develop as a personality and to choose and exercise a profession or occupation.

Family Care

Article 17. Spouses shall provide for the wellbeing of the family and take care of the upbringing, nurturing, education and support of the children through mutual understanding and shared efforts and in accordance with their capabilities, property and income.

Chapter Four
PROPERTY RELATIONS BETWEEN SPOUSES

Section I
General Provisions
Property Regime

Article 18. (1) Property regimes between spouses shall be as follows:

1. statutory regime of community of property;
2. statutory regime of separation of property;
3. contractual regime.

(2) The statutory regime of community of property shall govern, where the marrying partners have not chosen a property regime or they are minors or under limited judicial interdiction.

(3) The property regime shall be registered pursuant to the provisions of Article 19.

(4) The property regime may be subject to change during marriage. The change shall be entered into the civil marriage certificate and the register under Article 19.

Register of the Property Relations between Spouses

Article 19. (1) Matrimonial contracts and the applicable property regime shall be entered into the central electronic register at the Registry Agency Recordation Office.

(2) The registration shall be performed ex officio on the basis of a notice from the municipality or mayoralty the register of which keeps the civil marriage certificate. The notice shall be sent forthwith to the local subdivision of the Registry Agency Recordation Office at the seat of the respective district court of the location of the municipality.

(3) The change of the statutory regime and the change and termination of the matrimonial contract shall be specified in the civil marriage certificate and registered pursuant to the provisions of paragraph 2 on the basis of the documents laid down in Article 9, paragraph 2 or Article 27, paragraphs 2 and 3.

(4) The register under paragraph 1 shall be in the public domain. Fees shall be changed for any transcripts and certificates from the register in accordance with the rates approved by the Council of Ministers.

(5) The Minister of Justice shall issue regulations on the procedures for keeping the register.

Protection of Third Parties

Article 20. The statutory regime of community of property shall govern transactions between either spouse and a third party where no regime of property relations has been entered into the register.

Section II
Statutory Regime of Community of Property
Matrimonial Community of Property

**Article 21.** (1) Rights in rem acquired during marriage as a result of joint contribution shall be shared in common by both spouses, regardless of the fact in whose name they have been acquired.

(2) The joint contribution may be expressed in the input of resources, labour, care of the children and housework.

(3) The joint contribution is presumed until proven otherwise.

(4) (Amended, SG No. 100/2010, effective 21.12.2010) A claim for lack of joint contribution may be filed by:

1. a spouse during marriage or after its dissolution;
2. an heir to a spouse.

Personal Property

**Article 22.** (1) Rights in rem acquired before the marriage, as well as those acquired during marriage by inheritance or gift shall belong to the spouse who has acquired them. Personal shall also be the rights in rem acquired by either spouse, where a creditor seeks recovery of a personal debt from the other spouse pursuant to the provisions of Chapter Forty-four of the Code of Civil Procedure concerning rights in rem constituting matrimonial community of property.

(2) Personal shall be the chattels acquired by either spouse during marriage, which serve ordinary personal needs or the exercise of a profession or occupation.

(3) Personal shall be the rights in rem acquired by either spouse who is a sole proprietor during marriage for the purpose of engaging in business activities and included in his or her business.

Transformation of Personal Property

**Article 23.** (1) (Amended, SG No. 100/2010, effective 21.12.2010) Personal shall be the rights in rem acquired during marriage exclusively with personal property.

(2) Where rights in rem have been acquired in part with personal property under paragraph 1, the personal holding of the spouse shall be determined on a pro rata basis, unless this portion is insignificant.

Management of and Disposal with Common Property

**Article 24.** (1) Spouses shall have equal rights to the common property. Neither spouse may dispose during marriage with the share that this spouse would receive upon termination of the community of property.
(2) Common property may be managed by either spouse.

(3) Spouses shall dispose jointly with common property.

(4) The disposal with a right in rem over common immovable property by either spouse may be challenged. The other spouse may challenge the disposal in court within six months of becoming aware of it but not later than three years after the disposal.

(5) In the case of disposal with a right in rem over common movable property for consideration by either spouse without the participation of the other, the third party shall acquire the right provided the third party was not aware or could not be aware because of the circumstances that the consent of the other spouse was lacking. The provisions of paragraph 4 shall apply to disposal with common movable property without any consideration or to disposal to be executed in writing with notarized signatures.

Disposal with Personal Property

Article 25. Either spouse shall be free to dispose with his or her personal property in a transaction with a third party or the other spouse.

Disposal with the Marital Home Which Is Personal Property

Article 26. Any action of disposal with the marital home which is the personal property of either spouse shall be carried out with the consent of the other spouse, where the spouses have no other housing which is common property or personal property of either. In the case of no consent, the disposal shall be carried out with the consent of the district judge with reassurance that the disposal will not be to the detriment of the children under age and to the family.

Termination of the Matrimonial Community of Property

Article 27. (1) The matrimonial community of property shall be terminated upon the dissolution of the marriage.

(2) The matrimonial community of property may be terminated in court also during marriage provided there exist compelling reasons to do so.

(3) The matrimonial community of property may be terminated during marriage in case the spouses choose the regime of separation of property or conclude a matrimonial contract.

(4) The execution by a creditor seeking recovery of a personal debt of either spouse from property within the matrimonial community of property pursuant to the provisions of Chapter Forty-four of the Code of Civil Procedure shall terminate the community of this property.

(5) The matrimonial community of property shall be terminated when a decision to declare in bankruptcy a spouse who is a sole proprietor or a partner with unlimited liability becomes enforceable.
Shares of Spouses

**Article 28.** Spouses shall have equal shares upon termination of the community of property.

Award of a Greater Share to a Spouse

**Article 29.** (1) Where the matrimonial community of property is terminated due to divorce, the court may award a greater share of the common property to the spouse exercising the parental rights over children under age where this creates particular difficulties to this spouse.

    (2) The spouse exercising the parental rights over children under age shall be awarded, beyond his or her share, the movable property needed for their upbringing and nurturing.

    (3) Where the community of property is terminated due to divorce or under Article 27, paragraph 2, the court may award a greater share of the common property to either spouse provided that the contribution of this spouse substantially exceeds that of the other spouse.

Partial Apportioning of the Personal Property

**Article 30.** (1) In case of divorce, each spouse shall be entitled to receive a portion of the value of the property needed for the exercise of a profession or occupation and of the accounts receivable of the other spouse acquired during marriage, where their value is substantial and this spouse has contributed to their acquisition with labour, resources, care of the children or housework. This portion may be claimed also prior to the divorce, where the conduct of the spouse who has acquired the property endangers the interests of the other spouse or the children.

    (2) Paragraph 2 shall apply also to the cases under Article 22, paragraph 3.

Time Limits for Filing Claims

**Article 31.** The claims under Article 29, paragraph 3 and Article 30 may be filed within a year of the dissolution of the marriage or the termination of the matrimonial community of property, while those under Article 29, paragraphs 1 and 2 shall be filed within a year of the date of enforceability of the judgment on parental rights.

Liability for Debts

**Article 32.** (1) The costs incurred to meet family needs shall be borne by both spouses.

    (2) Spouses shall be jointly liable for debts incurred to meet family needs.

**Section III**

**Statutory Regime of Separation of Property**

**Separation of Property**
Article 33. (1) The rights acquired by each spouse during marriage shall remain his or her personal property.

(2) Where dissolution of marriage is petitioned, each spouse shall be entitled to receive a portion of the value of the acquisitions of the other spouse during marriage insofar as this spouse has contributed labour, resources, care of the children, housework or in any other way.

Disposal with the Marital home

Article 34. Article 26 shall apply to the disposal with the marital home.

Awarding of Personal Property for Use

Article 35. Where either spouse has given property for use to the other spouse, the user shall be liable only up to the amount of the usufruct as of the date of the claim in writing, unless agreed otherwise.

Liability for Family Debts

Article 36. (1) The costs incurred to meet family needs shall be borne by both spouses.

(2) Spouses shall be jointly liable for debts incurred to meet current family needs.

Section IV
Contractual Regime

Matrimonial Contract

Article 37. (1) Marrying partners may settle their property relations in a matrimonial contract.

(2) Matrimonial contracts may be concluded only by persons of full legal competence.

(3) A matrimonial contract may be concluded also during marriage.

Contents of the Matrimonial Contract

Article 38. (1) The matrimonial contract shall contain arrangements pertaining only to the property relations of spouses, such as:

1. the rights of the parties over property to be acquired during marriage;

2. the rights of the parties over their prenuptial property;

3. the ways of managing and disposing with property, including the marital home;
4. the participation of the parties in costs and liabilities;

5. the proprietary effects of a divorce;

6. the maintenance of spouses during marriage and in the event of a divorce;

7. the maintenance of the children born in the marriage;

8. other property relations insofar as this will not contravene the provisions of this Code.

(2) The property relations of the parties may be settled also through reference to a statutory regime. A clause envisaging the transformation of prenuptial property of either party into common patrimonial property shall not be allowed.

(3) The matrimonial contract may not include clauses concerning the event of death. This restriction shall not apply to the disposal with the shares of the spouses upon termination of agreed matrimonial community of property.

(4) The statutory regime of community of property shall govern the property relations which are not settled in the matrimonial contract.

Conclusion of a Matrimonial Contract

**Article 39.** (1) The matrimonial contract shall be concluded by the parties in person and given in writing with notarized content and signatures.

(2) A matrimonial contract transferring ownership rights or instating or transferring another right in rem over immovable property shall be attested by a notary public at the location of the property. Where the properties envisaged in the contract are located in the territories of different notaries, the parties shall be free to choose a notary public in either location.

(3) (Supplemented, SG No. 100/2010, effective 21.12.2010) A contract transferring property rights or instating or transferring another right in rem over immovable property shall have the effect of transfer and shall be entered into the property register on the day of the attestation by the notary public, where the contract is concluded during the marriage. Where it is concluded prior to the marriage, the contract shall be submitted for entry by the notary public on the date on which the notary public receives the certificate of civil marriage. Where the contract is subject to entry in another judicial district, the provisions of Article 25, paragraph 5 of the Notaries and Notarial Practice Act shall apply.

(4) Where the matrimonial contract is concluded during marriage, its conclusion shall be noted in the civil marriage certificate and the contract shall be subject to registration pursuant to the provisions of Article 19, paragraph 2.

Validity of a Matrimonial Contract

**Article 40.** (1) A matrimonial contract shall have effect as from the time of marriage or, when concluded during marriage, as from the date of conclusion of the contract or any other date specified therein.
(2) The contract shall have no prejudice to rights acquired by third parties prior to its conclusion.

Amendment to a Matrimonial Contract

Article 41. (1) A matrimonial contract shall be amended in the form prescribed for its conclusion.

(2) Article 40, paragraph 2 shall apply to third parties.

Termination and Voidance of a Matrimonial Contract

Article 42. (1) A matrimonial contract shall be terminated in any of the following cases:

1. at the mutual consent of the parties, whereby they may choose a statutory regime or conclude another contract, otherwise the statutory regime of community of property shall govern;

2. at the request of either spouse in the event of material change of circumstances, where the contract presents a serious threat to the interests of this spouse, the children under age or the family;

3. upon dissolution of marriage, except for the clauses settling the effects of termination and intended to apply afterwards.

(2) A matrimonial contract may become void judicially pursuant to the provisions of Article 87, paragraph 1 of the Obligations and Contracts Act provided that the voidance does not contravene the principles of this Code and good morals. A contract may become void only in part. The voidance shall have effect in the future.

Invalidity of a Matrimonial Contract

Article 43. (1) The general rules concerning the invalidity of contracts shall apply to a matrimonial contract.

(2) The annulment shall have effect in future. In such cases, spouses may choose a statutory regime or conclude another contract. Otherwise, the statutory regime of community of property shall govern.

Chapter Five
DISSOLUTION OF MARRIAGE

Grounds

Article 44. Marriage shall be dissolved in any of the following cases:

1. death of either spouse;
2. annulment of marriage;
3. divorce.

Dissolution of Marriage in the Case of a Declared Death

Article 45. (1) Where either spouse is declared dead by court, the marriage shall be dissolved at the time when the judgment becomes enforceable.

(2) Where the person declared dead turns out to be alive, the dissolved marriage shall not be restored.

Grounds for Annulment of Marriage

Article 46. (1) Marriage shall be annulled in any of the following cases:

1. violation of the provisions of Article 6 and 7 upon marriage;

2. giving consent for marriage due to intimidation with a serious and imminent threat to the life, health or dignity of the marrying partner or his or her kin.

(2) Nobody shall be entitled to invoke annulably of marriage until it is ruled by court.

Filing a Claim to Annul Marriage

Article 47. (1) A claim to annul marriage may be filed in any of the following cases:

1. violation of the provisions of Article 6 - by the minor spouse not later than six months after coming of age provided there are no children from this marriage and the wife is not pregnant;

2. Article 46, paragraph 1, subparagraph 2 - by the spouse under duress not later than a year after marriage;

3. Article 7, paragraph 1, subparagraph 1 - by either spouse, by the public prosecutor or by the spouse from the previous marriage;

4. Article 7, paragraph 1, subparagraphs 2 and 3 and paragraph 2 - by either spouse or by the public prosecutor.

(2) Marriage may not be annulled in the case of bigamy, where the earlier marriage has been dissolved.

(3) Where marriage took place in contravention of the provisions of Article 7, paragraph 1, subparagraph 1, the spouse from the previous marriage, the spouse from the annulable marriage or the public prosecutor may request establishment of the grounds for annulment of the marriage also after the death of the bigamous spouse.

(4) In the case of violation of Article 7, paragraph 1, subparagraph 2, the claim may be
filed by the sick or interdicted spouse not later than six months from the recovery or lifting of the interdiction or by the other spouse or by the public prosecutor before the recovery or lifting of the interdiction.

(5) In the cases of violation of Article 7, paragraph 1, subparagraph 3, marriage may not be annulled provided that the sick spouse has recovered.

(6) In the cases of violation of Article 7, paragraph 2, subparagraph 3, marriage may not be annulled provided that the adoption has been terminated.

Effects from the Annulment of Marriage

**Article 48.** (1) The annulment of marriage shall have effect in the future.

(2) The presumed paternity under Article 61 shall apply also to children conceived or born during the annulled marriage.

(3) The provisions concerning the effects of divorce on the personal and property relations between spouses and the relations between them and the children shall apply also to the cases of annulment of marriage. Bad faith in the annulment of marriage shall be tantamount to fault in divorce.

Divorce due to Breakdown of Marriage

**Article 49.** (1) Either spouse may request divorce in the case of deep and irremediable breakdown of marriage.

(2) The court shall guide spouses to reconcile through mediation or another voluntary dispute resolution mechanism.

(3) In its judgment on granting a divorce, the court shall rule also on the fault for the breakdown of marriage, where either spouse has requested this.

(4) In all stages of the proceedings, the spouses may submit to court an agreement on all or some effects of their divorce.

(5) The court shall approve the agreement under paragraph 4, having verified the protection of the interests of the children. The court may request an opinion from the Social Welfare Directorate.

No Fault Divorce

**Article 50.** In case of serious and unswerving consent of the spouses to divorce, the court shall grant divorce without seeking their grounds for the dissolution of marriage.

Marital Agreement in No Fault Divorce

**Article 51.** (1) In case of no fault divorce, spouses shall submit an agreement on the place of residence of the children, the exercise of parental rights, personal relations and the maintenance of children, as well as the use of the marital home, the maintenance of spouses
and the family name. They may agree also on other effects of the divorce.

(2) The court shall approve the agreement under paragraph 1, having verified the protection of the interests of the children. The court may request an opinion from the Social Welfare Directorate.

(3) Where the agreement is incomplete or the interests of children are not well protected, the court shall rule on a time limit to remove deficiencies. Failing to remove deficiencies within the prescribed time limit, the court shall not grant a divorce.

(4) Any change in the place of residence of the children, the exercise of parental rights, personal relations and the maintenance of children may be requested in case of changed circumstances.

Continuation of Divorce Proceedings by Heirs

Article 52. (1) The right to divorce shall not be transferred to heirs.

(2) Summoned descendants or parents may continue the proceedings, where the claimant has requested a ruling on the fault in order to establish the justification of the claim on the basis of the fault of the surviving spouse indicated by the claimant.

(3) The court shall not grant the claim, where the surviving spouse has no fault for the breakdown of marriage.

Family Name after Divorce

Article 53. A spouse may restore his or her name before marriage after the divorce.

Elimination of Succession and Will after Death

Article 54. (1) After the divorce, former spouses shall cease to be legitimate heirs to each other and lose the benefits ensuing from earlier will after death. These effects shall occur also where the justification of a divorce claim has been established under Article 52, paragraph 2.

(2) Paragraph 1 shall not apply to cases in which the testator has explicitly stated that the will shall have effect after divorce as well.

Cancellation of Gifts

Article 55. Gifts made in connection or during marriage to a spouse may be cancelled after divorce in the cases prescribed by civil law or where the cancellation is envisaged in the gist agreement or matrimonial contract.

Awarding of the Marital home after Divorce

Article 56. (1) In granting a divorce, where the marital home cannot be used by the two spouses separately, the court shall award its use to one of the spouses provided he or she has requested that and is in need of housing. Where minors are children from the marriage, the
court shall rule on the use of the marital home ex officio.

(2) Where minors are children from the marriage and the marital home is owned by one of the spouses, the court may award its use to the other spouse to whom the exercise of parental rights is awarded as long as he or she exercises these rights.

(3) Where minors are children from the marriage and the marital home is owned by kin of one of the spouses, the court may award its use to the other spouse to whom the exercise of parental rights is awarded for a period of up to one year.

(4) The use of the marital home shall be terminated earlier, where the housing need of the user becomes irrelevant and, in the cases under paragraphs 2 and 3, in case the user remarries.

(5) Where the spouses are co-owners or have a shared right to use the marital home, the court shall award its use to one of them, taking into account the interests of minor children, the fault, the health condition and other circumstances.

(6) Where the circumstances relevant to the awarded use under paragraph 5 change, either former spouse may request change in the use of the marital home.

Lease Relations

Article 57. (1) By force of the court judgment awarding the use of the marital home under Article 56, paragraphs 1, 2, 3 and 5, a lease relation shall occur. The judgment may be entered into the property register and the registration shall have the effect under Article 237, paragraph 1 of the Obligations and Contracts Act.

(2) Either party may request the court to rule on the amount of the rent in the divorce judgment. No rent shall be payable for the housing space used by minor children. The awarded amount of the rent may be changed in case of change in circumstances.

Prevalence of the Matrimonial Contract

Article 58. The provisions of Articles 54 to 57 shall apply, unless the matrimonial contract provides otherwise.

Parental Rights after Divorce

Article 59. (1) In the case of divorce, the spouses shall reach mutual consent on the issues related to the upbringing and nurturing of minor children from the marriage in the best interests of the children. The court shall approve the agreement pursuant to the provisions of Article 49, paragraph 5.

(2) Failing to reach an agreement under paragraph 1, the court shall rule ex officio on which parent the children will live with, on which parent will exercise parental rights, on the measures for the exercise of these rights, as well as on the regime of personal relations between children and parents and the maintenance of the children.

(3) The establishment of the regime of personal relations between parents and children
shall include the specification of a period or a day when the parent may see and take the children, including school holidays, public holidays and personal holidays of the child, as well as at other times.

(4) The court shall rule on the issues under paragraph 2, having assessed all circumstances in the best interests of the children, such as: the nurturing capabilities of the parents, the care of and attitude to the children displayed hitherto, the willingness of the parents, the closeness of the children to their parents, the gender and age of the children, the opportunities for assistance by third parties who are kin to the parents, the social environments and the financial capabilities.

(5) The amount of maintenance shall ensure the same living conditions which the child had before the divorce, unless this would create particular difficulties to the maintaining parent.

(6) (Amended, SG No. 100/2010, effective 21.12.2010) The court shall hear the parents and the children pursuant to the provisions of Article 15 of the Child Protection Act, take the opinion of the Social Welfare Directorate and, if appropriate, hear other persons as well. In the case of suspected parental alienation, the court shall hear an expert psychologist.

(7) (Amended and supplemented, SG No. 100/2010, effective 21.12.2010) By way of exception, where the interests of the children warrant it, the court may rule on their living with grandparents or with the family of other kin with the consent of the latter. Failing that, the child shall be accommodated with a foster family, a specialized institution designated by the Social Welfare Directorate or shall receive a social service of the resident type. In all cases, the court shall grant an appropriate regime of personal relations between the child and its parents.

(8) The court shall rule, if necessary, on appropriate protective measures to ensure the implementation of the judgment under paragraphs 2 and 7 such as:

1. conduct of personal relations in the presence of a designated person;
2. conduct of personal relations at a designated place;
3. covering the travelling costs of the child and, if necessary, of the accompanying person.

(9) In case of change in the circumstances, the court may modify earlier measures and impose new ones at the request of either parent, at the request of the Social Welfare Directorate, or on an ex officio basis.

(10) The judgment under paragraph 2 shall have no prejudice to the implementation of child protection measures pursuant to the provisions of the Child Protection Act.

Chapter Six
ORIGIN
Maternal Origin

Article 60. (1) Maternal origin shall be established by birth.

(2) Mother of the child is the woman who has given birth to it, including cases of assisted reproduction.

(3) The maternal origin established in a birth certificate may be challenged in court by the child, by the women specified in the certificate as the mother, by her husband, by the woman claiming to be the mother of the child, and by the man claiming that the child was born by his wife.

(4) Parties to the proceedings shall be also the mother's husband, the husband of the woman challenging the origin, as well as the child.

(5) The maternal origin from the woman who gave birth to the child through assisted reproduction may not be challenged on these grounds.

Paternal Origin

Article 61. (1) The mother's husband shall be considered to be father of the child born during marriage or within three hundred days from its dissolution.

(2) Where the child was born earlier than three hundred days from the dissolution of the marriage but the mother re-married, the husband of the mother in the new marriage shall be considered father of the child.

(3) In cases of declared absence of the husband the presumptions under paragraphs 1 and 2 shall not apply, where the child was born after the lapse of three hundred days from the date of the last news about the husband and, in cases of declared death, since the date of the presumed death.

(4) Paragraphs 1 to 3 shall apply also to cases of birth through assisted reproduction under Article 60, paragraph 2.

Challenge of Paternity

Article 62. (1) The mother's husband may challenge his paternity by proving that it could not have been conceived by him. This claim may be filed within a year of becoming aware of the birth.

(2) The mother may challenge her husband's paternity by proving that it could not have been conceived by him. This claim may be filed within a year of becoming aware of the birth.

(3) In the cases under Article 61, paragraph 2, where the second husband's challenge of paternity is granted, the former husband shall be considered father of the child. The former husband and the mother may challenge paternity within a year of becoming aware of the judgment but not later than three years from the date of its enforceability.
(4) The child may challenge paternity within a year of coming of age.

(5) No challenge of paternity shall be allowed in cases of birth through assisted reproduction, where the mother's husband has given his informed consent in writing.

Parties to Paternity Challenging Proceedings

**Article 63.** The parties summoned to paternity challenging proceedings shall be the mother, the child and the husband and, where paternity is challenged by the new husband, the former husband shall also be summoned as a party.

Acknowledgment

**Article 64.** (1) Each parent may acknowledge his or her child. Subject to acknowledgement may also be children conceived, as well as deceased children who have left descendants.

(2) A child may be acknowledged also by a parent who is sixteen years of age of above.

Forms of Acknowledgement

**Article 65.** (1) Acknowledgement shall be performed in person and given in writing before the registrar or through a statement with notarized signature submitted to the registrar. The statement may also be submitted through the manager of the medical establishment where the child was born.

(2) (Amended and supplemented, SG No. 100/2010, effective 21.12.2010) Within seven days, the registrar shall communicate the acknowledgement to the other parent if the latter is known, to the child if it is fourteen years of age or above, as well as to the Social Welfare Directorate at the current address of the child.

Challenging of Acknowledgement


**Article 66.** (1) The parent or the child aged fourteen or above may challenge the acknowledgement through a statement in writing to the registrar within three months of notification. Where it is not challenged, the acknowledgement shall be entered into the birth certificate.

(2) Where the acknowledgement is challenged, the acknowledging parent may claim establishment of origin in court within three months of notification.

(3) Where the acknowledgement was done prior to the drawing up of the child's birth certificate and the parent declared that he or she would not challenge it pursuant to the provisions of Article 65, paragraph 1, the acknowledging parent shall be entered into the birth certificate forthwith. The parent shall not be allowed to challenge the acknowledgement after the birth certificate was drawn up.

(4) Where the child was a minor at the time of acknowledgement, the child may
challenge it in court within a year of coming of age or of becoming aware of the acknowledgement. Where the claim is granted, the acknowledgement shall be deleted with an appropriate remark in the birth certificate.

(5) (New, SG No. 100/2010, effective 21.12.2010) In cases other than those under paragraphs 1 and 4, the acknowledgment may be challenged in court with a claim submitted within a year of its performance by the Social Welfare Directorate at the current address of the child.

Annulment of Acknowledgement

Article 67. The acknowledging parent may claim annulment of the acknowledgement on grounds of error or fraud within a year of the acknowledgement, in cases of acknowledgement under duress - within a year of the discontinuation of the duress, and in cases of legal incompetence - within a year of the acquisition of legal competence.

Claims to Establish Maternal Origin

Article 68. Maternal origin may be established through a claim filed by the child, the mother or the father. The mother's husband who could have been considered father of the child under Article 61 shall also be summoned as a defendant.

Claims to Establish Paternal Origin

Article 69. Paternal origin may be established through a claim filed by the mother within three years of the child’s birth or by the child within three years of coming of age. The mother shall also be summoned where the claim is filed by the child.

Parental Rights in Claims to Establish Origin

Article 70. Where it grants the claims under Article 68 and 69, the court shall rule ex officio on which parent the children will live with, on the measures for the exercise of these rights, on the regime of personal relations between the child and the parents and its maintenance, while applying the provisions of Article 59.

Impediments to the Establishment of Origin

Article 71. A claim to establish origin may not be filed and acknowledgement may not be performed before a claim challenging the existing origin is granted on grounds of the presumption under Article 61 or through acknowledgement. The two claims may be consolidated.

ClaimsFiled by or against Heirs

Article 72. (1) Heirs shall not be allowed to file the claims envisaged in this Chapter but they may continue the proceedings started on the basis of the claim filed by their testator.

(2) Where the father or the mother is deceased, the claim to establish or challenge origin shall be filed against their heirs.
Time Limits

**Article 73.** The time limits under this Chapter shall apply ex officio and shall not be subject to staying, stopping and resumption.

**Chapter Seven**
**KINSHIP**

**Lineal and Collateral Kin**

**Article 74.** (1) Lineal kinship shall mean the relationship between two persons one of whom descends from the other directly or indirectly.

(2) Collateral kinship shall mean the relationship between two persons who share a common ancestor but do not descend from each other.

**Degrees of Kinship**

**Article 75.** (1) Two lineals shall be as many times removed as is the number of generations.

(2) Two collaterals shall be as many times removed as is the number of generations from one of them to the common ancestor and from the latter to the other.

**Affinal Relatives**

**Article 76.** (1) The kin to either spouse shall be affinal relatives to both the other spouse and his or her kin.

(2) A person shall be affinal relative to a spouse in the relationship and degree to which this person is kin to the other spouse.

(3) The degree of affinal relationship between the kin to one spouse and the kin to the other shall be established by adding the degrees of kinship between one spouse and his or her kin and between the other spouse and his or her kin.

(4) The spouses of two siblings shall be affinal relatives two times removed.

(5) Affinal relationship shall be legally relevant only in the cases prescribed by law.

(6) Affinal relationship shall be terminated upon the dissolution of marriage.

**Chapter Eight**
**ADOPTION**

**Section I**


Adoptability

Adopted Child

Article 77. (1) Adoptable shall be only a person below the age of eighteen as of the date of the petition for adoption.

(2) Twins shall be adopted together. By way of exception, twins may be adopted separately provided they could not be adopted together in the course of six months of the date of entry into the register under Article 83 and their best interests warrant it.

(3) Siblings shall be adopted together if they have an emotional relationship between them.

Adoptive Parent

Article 78. Eligible to be an adoptive parent shall be a person of legal capacity who has not been deprived of parental rights.

Age Difference

Article 79. The adoptive parent shall be at least fifteen years older than the adopted child. No age difference shall be required for adoption of a child by birth of a spouse by the other spouse. Where the adoption is carried out simultaneously or consecutively by both spouses and one of them meets the age difference requirement, no such age difference shall be required from the other.

Non-adoptability of Kin

Article 80. (1) No adoption shall be allowed between lineal kin and between siblings.

(2) Grandparents or a grandparent may adopt a grandchild if the latter was born out of wedlock or a parent or the parents are deceased. The court shall hear also the other grandparents of the prospective adopted child.

(3) In cases of petitions for adoption by maternal or parental grandparents, the court shall rule with a view to the best interests of the child.

Non-adoptability by Two Persons

Article 81. (1) Nobody shall be adopted by two persons, unless the latter are spouses.

(2) Nobody shall be adopted for a second time before the existing adoption is terminated.

(3) The prohibitions under paragraphs 1 and 2 shall not apply to the spouse of the adoptive parent.

Additional Requirements for Full Adoptability
Article 82. (1) Full adoption shall be allowed provided that:

1. the prospective adopted child is entered into the register under Article 83; and

2. the adoptive parent is entered into the register under Article 85.

(2) Paragraph 1 shall not apply to the adoption of a spouse's child by the other spouse, to the adoption of a grandchild by the grandparents or either of them, as well as to the adoption by collateral kin three times removed.

(3) The requirement for entry into the register of adoptive parents under Article 85 shall not apply to the adoption by a custodian or a guardian or by the family of kin or relatives in which the child is accommodated by court pursuant to the provisions of the Child Protection Act.

(4) The persons under paragraph 3 shall be vetted by the Social Welfare Directorate at their permanent residence.

Registers of Children for Full Adoption

Article 83. (1) The Social Welfare Agency shall maintain a national electronic information system for adoptable children eligible for full adoption.

(2) Regional Social Welfare Directorates shall maintain registers for adoptable children eligible for full adoption.

(3) The details relevant to the adoption and the procedures for maintaining and keeping the registers shall be set out in a regulation of the Minister of Labour and Social Policy.

Entry of Children for Full Adoption in Regional Registers

Article 84. (1) (Supplemented, SG No. 100/2010, effective 21.12.2010) The Social Welfare Directorate shall notify in writing the Regional Social Welfare Directorate of a child accommodated administratively pursuant to the provisions of the Child Protection Act whose parents are unknown or have given their consent with full adoption within seven days of the accommodation. Where the consent is given after the accommodation, the seven-day time limit shall commence as of the date of the consent.

(2) (Supplemented, SG No. 100/2010, effective 21.12.2010) Where a child has been accommodated administratively at a specialized institution pursuant to the provisions of the Child Protection Act and the parent has not requested discontinuation of the accommodation or change in the protective measure without any cogent reason, the Social Welfare Directorate at the current address of the child shall notify in writing the Regional Social Welfare Directorate of the entry into the register within seven days of the expiration of the time limit under Article 93, paragraph 2, first sentence. A copy of the petition for judicial accommodation pursuant to the provisions of Article 27, paragraph 2 of the Child Protection Act shall be attached to the notification. Where the child is offered a social service of the resident type or is accommodated with a foster family and the parent has not requested termination of the accommodation without cogent reasons within the time limit under Article...
93, para 2, the Social Welfare Directorate shall advise the Regional Social Welfare Directorate of the entry of the child into the register provided that the child's interests require it to do so.

(3) A child whose parents are deceased, deprived of parental rights or placed under full legal interdiction may be entered into the register at the request of the custodian or guardian submitted to the director of the Regional Social Welfare Directorate. The director shall seek the opinion on the best interests of the child from the Social Welfare Directorate and from the custody and guardianship authority.

(4) A person under custodianship may request to be entered into the register under paragraph 3.

(5) The entry of a child into the register may be carried out also on the basis of a request by the parents submitted through the Social Welfare Directorate, where such registration is in the best interests of the child.

(6) The entry into the register and the refusal to make an entry shall be based on an order by the director of the Regional Social Welfare Directorate, which shall be subject to challenge pursuant to the provisions of the Administrative Procedure Code.

National Register of Full Adoptive Parents

Article 85. The Social Welfare Agency shall keep a register of prospective full adoptive parents. The entry into the register shall be made by the Regional Social Welfare Directorates pursuant to the provisions of the regulation under Article 83, paragraph 3.

Admission to the National Register of Full Adoptive Parents

Article 86. (1) A prospective full adoptive parent shall file a petition with the Social Welfare Directorate at his or her place of permanent residence to be entered into the register.

(2) The Social Welfare Directorate shall vet the eligibility of the person to become an adoptive parent.

(3) A person approved by the Social Welfare Directorate shall be entered into the register ex officio.

(4) The refusal to give approval shall be subject to challenge pursuant to the provisions of the Administrative Procedure Code.

(5) The approval shall be valid for two years.

(6) The procedures for the vetting and for issuance and withdrawal of the approval of the entry into the register shall be set out in the regulation under Article 83, paragraph 3.

Notes and Deletions in the Register

Article 87. (1) The prospective adoptive parent shall notify the Social Welfare Directorate of any change in the circumstances relevant to the issuance of the approval.
(2) Changes in the circumstances shall be noted in the register. An approval shall be withdrawn in cases of material change of circumstances after a new vetting procedure.

(3) The withdrawal of the approval shall be subject to challenge pursuant to the provisions of the Administrative Procedure Code.

(4) Notes and deletions shall be entered on the basis of an order by the director of the Regional Social Welfare Directorate.

Personal Data Protection

**Article 88.** The Social Welfare Agency shall take measures to ensure personal data protection in the registers.

**Section II**

**Granting of Adoption**

**Consent with the Adoption**

**Article 89.** (1) The consent of the following persons shall be required for adoption purposes:

1. the adoptive parent;
2. the parents of the person to be adopted;
3. the spouses of the adoptive parent and the person to be adopted;
4. the person to be adopted in case he or she is fourteen years of age or above.

(2) The mother may give her consent not earlier than 30 days after birth.

(3) The parents of the person to be adopted shall give their consent also in case they are minors.

(4) The consent of the persons under paragraph 1, subparagraphs 2 and 3 shall not be required in case they are below the age of fourteen or placed under legal interdiction.

(5) In cases of full adoption the Social Welfare Directorate shall explain to the persons under paragraph 1 the consequences of granting adoption prior to their giving of consent. In cases of limited adoption clarifications shall be given by court.

(6) The persons under paragraph 1 shall submit a declaration with notarized signature that their consent is not associated to any material gain.

Opinion on the Adoption
**Article 90.** (1) The court shall hear the prospective adopted child pursuant to the provisions of the Child Protection Act, unless it is below the age of fourteen.

(2) The following parties shall give an opinion on the adoption:

1. the custodian or guardian;

2. the parents in case they are minors, placed under limited legal interdiction or deprived of parental rights;

3. the spouses of the adoptive parent and the person to be adopted in case they are placed under limited legal interdiction.

Forms of the Consent and the Opinion

**Article 91.** (1) The consent under Article 89 and the opinion of the persons under Article 90 may be given to court in person, through a declaration with notarized signature or through a special proxy. The court may summon and hear in person some of these persons if its finds it necessary to do so.

(2) The person to be adopted shall give his or her consent to court in person.

(3) In cases of full adoption, where the parent gives his or her opinion in person, the parent and the adoptive parent shall be heard in separate court sessions, except for the cases under Article 82, paragraph 2.

Withdrawal of Consent

**Article 92.** (Amended, SG No. 100/2010, effective 21.12.2010) The parent may withdraw his or her consent with full adoption through a petition with notarized signature prior to the filing of an adoption petition under Article 95, paragraph 5 or prior to the consent with the adoption by the adoptive parent as specified by the Intercountry Adoption Board pursuant to the provisions of Article 114, paragraph 7.

Adoption with Parental Consent

**Article 93.** (1) Adoption without parental consent shall be granted, where the parent systematically fails to take care of the child, fails to provide maintenance or brings up and nurtures the child in a manner detrimental to its development.

(2) Adoption without parental consent shall be granted also in case the child is accommodated at a specialized institution and the parent has not requested discontinuation of the accommodation or change of the measure and return or accommodation of the child in a family of kin or relatives pursuant to the provisions of the Child Protection Act without any cogent reason for six months since the date of administrative accommodation under the Child Protection Act. This request may be filed also in the judicial accommodation proceedings pursuant to the provisions of the Child Protection Act.

(3) (New, SG No. 100/2010, effective 21.12.2010) Adoption without the consent of the parent under paragraph 2 shall be allowed also where the child has been offered a social
service of the resident type or has been accommodated with a foster family and has been entered into the register of children for full adoption.

(4) (Renumbered from Paragraph 3, SG No. 100/2010, effective 21.12.2010) In the cases under paragraph 1, the parent shall be summoned to be heard in court.

Adoption Board

Article 94. (1) The Adoption Board shall be established at the Regional Social Welfare Directorate.

(2) (Amended, SG No. 98/2010, effective 1.01.2011, amended and supplemented, SG No. 100/2010, effective 21.12.2010) The director of the Regional Social Welfare Directorate shall serve as chairperson of the Adoption Board. Members of the Board shall be as follows: a lawyer designated by the Regional Governor, a physician designated by the director of the Regional Health Inspectorate, a pedagogue designated by the head of the Regional Inspectorate for Education, a psychologist designated by the director of the Social Welfare Directorate at the current place of residence of the child, the head of the specialized institution where the child is accommodated, as well as the institution providing social services of the resident type.

(3) The authorities under paragraph 2 shall designated also permanent alternates to the Board members.

(4) The Board shall hold weekly meetings.

(5) The Board shall make decisions by show of hands and by a majority of at least two-thirds of the membership.

(6) (Amended, SG No. 74/2009, effective 1.10.2009) The Minister of Labour and Social Policy shall issue rules of the Board under paragraph 1 in consultation with the Minister of Health, the Minister of Education, Youth and Science and the Minister of Justice.

(7) The chairperson and the members of the Adoption Board shall receive remuneration in an amount determined by the Minister of Labour and Social Policy for their participation in each Board meeting.

Selection of a Full Adoptive Parent

Article 95. (1) Within a month from the entry of the child into the register, the Adoption Board shall select suitable adoptive parents for the child, depending on the sequence of their registration, their preferences and the circumstances relevant to the best interests of the child.

(2) Beyond the cases under paragraph 1, the Adoption Board may select as a suitable adoptive parent of the child a person acting as foster family provided the latter is entered into the register under Article 85 and has taken care of the child for at least a year after its accommodation with the foster family.

(3) The Regional Social Welfare Directorate shall notify in writing the top selected suitable adoptive parent of its decision under paragraph 1 and provide the details of the child.
The Social Welfare Directorate at the current place of residence of the child shall provide assistance for the establishment of personal contact.

(4) In the cases under paragraph 2, the Regional Social Welfare Directorate shall notify the adoptive parent in writing.

(5) The adoptive parent may file a petition for adoption to the court through the Regional Social Welfare Directorate within a month of reception of the notification. The Directorate shall refer the petition for adoption together with the file to the court within three days of reception of the petition.

(6) Where the notified adoptive parent rejects the proposal in writing or fails to file a petition within the time limit under paragraph 5, the Regional Social Welfare Directorate shall notify the next suitable adoptive parent.

(7) The rejection or failure to file a petition within the time limits under paragraph 5 shall be noted in the National Register of Full Adoptive Parents.

Jurisdiction

Article 96. (1) The petition for full adoption shall be filed by the adoptive parent through the Regional Social Welfare Directorate whose Adoption Board has selected the adoptive parent to the regional court at the location of the regional directorate.

(2) A petition for full adoption under Article 82, paragraphs 2 and 3 may be filed by the adoptive parent, the parents of the prospective adopted child or by the prospective adopted child provided the latter is fourteen years of age or above through the respective Regional Social Welfare Directorate to the regional court at the place of permanent residence of the petitioner.

(3) A petition for limited adoption shall be filed by the adoptive parent to the regional court at the place of permanent residence of the petitioner.

Judgment on the Petition for Adoption

Article 97. (1) (Amended, SG No. 100/2010, effective 21.12.2010) The regional court shall examine the petition for adoption in an open session held in camera within 14 days of reception of the petition. In cases of full adoption, the court shall require a report of the Social Welfare Directorate and collect evidence pursuant to the provisions of the Civil Procedure Code. The court shall hear the conclusion of the public prosecutor and rule a judgment with reasons attached thereof.

(2) Adoption shall be granted provided it is in the best interests of the adopted child.

(3) (Amended, SG No. 100/2010, effective 21.12.2010) The judgment shall be announced in court session and, after it becomes enforceable, the judgment shall be sent ex officio to the municipality at the place of permanent residence of the adoptive parent and to respective regional Social Welfare Directorate or, where the adoptive parent is a foreign national, to the City of Sofia and to the Ministry of Justice.
Appeal of Judgment

Article 98. (1) (Amended, SG No. 100/2010, effective 21.12.2010) The judgment under Article 97, paragraph 1 may be appealed by the adoptive parent, by the parents of the adopted child, except for the cases under Article 100, paragraph 2, by the adopted child and by the public prosecutor before the court of appeal within seven days of the announcement of the judgment. Where it is fourteen years of age or above, the adopted child may appeal against the judgment in person.

(2) Within 14 days of reception of the appeal, the court shall hear the case in an open session held in camera and rule the final judgment.

Scope of Provisions

Article 99. The provisions of Articles 77 to 98 shall apply also to the adoption of a child with habitual residence in the Republic of Bulgaria, as well as adoption by a foreign national with habitual residence in the Republic of Bulgaria.

Section III
Effects of Adoption

Types of Adoption

Article 100. (1) Adoption may be either full or limited.

(2) Full adoption shall be granted in any of the following cases:

1. the adopted person is a child of unknown parentage;

2. the parents have given their consent with full adoption in advance;


(3) In all other cases, adoption may be either full or limited. The type of adoption shall be determined by the persons whose consent is required under Article 89.

Full Adoption

Article 101. (1) In case of full adoption, the rights and obligations arising between the adopted child and its descendants, on of the one part, and the adoptive parent and his kin and relatives, on of the other part shall be tantamount to those between kin by origin, while the rights and obligations between the adopted child and its descendants and its kin by origin shall be terminated. The impediments to marriage due to kinship under Article 7, paragraph 2, subparagraphs 1 and 2 shall be retained.

(2) The court shall rule on the issuance of a new birth certificate in which the adoptive parent shall be specified as the parent. The birth certificate shall be issued by the registrar at
Limited Adoption

Article 102. (1) In case of limited adoption, rights and obligations identical to those between kin by origin shall arise only between the adopted child and its descendants, of the one part, and the adoptive parent, of the other part, shall be tantamount to those between kin by origin, while the rights and obligations between the adopted child and its descendants and its kin by origin shall be retained. The parental rights and obligations shall be transferred to the adoptive parent.

(2) The parents by birth shall owe maintenance, where the adoptive parent is not in a position to provide it. Parents by birth shall not be heirs to the adopted child.

Adoption by the Spouse of a Parent

Article 103. (1) Where a child is adopted by the spouse of a parent, the rights and obligations arising between this parent and his kin and relatives, on the one part, and the adopted child and its descendants, on the other part, shall be retained.

(2) In the case under paragraph 1, the existing birth certificate shall feature the details of the adoptive parent, alongside with the details of the parent by birth with whom relations are retained.

Post-adoption Monitoring

Article 104. The Social Welfare Directorate at the current place of residence of the adoptive parent shall monitor the upbringing of the child and the respect for its rights and legitimate interests in the course of two years.

Right to Information

Article 105. (Amended, SG No. 100/2010, effective 21.12.2010) (1) Adoptive parents or adopted persons above the age of sixteen may request the regional court which has ruled on the admissibility of the adoption to obtain information about the origin of the adopted person provided there exist compelling reasons to do so. The regional court shall hold a session in camera to hear the birth parents of the adopted person and the conclusion of the public prosecutor and shall rule thereof.

(2) The decision of the regional court may be challenged by the adoptive parents and the adopted person and it may be attacked by the public prosecutor.

Section IV
Termination of Adoption

Termination Grounds
Article 106. (1) The regional court shall terminate the adoption in any of the following cases:

1. need for annulment due to violation of Article 77, paragraph 1, Articles 78, Article 79, Article 80, paragraphs 1 and 2, first sentence, Article 81, Article 82, paragraph 1, subparagraphs 1, 2 and 4 and paragraphs 2 and 3;

2. serious fault of either party or existence of other circumstances which lead to deep breakdown of the relations between the adoptive parent and the adopted person.

(2) A petition for annulment of adoption due to violation of Article 89, paragraph 1, subparagraphs 1, 2 and 4 may be filed by the person who has not given his or her consent within a one-year time limit prescribed for the adoptive parent and each parent of the adopted child as from the time of becoming aware of the adoption. The time limit for the adopted person shall commence on the date of coming of age or becoming aware of the adoption, whichever is later. The same rule shall apply also to the person whose consent has been given due to mistake or fraud or under duress or in violation of Article 89, paragraph 2.

(3) A petition for annulment of adoption due to violation of Article 82, paragraph 1, subparagraph 1 may be filed by the adoptive parent, the adopted child and either parent of the adopted child within a year of the granting of the adoption.

(4) In all other cases of need for annulment, termination may be requested by the adoptive parent, the adopted child and either parent of the adopted child until the adopted child comes of age.

(5) In the cases under paragraph 1, subparagraph 2, termination of the adoption may be requested by the adoptive parent and the adopted child.

(6) (Amended, SG No. 100/2010, effective 21.12.2010) The public prosecutor shall be entitled to request termination of adoption in the best public interests. In the cases under paragraph 1, subparagraph 1 the claim shall be filed within the time limits under paragraphs 3 and 4 and in the cases under paragraph 1, subparagraph 2 prior to the child coming of age.

(7) (Amended, SG No. 100/2010, effective 21.12.2010) The Social Welfare Directorate shall be entitled to request termination of adoption under paragraph 1 where it contravenes the child's interests. In the cases under paragraph 1, subparagraph 1 the claim shall be filed within the time limits under paragraphs 3 and 4 and in the cases under paragraph 1, subparagraph 2 prior to the child coming of age.

(8) Adoption may be terminated by the district court at the mutual consent of the adoptive parent and the adopted person provided both have legal competence.


Termination of Adoption upon Death

Article 107. (1) In cases of full adoption, the court may terminate the adoption at the request of the adopted child, his or her parents, the custodian, the guardian or the Social
Welfare Directorate, where either or both adoptive parents are deceased, the adopted child is a minor and its best interests warrant it.

(2) In cases of limited adoption, adoption shall be terminated upon the death of the adoptive parent or upon the death of the adopted person who has left no descendants but the survivor shall inherit the deceased.

Continuation of Proceedings for Termination of Adoption

**Article 108.** Where the adoptive parent or the prospective adopted child dies during the proceedings for termination of adoption under Article 106, paragraph 1, the proceedings may be continued by the heirs of the petitioner. Where the court grants the petition, the surviving adoptive parent or adopted child at fault shall not inherit the deceased.

Effects of Termination

**Article 109.** The effects of adoption shall discontinue upon its termination.

**Section V**

**Special Rules for Intercountry Adoption**

**Adopted Child**

**Article 110.** (1) A child habitually resident in the Republic of Bulgaria may be adopted by a person habitually resident abroad if all possibilities for domestic adoption have been exhausted and the child is entered into the register under Article 113, paragraph 1, subparagraph 1, except for the cases under Article 82, paragraph 2.

(2) The adoption of a child who is a Bulgarian citizen habitually resident in other State shall be carried out, while observing the requirements of the legislation of this State.

**Adoptive Parent**

**Article 111.** (1) A person habitually resident abroad may adopt a child habitually resident in the Republic of Bulgaria if this person is entered into the register under Article 113, paragraph 1, subparagraph 2, except for the cases under Article 82, paragraph 2.

(2) A person under paragraph 1 may not adopt a child habitually resident in the Republic of Bulgaria if he or she is habitually resident in a State which will not recognize the judgment of the Bulgarian court on the adoption.

**Powers of the Minister of Justice**

**Article 112.** (1) The Ministry of Justice shall perform the functions of a Central Authority under the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption drawn up in the Hague on 29 May 1993 (ratified by law - State Gazette, No. 16 of 2002) (SG, No. 78 of 2002), hereinafter referred to as "the Hague Convention".
(2) The Minister of Justice shall:

1. perform the activities related to intercountry adoption;

2. supervise the activities of accredited intermediary bodies in intercountry adoption;

3. issue regulations on the procedures for keeping intercountry adoption registers.

(3) Where a child habitually resident in the Republic of Bulgaria is adopted in accordance with the Hague Convention, the Minister of Justice shall certify this fact.

(4) The Minister of Justice shall give opinion on the cases under Article 110, paragraph 2, where the legislation of the State in which the child is habitually resident requires a ruling by the Bulgarian Central Authority on intercountry adoption.

(5) Where violation of the rights and legitimate interests of the adopted child is observed within two years of granting adoption, the Minister of Justice shall notify the Competent Authority of the State in which the adoptive parent is habitually resident.

(6) Where no suitable adoptive parents are entered into the register, the Intercountry Adoption Board cannot select suitable registered adoptive parents or the selected adoptive parents have failed to adopt a child with health problems, special needs or above the age of seven, the Minister of Justice shall undertake the measures laid down in the regulation under Article 113, paragraph 4.

Intercountry Adoption Registers

Article 113. (1) The Ministry of Justice shall keep:

1. a register of children adoptable by persons habitually resident abroad on full adoption basis;

2. a register of adoptive parents habitually resident abroad who are willing to adopt a child habitually resident in the Republic of Bulgaria on full adoption basis;

3. (amended, SG No. 100/2010, effective 21.12.2010) a register of adoptive parents habitually resident in the Republic of Bulgaria who are willing to adopt a child habitually resident abroad;

4. a public register of accredited intermediary bodies in intercountry adoption.

(2) The Adoption Board under Article 94 shall notify the Intercountry Adoption Board on the entry of a child in the register of children if at least three adoptive parents were selected for the child pursuant to the provisions of Article 95 and none has filed a petition for adoption or where no suitable adoptive parent can be selected in spite of all efforts.

(3) The entry of the child into the register under paragraph 1, subparagraph 1 shall be noted in the regional register, providing no obstacle for the respective Adoption Board to select a suitable adoptive parent.
(4) The content and procedure of keeping the registers under paragraph 1 shall be set out in a regulation of the Minister of Justice.

(5) (New, SG No. 100/2010, effective 21.12.2010) Fees established in the rates of the Council of Ministers shall be payable for the entering into the registers under paragraph 1, subparagraphs 2 and 3.

Intercountry Adoption Board

Article 114. (1) (Amended, SG No. 74/2009, effective 1.10.2009) The Intercountry Adoption Board shall be established at the Ministry of Justice, consisting of a chairperson who is Deputy Minister of Justice and members who represent the Ministry of Justice, the Ministry of Health, the Ministry of Education, youth and Science, the Ministry of Labour and Social Policy, the Ministry of Foreign Affairs and the State Child Protection Agency each.

(2) The chairperson and each member shall have alternates.

(3) The Board shall hold at least three meetings monthly.

(4) The Board shall make decisions by show of hands and by a majority of at least two-thirds of the membership.

(5) The Minister of Justice shall designate the members of the Board under paragraphs 1 and 2 by name at the proposal of the heads of the respective institutions and issue rules for its activity.

(6) The chairperson and the members of the Intercountry Adoption Board shall receive remuneration in an amount determined by the Minister of Justice for their participation in each Board meeting.

(7) Within 60 days of the entry of the children into the register, the Intercountry Adoption Board shall examine the candidates to select a suitable adoptive parent, while observing the criteria under Article 95, paragraph 1.

(8) The Board shall examine all eligible candidates to select a suitable adoptive parent.

Competence of the Intercountry Adoption Board

Article 115. The Intercountry Adoption Board shall:

1. make a proposal to the Minister of Justice on the selection of a suitable adoptive parent;

2. express an opinion before the Minister of Justice on the petitions of persons habitually resident in the Republic of Bulgaria for adoption of a child habitually resident abroad;

3. make proposals to the Minister of Justice on the issuance of licences under Article 121;
4. express opinions and give recommendations to the Minister of Justice with respect to intercountry adoption;

5. make a proposal to the Minister of Justice on the withdrawal of the license licence of an accredited body.

Intermediation in Intercountry Adoption

**Article 116.** (1) Intermediation in intercountry adoption may be carried out by a legal entity pursuing non-profit objectives in public interest, hereinafter referred to as "an accredited body" entered into the Central Register under Article 45, paragraph 1 of the Non-profit Legal Persons Act and licensed for this purpose by the Minister of Justice.

(2) A foreign non-profit legal entity accredited to serve as an intermediary in respect of intercountry adoption by a foreign authority may perform its tasks in the Republic of Bulgaria only on the basis of a licence issued by the Minister of Justice for intermediation with the respective State.

(3) The Minister of Justice shall issue a regulation on the procedures for the issuance and withdrawal of licences and on the activities of accredited bodies, including their termination.

Consent of the Minister of Justice

**Article 117.** (1) The Minister of Justice shall give his or her consent with the adoption of a child habitually resident in the Republic of Bulgaria by the adoptive parent proposed by the Intercountry Adoption Board.

(2) The Minister of Justice shall refuse to give his or her consent in any of the following cases:

1. establishment of circumstances which are not in the best interests of the child;

2. material violations in the adoption proceedings.

(3) In the cases under paragraph 2, the Intercountry Adoption Board shall make a new proposal.

(4) A fee shall be charged for giving consent with the adoption at rates approved by the Council of Ministers.

Proceedings on the basis of Petitions for Intercountry Adoption

**Article 118.** (1) Where consent is given under Article 117, the Ministry of Justice shall refer the petition for adoption to the Sofia City Court. Proceedings shall take place pursuant to the provisions of Article 97.

(2) (Amended, SG No. 100/2010, effective 21.12.2010) The judgment under paragraph 1 may be appealed under Article 98.
Termination of Intercountry Adoption

**Article 119.** (1) The Minister of Justice shall be entitled to request termination of adoption, where the grounds under Article 106, paragraphs 1 and 7 exist and within the time limits prescribed therein.

(2) The Minister of Justice shall file a petition to terminate the adoption in case the judgment of the Bulgarian court on its granting is not recognized by the receiving State.

Data Protection

**Article 120.** The Minister of Justice shall take measures to ensure personal data protection.

License for Intermediation

**Article 121.** (1) An application shall be filed with the Minister of Justice for the issuance of a license for intermediation in intercountry adoption.

(2) The validity of the license shall be five years.

(3) A fee shall be charged for the examination of an application for a license at rates approved by the Council of Ministers.

(4) A license shall be withdrawn at a proposal of the Intercountry Adoption Board with reasons attached thereof.

**Chapter Nine**

RELATIONS BETWEEN PARENTS AND CHILDREN

Parental Rights and Obligations

**Article 122.** (1) Bearer of parental rights and obligations with respect to minor children shall be each parent.

(2) Parents have equal rights and obligations, regardless of whether they are married or not.

(3) The parent's spouse shall assist the parent in performing his or her obligations.

Exercise of Parental Rights and Discharge of Parental Obligations

**Article 123.** (1) Parental rights shall be exercised and parental obligations shall be discharged in the best interests of the child by both parents jointly and severally. Acting on his or her own, the parent shall advise the other parent thereof.

(2) Parental rights shall be exercised and parental obligations shall be discharged at the parents' mutual consent. In case of dispute, they may seek mediation or file a petition with
the district court at the current place of residence of the child, which shall resolve the dispute, having heard the parents and, if necessary, the child. The court judgment shall be subject to appeal in accordance with the general rules.

Rights and Obligations of the Child

Article 124. (1) The child shall have the right to be brought up and nurtured in a way that will ensure its normal physical, mental, moral and social development.

(2) The child shall have the right to personal relations with its parents, unless the court has ruled otherwise.

(3) In case of dispute between a parent and a child, the child may approach the Social Welfare Directorate in person to receive assistance. Where the child is fourteen years of age or above and the dispute concerns issues of material significance, the child may approach the district court at its current place of residence through the Directorate. The court judgment shall be subject to appeal in accordance with the general rules.

(4) Children shall respect their parents and grandparents and help them. Children have the same obligation to the other family members, as well as to the parent's spouse.

(5) Adult children shall take care of their aged or sick parents.

Care, Nurturing and Monitoring of Children

Article 125. (1) The parent shall have the right and obligation to take care of the physical, mental, moral and social development of the child, its education and its personal and property interests.

(2) The parent shall nurture the child, shape its views and provide for its education, depending on his capabilities and in accordance with the needs and aptitudes of the child and with a view to ensuring its development as an independent and responsible personality. The parent shall not use violence or nurturing methods which infringe upon the child's dignity.

(3) The parent shall ensure continuous monitoring of his or her child below the age of fourteen and appropriate control of the behaviour of his or her minor child.

Co-habitation

Article 126. (1) Parents and minor children shall live together, unless compelling reasons warrant their living separately.

(2) Where a child deviates or is deviated from its place of residence, the district court at the current place of residence of the parent, at the latter's request, shall rule on the return of the child, having heard it. The court ruling may be subject to appeal before the regional court but the appeal shall not stay enforcement. The child shall be returned administratively.

(3) Where the court finds compelling reasons under paragraph 1, it shall deny return of the child to the parent and notify the Social Welfare Directorate at the current place of residence of the child, which shall undertake measures forthwith.
Dispute over Parental Rights

**Article 127.** (1) In case the parents do not live together, they may reach an agreement on the place of residence of the child, the exercise of parental rights, the personal relations with it and its maintenance. They may request the district court at the current place of residence of the child to endorse their agreement. The agreement shall have the effect of grounds for execution under Article 404, subparagraph 1 of the Code of Civil Procedure.

(2) Failing to reach an agreement under paragraph 1, the parents shall refer the dispute to the district court at the current place of residence of the child, which shall rule on the place of residence of the child, the exercise of parental rights, the personal relations with the child and its maintenance pursuant to the provisions of Articles 59, 142, 143 and 144. The court judgment shall be subject to appeal in accordance with the general rules.

(3) At the request of the parent, the court shall rule on provisional measures in the best interests of the child, having taken the opinion of the Social Welfare Directorate. The court ruling shall not be subject to appeal but it may be modified by the same court.

(4) The court may apply the protective measures under Article 59, paragraph 8.

Dispute in Case of Disagreement between Parents on the Child Travelling Abroad

**Article 127a.** (New, SG No. 100/2010, effective 21.12.2010) (1) The issues related to the travelling abroad of the child and the issuance of the necessary identity documents thereof shall be resolved upon the common consent of the parents.

(2) Failing to reach an agreement under paragraph 1, the parents shall refer the dispute to the regional court at the current address of the child.

(3) The proceedings shall start at the request of either parent. The court shall hear the other parent, unless his or her absence is due to cogent reasons. The court may collect evidence at its own initiative as well.

(4) The court may allow preliminary enforcement of the decision made.

Personal Relations with Kin

**Article 128.** (1) Grandparents may request the district court at the current place of residence of the child to impose measures for personal relations with the child provided this is in the best interests of the child. The child shall have the same right.

(2) The court shall apply the provisions of Article 59, paragraphs 8 and 9 respectively.

(3) Where the parent to whom the court has ruled a regime of personal relations with the child is not in a position to exercise it temporarily due to absence or illness, the regime may be carried out by the child's grandparents.

Representation and Guardian Assistance
Article 129. (1) Each parent may represent his or her child below the age of fourteen on his or her own and give consent with the legal actions of his or her minor child in its best interests.

(2) A special representative shall be appointed in cases of contradiction between the interests of the parent and the child.

Management and Disposal of the Child's Property

Article 130. (1) Parents shall manage the child's property in its best interests and with good care.

(2) The income from the child's property which is not needed for its own needs may be used to meet family needs.

(3) Any action of disposal of immovable property, movable property with a formal transaction and deposits, as well as securities owned by the child shall be allowed with the permission of the district court at its current place of residence provided the disposal does not contravene the child's interests.

(4) Any gift, abandonment of rights, lending and securing of other person's debts by a minor child shall be null and void. By way of exception, other person's debts may be secured through pledge or mortgage pursuant to the provisions of paragraph 3 in case of need or obvious benefit to the child or emergency needs of the family.

(5) Only the restriction under Article 6, paragraph 4 shall apply to the transactions of a married minor.

Restriction of Parental Rights

Article 131. (1) Where the parent's behaviour threatens the personality, health, nurturing or property of the child, the district court shall take measures in the best interests of the child by restricting parental rights - depriving the parent of some of them or imposing conditions on their exercise - and may assign their exercise to another person. The place of residence of the child may be changed, if needed, or the child may be accommodated outside the family.

(2) The measures under paragraph 1 shall be taken also in case the parent is not in a condition to exercise his or her parental rights due to prolonged physical or mental disorder or other reasons beyond the parent's control.

Deprivation of Parental Rights

Article 132. (1) The parent may be deprived of parental rights in any of the following cases:

1. particularly serious cases under Article 131;

2. the parent takes no care of the child and provides no maintenance for a long period of time without any cogent reason.
(2) Where a parent is deprived of parental rights and there is no other parent or the exercise of parental rights by the other parent is not in the best interests of the child, the court shall take protective measures and accommodate the child outside the family.

Proceedings to Restrict Parental Rights or Deprive from Parental Rights

Article 133. (1) Proceedings to restrict parental rights or deprive from parental rights shall be brought at the petition of the other parent, the public prosecutor or the Social Welfare Directorate before the district court at the current place of residence of the child.

(2) The public prosecutor, a representative of the Social Welfare Directorate and the parent whose restriction or deprivation of parental rights is petitioned, unless the parent does not appear without any cogent reasons, shall be heard in the proceedings.

(3) The court shall rule on appropriate provisional measures in the best interests of the child, taking into consideration the opinion of the Social Welfare Directorate. The court ruling shall not be subject to appeal but it may be modified by the same court.

Maintenance and Measures with respect to Personal Relations

Article 134. When restricting parental rights through accommodation of the child outside the family or depriving of parental rights, the court shall determine:

1. the child's maintenance, unless it has been adjudicated;

2. the measures with respect to the personal relations between the parent and the child, while applying Article 59, paragraph 8 respectively.

Modification of Measures and Recovery of Parental Rights

Article 135. (1) In case of change in circumstances, the court may modify the measures under Articles 131, 132 and 134.

(2) The parent may request the court to recover his or her parental rights, where the grounds for the deprivation of parental rights have been removed.

Recordation

Article 136. In the cases under Articles 131 and 132, the court shall notify ex officio the municipality at the place of permanent residence of the parent to record the deprivation of parental rights, their recover or modification under Article 135. The court shall send a copy also to the Social Welfare Directorate at the current place of residence of the child, which shall undertake appropriate measures and, if necessary, propose the instatement of custody or guardianship.

Surrogate Care

Article 137. (1) Persons assigned with the care of the child shall not acquire parental rights and obligations.
(2) The persons under paragraph 1 may take decisions and undertake actions to protect the life and health of the children they are taking care of, without the consent of the parents.

(3) The persons with whom the child has been accommodated judicially shall have the right and obligation to live with it, as well as the obligation to undertake practical action under Article 125. They shall also be entitled to the right under Article 126, paragraph 2.

(4) (Amended, SG No. 82/2009) The persons under paragraph 3 shall undertake the necessary legal action to protect the child's personal rights related to its health, education and civil status, as well as to have its identity documents issued pursuant to the provisions of the Bulgarian Personal Documents Act, having obtained a positive opinion from the Social Welfare Directorate. These persons shall have the obligation under Article 165, paragraph 3.

(5) In cases of administrative accommodation of the child pursuant to the provisions of Article 27 of the Child Protection Act, the actions under paragraph 4 shall be undertaken by the Social Welfare Directorate.

Participation of the Child in Proceedings

Article 138. The child shall be heard in proceedings under this Chapter pursuant to the provisions of Article 15 of the Child Protection Act.

Chapter Ten
MAINTENANCE

Right to Maintenance

Article 139. Any person who is not able to work and cannot support himself or herself from his or her property shall be entitled to maintenance.

Sequence of Persons Liable to Provide Maintenance

Article 140. (1) The person entitled to maintenance may seek it in the following sequence:

1. children and spouse;
2. parents;
3. former spouse;
4. grandchildren and great-grandchildren;
5. siblings;
6. grandparents and ancestors more times removed.

(2) Where the persons from a preceding order are not in a position to provide
maintenance, the persons from the following order shall become liable to provide maintenance.

(3) Where several persons from the same order are liable to provide maintenance, the obligations shall be distributed among them, depending on their capabilities. If maintenance has been provided by only one of them, the person may seek from the other the relevant portion together with the statutory interest rate.

Sequence of Persons Entitled to Maintenance

**Article 141.** A person liable to provide maintenance to several persons shall provide it in the following sequence:

1. children and spouse;
2. parents;
3. former spouse;
4. grandchildren and great-grandchildren;
5. siblings;
6. grandparents and ancestors more times removed.

Amount of Maintenance

**Article 142.** (1) The amount of maintenance shall be determined in accordance with the needs of the person entitled to maintenance and the capabilities of the person liable to provide it.

(2) The minimum maintenance of a child shall be equal to one quarter of the minimum wage.

Maintenance of Minors by Parents

**Article 143.** (1) Each parent shall provide, within his or her capabilities and financial condition, the living conditions needed for the development of the child.

(2) Parents shall be liable to provide maintenance to their minor children, regardless of whether the latter are able to work or support themselves from their property.

(3) Parents shall be liable to provide maintenance also in case the child is accommodated outside the family.

(4) The court may adjudicate, at the request of a parent or surrogate carer under Article 137, an additional allowance to the maintenance established by the court to cover emergency needs of the child in an amount which will not create excessive burden to the parent. The court shall establish also the period for which the additional allowance shall be provided.
Maintenance of Adult Student Children by Parents

**Article 144.** Parents shall be liable to provide maintenance to their adult children provided the latter attend regular courses at secondary and higher schools during the term of education until the child becomes twenty years of age at secondary school and twenty-five years of age at an establishment of higher learning and cannot support themselves from their income or use of their property and the parents can provide it without excessive burden.

Maintenance of a Former Spouse

**Article 145.** (1) A spouse who has no fault for the divorce shall be entitled to maintenance.

(2) The maintenance shall be provided for up to three years after the dissolution of marriage, unless the parties have agreed a longer period. The court may renew the period, where the maintained person is in a particularly difficult condition, while the provider can provide it without excessive burden.

(3) The right to maintenance of the former spouse shall be terminated upon his or her re-marriage.

Payment of Maintenance in Cash

**Article 146.** (1) Maintenance in cash shall be paid on a monthly basis. The statutory interest rate shall be charged on delayed payments.

(2) Petitions for maintenance shall be examined in summary proceedings pursuant to the provisions of the Code of Civil Procedure.

Abandonment of Maintenance

**Article 147.** The abandonment of maintenance for future periods shall be null and void.

Prohibition of Netting

**Article 148.** The netting of debt against maintenance shall be prohibited.

Maintenance for Past Periods

**Article 149.** Maintenance for past periods may be sought for up to one year prior to the filing of the petition.

Modification and Termination of Maintenance

**Article 150.** The adjudicated maintenance or the additional allowance thereto may be modified or terminated in case of change in circumstances.

Loss of the Right to Maintenance

**Article 151.** (1) A person who has committed a serious malfeasance against the provider
of the maintenance, his or her spouse, ascendant or descendant may not seek maintenance.

(2) Paragraph 1 shall not apply to the maintenance of children until they become sixteen years of age.

(3) A person deprived of parental rights shall not be relieved from the obligation to provide maintenance to his or her child. A person culpably deprived of parental rights may not seek maintenance from the child with respect of whom the deprivation has been ruled.

Payment of Adjudicated Maintenance by the State

Article 152. (1) (Supplemented, SG No. 100/2010, effective 21.12.2010) The State shall pay the maintenance adjudicated to a Bulgarian citizen under age at the expense of the defaulting debtor in the amount established in the court judgment but not more than the maximum amount specified in the annual State Budget Act of the Republic of Bulgaria.

(2) (Amended, SG No. 100/2010, effective 21.12.2010) The payment under paragraph 1 shall be made, where it is established in the course of the recovery proceedings that the debtor in default has no income or property to seek recovery in the recovery action.


(5) (Amended, SG No. 100/2010, effective 21.12.2010) Maintenance shall be paid as from the first day of the month following the month when the circumstances under paragraph 2 were established.

(6) (Amended, SG No. 100/2010, effective 21.12.2010) The defaulting debtor shall recover the maintenance paid by the State together with the statutory interest accrued.

(7) (New, SG No. 100/2010, effective 21.12.2010) The state shall be considered an adjoined claimant on the private public receivable for the maintenance paid by the municipality under the recovery proceedings, together with the statutory interest accrued. The fees and expenses due shall be collected directly from the debtor in such cases.


Chapter Eleven
CUSTODY AND GUARDIANSHIP

Conditions for Instatement

Article 153. (1) Custody shall be instated over children below the age of fourteen, whose parents are unknown, deceased, placed under full legal interdiction or deprived of
parental rights. Custody shall be instated also over persons placed under full legal interdiction.

(2) Custody shall be instated over minors whose parents are unknown, deceased, placed under full legal interdiction or deprived of parental rights. Custody shall be instated also over persons placed under full legal interdiction.

(3) Any person who becomes aware of the need for custody or guardianship to be instated shall report to the custody and guardianship authority forthwith and, in cases of a child, also the Social Welfare Directorate. Where the child is accommodated at a specialized institution, the report shall be made by the director within seven days of the accommodation.

Custody and Guardianship Authority

**Article 154.** The mayor of the municipality or a person designated by the mayor shall serve as custody and guardianship authority.

Custody and Guardianship Instatement Procedure

**Article 155.** (1) The custody and guardianship authority shall appoint a custody board or a guardian and a deputy guardian within 30 days. The time limits shall commence as from the date of reception of the court judgment on the interdiction or deprivation of parental rights or as from the date of becoming aware of the parent's death.

(2) In cases of a report under Article 153, paragraph 3, the custody and guardianship authority shall carry out an inspection and, if such grounds exist, appoint a custody board or a guardian and a deputy guardian within the time limits under paragraph 1.

(3) The custody and guardianship authority shall hear the child pursuant to the provisions of Article 15 of the Child Protection Act and take the opinion of the Social Welfare Directorate. Where guardianship is instated over a person placed under limited legal interdiction, the authority shall hear also this person.

Custody Board

**Article 156.** (1) The custody and guardianship authority at the place of permanent residence of the person shall appoint a custodian, a deputy custodian and two advisors from among the kin and relatives of the person under the age of fourteen or the person placed under full legal interdiction who will best take care of his or her best interests and have given their consent in writing. They shall make up the custody board.

(2) The custody board may involve also other suitable members.

Guardian

**Article 157.** The custody and guardianship authority at the place of permanent residence of the person shall appoint a guardian and a deputy guardian from among the persons under Article 156 who have given their consent in writing.

Impediments to Appointment
Article 158. Persons lacking legal competence, deprived of parental rights and convicted for felony shall not be eligible to become members of a custody board or guardians or deputy guardians.

Protective Measures

Article 159. (1) Pending the appointment of a custodian or a guardian, the custody and guardianship authority shall take protective measures with respect to the personality and property of the person to be placed under custody or guardianship. The custody and guardianship authority shall draw up a list of his or her property or have such a list drawn up. The authority may assign a specific person to serve as a temporary custodian or guardian.

(2) Where custody or guardianship is instated over a child, the custody and guardianship authority may ask the Social Welfare Directorate to take special protective measures.

Changes in Membership

Article 160. (1) The custody and guardianship authority may change the membership of the custody board, where the best interests of the person under the age of fourteen or the person placed under full legal interdiction warrant it. Members of the custody board may be changed at their own request as well.

(2) Paragraph 1 shall apply also to the guardian and deputy guardian.

(3) Prior to its ruling on the changes under paragraphs 1 and 2, the custody and guardianship authority shall take the opinion also of kin to the person placed under custody or guardianship, while the provisions of Article 155, paragraph 3 shall additionally apply to minors.

Appeal against the Actions of the Custody and Guardianship Authority

Article 161. The actions of the custody and guardianship authority, as well as the refusal to instate custody or guardianship or take the measures under Article 159 may be appealed by the parties concerned or by the public prosecutor before the district court. The Social Welfare Directorate shall have the same right with regard to children. The judgment of the district court shall be ruled on the merit of the case and shall not be subject to appeal.

Assistance

Article 162. The custody and guardianship authority shall assist the custodian and the guardian in the discharge of their duties. Where the person placed under custody or guardianship is a child, such assistance shall be provided also by the Social Welfare Directorate.

Place of Residence of the Person Placed under Guardianship

Article 163. (1) A person placed under custody shall live with the custodian, unless compelling reasons warrant that they live separately.
(2) Where a person placed under custody deviates or is deviated from his or her place of residence, the custodian may request the district court to return the person, having heard him or her. The court ruling may be subject to appeal before the regional court but the appeal shall not stay enforcement. The person shall be returned administratively.

(3) Article 126, paragraph 3 shall apply to the cases under paragraph 2 respectively.

Rights and Obligations of the Custodian

**Article 164.** (1) The activity of the custodian shall be honorary.

(2) The custodian of a child below the age of fourteen shall have also the obligations under Articles 125 and 129 and also those under Article 129 where the child is accommodated with a foster family.

(3) The guardian of a person placed under legal interdiction shall take care of this person, manage his or her property and represent him or her before third parties.

Management and Disposal of the Property of a Person Placed under Guardianship

**Article 165.** (1) The guardian shall manage the property of the person placed under guardianship with good care and in his or her best interests.

(2) The guardian shall notify the custody and guardianship authority, within a month, of the acquisition of property of material value after the instatement of custody, whereby this property shall be entered into the list under Article 159, paragraph 1.

(3) The custodian shall remit the cash of the person placed under custody to his or her name with a bank within seven days of receipt. The custodian shall pay the statutory interest rate for any delay of remittance.

(4) Article 130, paragraph 3 and paragraph 4, first sentence shall apply to the disposal of property of a person placed under custody. The custodian shall attach the opinion of the custody board to the petition.

Rights and Obligations of Advisors in the Custody Board

**Article 166.** (1) Advisors shall assist the custodian and deputy custodian in the discharge of their duties and notify the custody and guardianship authority of any disturbances in the upbringing and nurturing of the child under the age of fourteen or the protection of the rights and interests of the person placed under custody. They shall hear the report of the custodian and take part in its adoption by the custody and guardianship authority. Advisors may propose dismissal of the custodian and give opinion in the cases prescribed by law.

(2) The custody board shall give its opinion in writing on the adoption of the child placed under custody by the custodian in the cases under Article 82, paragraph 3.
Place of Residence of Persons Placed under Guardianship

**Article 167.** (1) A person placed under guardianship shall live with the guardian, accommodated elsewhere as prescribed by law. The guardian shall have the right under Article 163, paragraph 2.

(2) The deputy guardian shall give his or her opinion in cases of adoption of the person placed under guardianship by the guardian.

Rights and Obligations of the Guardian

**Article 168.** (1) The activity of the custodian shall be honorary.

(2) The provisions of Article 164 and Article 165, paragraphs 2 and 4 shall apply also to the guardian. The cash of the person placed under guardianship shall be remitted in his or her name with a bank.

Deputy Custodian and Deputy Guardian

**Article 169.** (1) The deputy custodian shall replace the custodian in cases the latter is prevented from discharging his or her duties or in cases of conflict of interest between the interests of the custodian and the interests of the person placed under custody. In such cases, the custody and guardianship authority may appoint a special representative.

(2) The deputy custodian may propose to the custody and guardianship authority to dismiss the custodian.

(3) Paragraphs 1 and 2 shall apply also to the deputy guardian.

Supervision of Custodians and Guardians

**Article 170.** (1) The custody and guardianship authority shall supervise the activities of the custodian. It may stop his or her actions and prescribe action to be taken, having taken the opinion of the custody board.

(2) Paragraph 1 shall apply also to the guardian.

Reports of Custodians and Guardians

**Article 171.** (1) The custodian shall report his or her activities to the custody board each year by the end of February and submit the report to the custody and guardianship authority. The custodian shall report also upon dismissal and at any time upon the request of the custody and guardianship authority.

(2) The guardian shall give explanations about his or her actions upon the request of the custody and guardianship authority in the presence of the deputy guardian.

(3) The custody and guardianship authority shall rule on the report of the custodian and the explanations of the guardian and, if irregularities are observed, demand the removal of such irregularities. Where the custody or guardianship is instated over a minor, the Social
Welfare Directorate shall give its opinion as well.

(4) The district court shall issue a writ of execution against the custodian for unreported amounts of money on the basis of a petition by the custody and guardianship authority.

(5) Where the custodian fails to appear or submit the report without any cogent reason, the custody and guardianship authority shall impose a fine ranging from BGN 50 to BGN 500. The authority shall seek the report from the deputy custodian.

(6) Where the guardian fails to appear or give explanations without any cogent reason, the custody and guardianship authority shall impose the fine under paragraph 5. The authority shall seek the explanations from the deputy custodian.

(7) The establishment of the misdemeanour and the issuance, appeal and execution of the penalty order shall follow the procedures prescribed in the Administrative Violations and Sanctions Act.

Transition from Custody to Guardianship

Article 172. (1) When the child becomes fourteen, custody shall be terminated and the custody and guardianship authority shall appoint a guardian and a deputy guardian. Pending their appointment, these functions shall be performed by the custodian.

(2) In cases of transition from full to limited legal interdiction, pending the appointment of a guardian, these functions shall be performed by the custodian.

Custody and Guardianship by Right

Article 173. (1) Custodian or guardian respectively of a child of unknown parentage shall be the head of the specialized institution in which the child is accommodated.

(2) Custodian of a spouse placed under full legal interdiction or guardian of a spouse placed under limited legal interdiction shall be the spouse with legal competence. If there is no such spouse, parental rights shall be exercised and parental obligations shall be discharged by his or her parents, unless they are unknown, deceased or deprived of parental rights.

(3) In the cases under paragraphs 1 and 2, no custody board or guardian and deputy guardian shall be appointed and no custody proceedings shall be opened.

(4) The custody and guardianship authority shall dismiss the custodian or guardian under paragraph 2, where the best interests of the person placed under legal interdiction warrant it. In these cases, a custody board or a guardian and a deputy guardian shall be appointed following the general rules.

Register

Article 174. (1) In cases of appointment of a custody board or a guardian and a deputy guardian and in the cases under Article 173, paragraph 2, the custodian and the guardian shall be entered into a register. The register shall be kept by the custody and guardianship authority at the place of permanent residence of the person placed under custody or guardianship.
(2) In the cases under Article 173, paragraph 2, the entry shall be made at the request of the spouse or the parents and after that the applicant shall be issued a certificate on his or her status of a custodian or guardian.

Chapter Twelve
ADMINISTRATIVE PENALTY PROVISIONS

Article 175. (1) Any official committing a violation or having a violation committed under Article 83 to 88 and Article 95 and the related secondary legislation shall be punished with a fine ranging from BGN 1,000 to BGN 2,000, unless the action constitutes an offence.

(2) Where the action is repeated, the fine shall range from BGN 2,500 to BGN 5,000.

Article 176. (1) Violation statements shall be drawn up by officials authorized by the Minister of Justice or the Minister of Labour and Social Policy respectively.

(2) Penalty orders shall be issued by the Minister of Justice or the Minister of Labour and Social Policy respectively or officials authorized by them.

(3) The establishment of violations and the issuance, appeal and execution of penalty orders shall follow the procedures prescribed in the Administrative Violations and Sanctions Act.

ADDITIONAL PROVISIONS

§ 1. "Marital home", within the meaning of this Code, shall be the home inhabited by both spouses and their minor children.

§ 2. "Repeated", within the meaning of this Code, shall be a violation committed within a year of the date of enforceability of the penalty order imposing a penalty on the perpetrator for the same type of violation.

TRANSITIONAL AND FINAL PROVISIONS


§ 4. (1) The rules of this Code with respect to spousal property relations shall apply also to properties acquired by spouses in marriage existing prior to its entry into force.

(2) Spouses in marriage existing prior to the entry of this Code into force may choose the regime of separation of property or conclude a matrimonial contract pursuant to the provisions of this Code.

§ 5. (1) Pending the establishment of the maximum amount of the adjudicated maintenance under Article 152, paragraph 1 in accordance with the annual State Budget Act
of the Republic of Bulgaria, the State shall pay the adjudicated maintenance at the expense of the defaulting debtor in the amount set out in the judgment but not more than BGN 80.

(2) Prior to the establishment of the maintenance under paragraph 1 in pending execution proceedings and files opened before the entry of this Code into force, the State shall pay maintenance in the adjudicated amounts but not more than BGN 80.

(3) The State shall terminate the payment of maintenance adjudicated pursuant to the provisions of Article 82, paragraph 2 and Article 83 of the repealed Family Code in the cases and files under paragraph 2 as from the first day of the month following the entry of this Code into force.

§ 6. (1) The national electronic information system under Article 83 and the register under Article 85 shall be established within a year of the entry of this Code into force.

(2) Pending the establishment of the register under Article 85, the prospective full adoptive parents shall be entered into the registers under Article 57b of the repealed Family Code.

§ 7. Within a month of the entry of this Code into force, the Civil Registration and Administrative Services General Directorate at the Ministry of Regional Development and Public Works shall provide the Recordation Office with free access to the data in the automatic information arrays of the Integrated Civil Registration and Administrative Services System at the nationwide level.

§ 8. (1) A parent whose child is accommodated at a specialised institution by court without any term specified in the judgment or whose child has stayed at the institution for more than a year shall ask for termination of the accommodation or change of the protective measure within three months of the entry of this Code into force with a view to the upbringing of the child in a family environment.

(2) The relevant Social Welfare Directorate shall notify the parent at his or her place of permanent residence for the undertaking of the measures under paragraph 1 within a month of the entry of this Code into force. Failing to find the parent at the place of permanent or current residence, a notice shall be exhibited visibly on the premises of the Directorate, specifying the deadline. The notice shall be delivered also pursuant to the provisions of the Code of Civil Procedure.

(3) The Social Welfare Directorate shall notify in writing the relevant Regional Social Welfare Directorate within seven days for entry of the child into the regional register at the location of the specialised institution in cases of non-performance under paragraph 1. Adoption shall proceed without the parent's consent.

§ 9. The Private International Law Code (Promulgated, SG No. 42/2005, amended, No. 59/2007) Article 84 shall be amended as follows:

1. Paragraph 3:

(a) the first sentence shall be amended as follows: "The consent of the Minister of Justice shall be required where the adopted child is habitually resident in the Republic of
Bulgaria, unless the adoptive parent is habitually resident in the Republic of Bulgaria; 

(b) in the second sentence, the words "from a foreign national to a person who is a Bulgarian citizen" shall be deleted.

2. In paragraph 4, the words "Bulgarian or foreign national" shall be deleted.

§ 10. In the Code of Civil Procedure (Promulgated, SG No. 59 of 2007; Amended, No. 50 of 2008, Judgment No. 3 of the Constitutional Court of 2008 - No. 63 of 2008, No. 69 of 2008, Nos. 12, 19 and 42 of 2009), Article 327, first sentence, the word "ascendants" shall be replaced by the word "parents".


1. Article 25:

(a) The existing text shall become paragraph 1;

(b) Paragraph 2 shall be inserted as follows:

"(2) The format of the personal registration card shall be approved through an order of the Minister of Regional Development and Public Works".

2. In Article 50, paragraph 1, first sentence, the words "within three days of reception of the copy" shall be inserted at the end.

3. Article 53:

(a) A new subparagraph 6 shall be inserted as follows:

"6. regime of property relations";
(b) The existing subparagraphs 6, 7, 8 and 9 shall be re-numbered into subparagraphs 7, 8, 9 and 10 respectively.


1. In Article 45, paragraph 13 shall be inserted as follows:

"(13) An official failing to perform an obligation under Article 27, paragraph 2 shall be punished with a fine ranging from BGN 1,000 to BGN 2,000 for a first violation and from BGN 1,500 to BGN 3,000 for a repeated violation, unless the official is subject to a more severe administrative punishment prescribed by a special law or the action constitutes an offence.".

2. In Article 46, paragraph 3, the words "and 13" shall be added after the words "paragraph 7" in the text before subparagraph 1.


1. Article 25, paragraph 4:

(a) a new second sentence shall be inserted: "The matrimonial contract in the cases under Article 39, paragraph 3 of the Family Code shall be submitted for recordation upon reception of the civil marriage certificate";

(b) the existing second sentence shall become the third sentence.

3. In Article 28a, paragraph 1, subparagraph 4, the words "as well as the matrimonial contracts under Article 39 of the Family Code" shall be inserted at the end.

§ 16. In the Control of Juvenile Anti-social Behaviour Act (Promulgated, Izv., No. 13 of 1958; Amended, No. 11 of 1961; SG, No. 35 of 1966, No. 30 of 1969, No. 89 of 1974, No. 53 of 1975; Emended, No. 55 of 1975; Amended, No. 63 of 1976, No. 36 of 1979, No. 75 of 1988, No. 110 of 1996; Emended, No. 3 of 1997; Amended, No. 69 of 1999, Nos. 66 and 96 of 2004, Nos. 28, 94 and 103 of 2005 and No. 25 of 2009), Article 15, subparagraph 7, the words "Articles 74 to 76" shall be replaced by the words "Articles 131, 132 and 134".
§ 17. In the Succession Act (Promulgated, SG, No. 22 of 1949; Emended, No. 41 of 1949; Amended, No. 275 of 1950, No. 41 of 1985, No. 60 of 1992, Nos. 21 and 104 of 1996, No. 117 of 1997, No. 96 of 1999, No. 34 of 2000 and No. 59 of 2007), Article 5, paragraph 3, the words "Article 62" shall be replaced by the words "Article 102".

§ 18. This Code shall enter into force on 1 October 2009.

This law was adopted by the 40th National Assembly on 12 June 2009 and the official seal of the National Assembly was affixed thereto.

Act to Amend and Supplement the Family Code

(SG No. 100/2010, effective 21.12.2010)

TRANSITIONAL AND FINAL PROVISIONS

§ 19. (Effective 1.10.2009 - SG No. 100/2010) Bulgarian citizens with habitual residence abroad who have been entered into the register under Article 57b, paragraph 1 of the repealed Family Code (Promulgated State Gazette, No. 41 of 1985; amended, SG No. 11 of 1992; emended, SG No. 15 of 1992; amended, SG Nos. 63 and 84 of 2003, No. 42 of 2005, No. 30 of 2006 and No. 59 of 2007; repealed, SG No. 47 of 2009) may take part in the adoption procedure under this Code without applying Article 84, paragraph 3 of the Private International Law Code pending the expiration of their permission for entry into the register. Adoptive parents who have not adopted a child before 1 October 2001 may apply for entry into the register under Article 113, paragraph 1, subparagraph 2 of this Code.

§ 20. (Effective 1.10.2009 - SG No. 100/2010) The permissions for entry into the register under Article 57b, paragraph 1 of the repealed Family Code of Bulgarian citizens with habitual residence abroad shall be valid until 1 October 2011 provided that the term of these permissions had not expired before 1 October 2009.

§ 21. (Effective 1.10.2009 - SG No. 100/2010) Any pending proceedings under Article 53e, paragraph 1 of the repealed Family Code shall be completed under the terms and conditions provided therein, whereby the child shall be entered into the register under Article 83, paragraph 2 of this Code after the effective date of the court decision under Article 53e, paragraph 4 of the repealed Family Code.

§ 22. The pending procedures for payment of maintenance adjudicated under Article 152 by the state started prior to the effective date of this Act shall be continued under the new terms and conditions.

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§ 24. This Act shall enter into force on the date of its promulgation in The State Gazette, except for § 19, 20 and 21 which shall enter into force as from 1 October 2009.
Part One
BASIC PROVISIONS

Chapter One
SCOPE OF CODE

Subject Matter

Article 1. (1) The provisions of this Code shall govern:

1. the international jurisdiction of the Bulgarian courts, of other authorities, and proceedings in international civil matters;

2. the law applicable to relationships at private law with an international element;

3. the recognition and enforcement of foreign judgments and other authentic instruments in the Republic of Bulgaria.

(2) Within the meaning given by this Code, "relationship at private law with an international element" shall be a relationship involving two or more States.

Closest Connection Principle

Article 2. (1) Relationships at private law with an international element shall be governed by the law of the State with which the said relationships are most closely connected. The provisions contained in the Code regarding the determination of the applicable law express this principle.

(2) If the applicable law cannot be determined on the basis of the provisions of Part Three herein, the law of the State with which the relationship has the closest connection by virtue of other criteria shall apply.

Relations with International Treaties, International Instruments and Other Laws

Article 3. (1) The provisions of this Code shall not affect the regulation of relationships at private law with an international element as established in an international treaty, in another international instrument in force for the Republic of Bulgaria, or in another law.
(2) Upon application of an international treaty or of another international instrument, regard shall be had to the international character of the provisions thereof, to the qualification established in the said provisions, and to the need to achieve uniformity in the interpretation and application of the said provisions.

Part Two
INTERNATIONAL JURISDICTION OF BULGARIAN COURTS AND OTHER AUTHORITIES.
PROCEEDINGS IN INTERNATIONAL CIVIL MATTERS

Chapter Two
JURISDICTION OF BULGARIAN COURTS AND OTHER AUTHORITIES

General Jurisdiction

Article 4. (1) The Bulgarian courts and other authorities shall have international jurisdiction where:

1. the defendant has a habitual residence, statutory seat or principal place of business in the Republic of Bulgaria;

2. the claimant or applicant is a Bulgarian national or is a legal person registered in the Republic of Bulgaria.

(2) Actions against a legal person, where the dispute has arisen out of direct relationships with a branch of the said person, may be brought before the Bulgarian courts if the branch is registered in the Republic of Bulgaria.

Jurisdiction in Matters Relating to Personal Rights

Article 5. Apart from pursuant to Article 4 herein, the Bulgarian court and other authorities shall furthermore have jurisdiction:

1. over matters relating to a change or protection of a name, where the person is a Bulgarian national or is habitually resident in the Republic of Bulgaria;

2. over matters relating to limitation or deprivation of Bulgarian nationals of the capacity to enter into legal relationships;

3. to establish and terminate guardianship or curatorship, where the person placed under guardianship or curatorship is a Bulgarian national or is habitually resident in the Republic of Bulgaria;
4. to declare the absence unheard from or death of a person who is a Bulgarian national or who has a known habitual residence in the Republic of Bulgaria.

Celebration of Marriage

Article 6. (1) Marriage in the Republic of Bulgaria shall be celebrated by a civil-status registrar if one of the future spouses is a Bulgarian national or is habitually resident in the Republic of Bulgaria.

(2) Marriage between foreign nationals may be celebrated in the Republic of Bulgaria by a consular official or a diplomatic agent of the State of origin of the said foreign nationals, if this is permissible under the law of the said State.

(3) Bulgarian nationals abroad may enter into marriage before a competent authority of the foreign State if this is permissible under the law of the said State.

(4) Marriage between Bulgarian nationals abroad may be celebrated by a Bulgarian consular official or diplomatic agent if this is permissible under the law of the receiving State.

(5) Marriage between a Bulgarian national and a foreign national may be celebrated abroad by a Bulgarian consular official or diplomatic agent if this is permissible under the law of the receiving State and the national law of the foreign national.

Jurisdiction in Matrimonial Matters

Article 7. Matrimonial matters shall be cognizable in the Bulgarian courts if one of the spouses is a Bulgarian national or is habitually resident in the Republic of Bulgaria.

Jurisdiction in Matters Relating to Interspousal Relationships

in Personam and in Rem

Article 8. Under the terms established by Article 7 herein, the Bulgarian courts shall furthermore have jurisdiction over matters relating to relationships in personam and in rem between spouses.

Jurisdiction in Matters Relating to Establishment of Parenthood

Article 9. (1) The Bulgarian courts and other authorities shall have jurisdiction over proceedings for establishment and contesting of parenthood except pursuant to Article 4 herein and where the child or the parent, who is a party, is a Bulgarian national or is habitually resident in the Republic of Bulgaria.

(2) Under the terms established by Paragraph (1), this jurisdiction shall furthermore apply to matters relating to relationships in personam and in rem between parents and children.

Jurisdiction in Matters Relating to Adoption

Article 10. (1) The Bulgarian courts and other authorities shall have jurisdiction over matters relating to admission of adoption, annulment or revocation of adoption, except in the cases
covered under Article 4 herein and where the adopter, the adoptee or one of the parents of the adoptee is a Bulgarian national or is habitually resident in the Republic of Bulgaria.

(2) The Bulgarian courts shall have jurisdiction over matters relating to relationships in rem between adopter and adoptee, where the adopter or adoptee is a Bulgarian national or is habitually resident in the Republic of Bulgaria, as well as in the cases covered under Article 4 herein.

Jurisdiction in Matters Relating to Maintenance

Article 11. The Bulgarian courts shall have jurisdiction over actions on maintenance save in the cases under Article 4 (1) herein and where the maintenance creditor is habitually resident in the Republic of Bulgaria.

Jurisdiction in Matters Relating to Rights in Rem

Article 12. (Amended, SG No. 59/2007) The matters under Article 109 of the Code of Civil Procedure relating to immovable property situated in the Republic of Bulgaria, the matters relating to enforcement or to security which such property constitutes, as well as the matters relating to transfer or establishment of rights in rem in such property, shall be exclusively cognizable in the Bulgarian courts and other authorities.

(2) The Bulgarian courts shall have jurisdiction over actions on rights in rem in movable property, save in the cases covered under Article 4 herein and where the property is situated in the Republic of Bulgaria.

Jurisdiction in Matters Relating to Intellectual Property Rights

Article 13. (1) The Bulgarian courts shall have jurisdiction over actions on copyrights and neighbouring rights, where protection is sought within the territory of the Republic of Bulgaria.

(2) The Bulgarian courts shall have exclusive jurisdiction over actions on items of industrial property, where the patent has been issued or the registration has been effected in the Republic of Bulgaria.

Jurisdiction in Matters Relating to Succession

Article 14. (Amended, SG No. 59/2007) The Bulgarian courts and other authorities shall have jurisdiction over actions under Article 110 of the Code of Civil Procedure and other proceedings relating to succession to the estates of deceased persons, where the deceased at the time of his or her death was habitually resident in the Republic of Bulgaria, or was then a Bulgarian national, as well as where part of the estate thereof is situated in the Republic of Bulgaria.

Jurisdiction in Matters Relating to Rights Arising out of Contractual Relationships

Article 15. The Bulgarian courts shall have jurisdiction over actions on contractual
relationships, save in the cases covered under Article 4 herein and where the place of performance of the obligation is within the Republic of Bulgaria or where the defendant has a principal place of business within the Republic of Bulgaria.

Jurisdiction in Matters Relating to Consumer Rights

**Article 16.** (1) The Bulgarian courts shall have jurisdiction over actions brought by a consumer save in the cases covered under Article 4 herein and where the said consumer is habitually resident in the Republic of Bulgaria and the conditions under Article 95 (2) herein are in place.

(2) An agreement on choice of court shall be admissible solely if entered into after the dispute has arisen.

Jurisdiction in Labour Disputes

**Article 17.** (1) Matters relating to labour disputes shall be cognizable in the Bulgarian courts, where the factory or office worker habitually carries out his or her work in the Republic of Bulgaria, as well as in the cases covered under Article 4 herein.

(2) An agreement on choice of court shall be admissible solely if entered into after the dispute has arisen.

Jurisdiction in Matters Relating to Tortious or Delictual Rights

**Article 18.** (1) The Bulgarian courts shall have jurisdiction over actions on damage sustained as a result of a tort or delict save in the cases covered under Article 4 herein and where the harmful act was committed in the Republic of Bulgaria or where the damage or part thereof occurred in the Republic of Bulgaria.

(2) The jurisdiction referred to in Paragraph (1) shall furthermore apply to direct actions taken by the party who has suffered the damage against the insurer of the person claimed to be liable.

Exclusive Jurisdiction in Matters Relating to the Legal Status of Legal Persons Registered in the Republic of Bulgaria

**Article 19.** (1) (Amended, SG No. 59/2007) The Bulgarian courts shall have exclusive jurisdiction over actions under Item 5 of Article 104 of the Code of Civil Procedure, where the legal person is registered in the Republic of Bulgaria.

(2) Paragraph (1) shall apply to actions which have as their object the nullity or the dissolution of a corporation or another legal person, or the revocation of acts of bodies thereof, protection of membership, as well as challenge of the transformation of a commercial corporation and pecuniary balancing upon transformation, where the corporation or the other legal person is registered in the Republic of Bulgaria.
Jurisdiction in Actions Brought against a Number of Defendants

**Article 20.** The Bulgarian courts shall have jurisdiction over actions brought against a number of defendants if the grounds for jurisdiction exist in respect of one of the said defendants.

Jurisdiction by Reason of Related Actions

**Article 21.** (1) Where the Bulgarian courts have jurisdiction over one of the actions brought by the claimant, the said courts shall furthermore have jurisdiction over the rest of the actions if the connection between the cases necessitates that they be heard and determined together.

(2) (Amended, SG No. 59/2007) Where the Bulgarian courts have international jurisdiction over the original claim, the said courts shall also have jurisdiction over the counter-claim under the terms established by Article 211 of the Code of Civil Procedure.

Exclusive Jurisdiction

**Article 22.** The international jurisdiction of the Bulgarian courts and other authorities shall be exclusive solely where so expressly provided for.

Submission of Action to Foreign Court

**Article 23.** (1) (Amended, SG No. 59/2007) Where an action is brought to assert a proprietary right and the dispute does not fall within the exclusive jurisdiction of the Bulgarian courts, any such action may be submitted to a foreign court by an agreement in writing between the parties. Where the Bulgarian court has been seised while such an agreement is in place, the defendant must raise his or her objection to the exercise of such jurisdiction within the time limit for response to the statement of action and before the court has taken a stand on the merits of the dispute. Sentence one shall not apply to actions on maintenance.

(2) Under the terms established by sentence one of Paragraph (1), a case cognizable in a foreign court may be submitted to the Bulgarian courts. This shall not apply to actions on maintenance.

(3) Save insofar as otherwise provided for by the agreement, it shall be presumed to confer on the Bulgarian or foreign courts exclusive jurisdiction over the dispute for the subject matter whereof the said agreement has been entered into.

Tacit Establishment of Jurisdiction by Bulgarian Court

**Article 24.** (Amended, SG No. 59/2007) Where the jurisdiction of the Bulgarian courts may be stipulated by an agreement under Article 23 (1) herein, the said jurisdiction may be established even without any such agreement if the defendant accepts the said jurisdiction expressly or tacitly through acts on the merits of the dispute within the time limit for response to the statement of action.

Jurisdiction upon Securing a Claim
Article 25. The Bulgarian courts shall furthermore have jurisdiction to secure a claim for the examination whereof they do not have international jurisdiction, if the subject matter of the conservatory attachment is situated in the Republic of Bulgaria and the judgment of the foreign court is entitled to recognition and enforcement in the Republic of Bulgaria.

Jurisdiction to Coerce Enforcement

Article 26. The Bulgarian enforcement authorities shall have exclusive jurisdiction to take action for coercive enforcement where the obligation which is the subject to such action must be performed by a person habitually resident in the Republic of Bulgaria or where the subject matter of this action is situated in the Republic of Bulgaria.

Jurisdiction upon Change of Circumstances

Article 27. (1) Where the grounds for international jurisdiction existed when the case was instituted, the said jurisdiction shall be retained even if the said grounds lapse while the proceedings are in progress.

(2) If the international jurisdiction did not exist when the case was instituted, the said jurisdiction shall be conferred if the grounds for it arise while the proceedings are in progress.

Verification Proprio Motu

Article 28. The court shall of its own motion verify international jurisdiction. The determination of the existence of absence of such jurisdiction shall be subject to intermediate and cassation appeal.

Chapter Three
PROCEEDINGS

Applicable Law

Article 29. The Bulgarian courts and other authorities shall hear and determine cases pursuant to Bulgarian law.

Rules of Evidence

Article 30. (1) The apportionment of the burden of proof shall be determined by the substantive law which governs the consequences of the fact requiring proof.

(2) (Amended, SG No. 59/2007) If the law applicable to the merits of the case admits testimony regarding the circumstances under Article 164 of the Code of Civil Procedure, this type of evidence shall be admissible if the fact materialized within the territory of the State whereof the law is applicable.

(3) The securing of evidence which is situated in the Republic of Bulgaria shall be effected by the Bulgarian courts even if they do not have jurisdiction over the case for the determination of which the said evidence is required. The opposite party shall be notified of the day of the securing, unless it brooks no delay.
Evaluation of Foreign Procedural Acts

**Article 31.** The Bulgarian courts and other authorities shall evaluate the validity of foreign procedural acts and authentic instruments in conformity with the law of the State where the said acts were performed or the said instruments issued.

Summoning and Service of Documents

**Article 32.** (1) The summoning, as well as the service of notices and documents abroad, shall be effected through the Bulgarian diplomatic agents or consular officials and the competent foreign authorities. The Bulgarian authorities shall approach the said agents, officers and authorities through the Ministry of Justice according to a procedure established by the Minister of Justice.

(2) Assistance from the Bulgarian diplomatic agents and consular officials shall be sought solely for acts in respect of Bulgarian nationals.

Legal Address

**Article 33.** (1) A party with a known address abroad shall be summoned at the said address, with the writ of summons indicating that the said party may name a legal address in the Republic of Bulgaria.

(2) The obligation referred to in Paragraph (1) shall furthermore apply to the legitimate representative, guardian and authorized representative of a person in the Republic of Bulgaria, should they leave the country.

(3) Upon non-performance of the obligation referred to in Paragraphs (1) and (2), the subsequent writs of summons shall be filed with the case records and shall be presumed served. The party shall be notified of these consequences upon the first summoning.

Summoning through Representative

**Article 34.** Where a party has a known address abroad, the said party may be summoned through a representative thereof in the Republic of Bulgaria, if the said representative has concluded on behalf of the said party the transaction in connection with which the proceedings have been instituted.

Summoning through Publication

**Article 35.** (1) Where a party has a known address abroad and an attempt at summoning at the said address has failed, the said party shall be summoned by means of a publication in the Unofficial Section of the State Gazette, effected at least one month prior to the date of the hearing.

(2) If, notwithstanding the publication, the party does not appear at the hearing, the court shall appoint a representative of the said party.

Judicial Cooperation
Article 36. (1) The Bulgarian authorities shall be obliged to render judicial cooperation at the request of the foreign authorities, except where compliance with any such request is contrary to Bulgarian public policy.

(2) The requested cooperation shall be provided in accordance with Bulgarian law. At the request of the foreign authority, the said cooperation may be provided in accordance with the foreign law provided this is compatible with Bulgarian law.

(3) Where the Bulgarian authorities seek judicial cooperation abroad, the said authorities may request that the act be performed pursuant to Bulgarian law.

Decline of Jurisdiction over Lawsuit Pending Elsewhere (Lis Pendens)

Article 37. The Bulgarian court shall of its own motion stay any proceedings brought before it if other proceedings based on the same facts, involving the same cause of action and between the same parties, were brought earlier before a foreign court and the latter proceedings are expected to be concluded within a reasonable time by a final judgment which is entitled to recognition and enforcement in the Republic of Bulgaria.

Jurisdiction over Pre-conditioning Legal Relationship

Article 38. (1) The Bulgarian court shall take a stand on legal relationships on which the outcome of the dispute depends, even where it does not have jurisdiction over the cases for such relationships.

(2) Where a lawsuit is pending abroad on the pre-conditioning legal relationship, the Bulgarian court may stay the proceedings brought before it if there is reason to expect that the foreign judgment will be recognized in the Republic of Bulgaria.

Part Three
APPLICABLE LAW

Chapter Four
COMMON PROVISIONS

Qualification

Article 39. (1) Where determination of the applicable law depends on the qualification of the essential elements or of the relationships, the said qualification shall be performed according to Bulgarian law.

(2) Where a specific legal institution or legal concept are unknown to Bulgarian law and cannot be defined through interpretation pursuant to Bulgarian law, the foreign law which governs the said institution or concept must be taken into consideration for the qualification thereof.
(3) Upon performance of qualification, account must be taken of the international element in the relationships which are being settled and of the specifics of private international law.

Referral

**Article 40.** (1) Within the meaning given by this Code, the "law of a State" shall denote the legal standards of the said State, including the conflict of laws rules thereof, save as otherwise provided for in this Code or in another statute.

(2) Remission to Bulgarian law and transmission to the law of a third State shall be inadmissible regarding:

1. the legal status of legal persons and of bodies unincorporate;

2. the formal requirements for legal transactions;

3. the choice of applicable law;

4. maintenance;

5. contractual relationships;

6. non-contractual relationships.

(3) In the cases covered under Paragraph (1), where referral is admitted, Bulgarian substantive law or, respectively, the substantive law of the third State, shall apply.

Applicable Law of State with Several Legal Systems

**Article 41.** (1) Where the State whereof the law has been determined as applicable by this Code has several territorial units with separate legal systems, the law of that State shall determine which of the said systems shall apply.

(2) Where a State has several territorial units each having its own legal regulation of contractual and non-contractual relationships, each territorial unit shall be treated as a separate State upon determination of the applicable law under Chapters Ten and Eleven herein.

(3) Where the State whereof the law has been determined as applicable by this Code comprises several legal systems applicable to different categories of persons, the law of that State shall determine which of the said systems shall apply.

(4) Where the law of the State referred to in Paragraphs (1) and (3) does not lay down criteria for determination of the applicable legal system, the legal system with which the relationship has the closest connection shall apply.

Change of Determination Criterion

**Article 42.** No subsequent change of circumstances on the basis of which the applicable law
has been determined shall be retroactive.

Establishment of Content of Foreign Law

Article 43. (1) The court or another authority applying the law shall of its own motion establish the content of the foreign law. The said court may resort to the methods provided for in international treaties, may request information from the Ministry of Justice or from another body, as well as request opinions from experts and specialized institutions.

(2) The parties may present documents establishing the content of the provisions of foreign law on which they base their motions or objections, or otherwise assist the court or another authority applying the law.

(3) Upon choice of applicable law, the court or another authority applying the law may order the parties to assist in the establishment of the content of the said law.

Interpretation and Application of Foreign Law

Article 44. (1) The foreign law shall be interpreted and applied as it is interpreted and applied in the State which created the said law.

(2) Non-application of a foreign law, as well as its misinterpretation and misapplication, shall be a ground for appeal.

Public Policy

Article 45. (1) A provision of a foreign law determined as applicable by this Code shall not apply only if the consequences of such application are manifestly incompatible with Bulgarian public policy.

(2) Incompatibility shall be evaluated while taking account of the extent of connection of the relationship with Bulgarian public policy and the significance of the consequences of application of the foreign law.

(3) Where an incompatibility referred to in Paragraph (2) is established, another appropriate provision of the same foreign law shall be applied. In the absence of such a provision, a provision of Bulgarian law shall apply, if necessary for settlement of the relationship.

Special Mandatory Rules

Article 46. (1) The provisions of this Code shall not affect the application of the mandatory rules of Bulgarian law which, considering their subject matter and purpose, must be applied notwithstanding the referral to a foreign law.

(2) The court may have regard to the mandatory rules of another State with which the relationship has a close connection if the said rules, according to the law of the State that created them, must be applied notwithstanding what law has been determined as applicable by a conflict of laws rule of this Code. To decide whether to have regard of such special mandatory rules, the court must have regard to the nature of the said rules and the subject matter thereof, as well as to the consequences of the application or non-application thereof.
Reciprocity

**Article 47.** (1) The application of a foreign law shall be independent of any requirement of reciprocity.

(2) In case a statutory instrument requires reciprocity, the existence of such reciprocity shall be presumed until the contrary is established.

**Chapter Five**

**LEGAL STATUS OF SUBJECTS**

**Section I**

Legal Status of Natural Persons

Common Provisions

**Article 48.** (1) Within the meaning given by this Code, the national law of a person (lex patriae) shall be the law of the State of the nationality of the said person.

(2) The national law of a person holding dual or multiple nationality, of which one is Bulgarian nationality, shall be Bulgarian law.

(3) The national law of a person who is a national of two or more foreign States shall be the law of the State of habitual residence of the said person. Where the person does not have a habitual residence in any State whereof the said person is a national, the law of the State with which the said person has the closest connection shall apply.

(4) Within the meaning given by this Code, the national law of a stateless person shall be the law of the State of habitual residence of the said person.

(5) Within the meaning given by this Code, the national law of a person with a recognized refugee status and of an asylee shall be the law of the State of habitual residence of the said person.

(6) Where in the cases referred to in Paragraphs (3), (4) and (5) the person does not have a habitual residence or such cannot be established, the law of the State with which the said person has the closest connection shall apply.

(7) Within the meaning given by this Code, "habitual residence of a natural person" shall denote the place where the said person has settled predominantly to live without this being related to a need of registration or authorization of residence or settlement. For determination of this place, special regard must be had to circumstances of personal or professional nature arising from sustained connections of the person with the said place or from the intention of the said person to establish such connections.

Capacity to Have Rights and Duties
Article 49. (1) The capacity of a person to have rights and duties shall be governed by the national law thereof.

(2) Foreign nationals and stateless persons shall have in the Republic of Bulgaria the same rights as Bulgarian nationals, save as otherwise provided for by statute.

Capacity to Enter into Legal Relationships

Article 50. (1) The capacity of a person to enter into legal relationships shall be governed by the national law thereof. Where the law applicable to a specific relationship establishes special conditions regarding the capacity to have rights and duties, the said law shall apply.

(2) Where the contract is entered into between persons who are present within the territory of the same State, the person who is capable of having rights and duties under the law of that State may not invoke the incapacity thereof under the law of another State, except where the opposite party was aware of the said incapacity or was unaware of the said incapacity through negligence at the time of conclusion of the contract.

(3) The provision of Paragraph (2) shall not apply to any transactions in family and succession relationships, as well as to any transactions regarding rights in rem in immovable property situated in a State other than the State of the place of conclusion of the transaction.

Acquired Capacity to Have Rights and Duties and to Enter into Legal Relationships

Article 51. The capacity to have rights and duties and to enter into legal relationships, which is acquired pursuant to national law, shall not be affected by a change of nationality.

Capacity to Carry Out Activities of Commercial Nature

Article 52. The capacity of a person to carry out activities of a commercial nature without incorporation of a legal person shall be determined by the law of the State where the person is registered as a merchant. Where registration is not required, the law of the State where the person has a principal place of business shall apply.

Name

Article 53. (1) The name of a person and the change of the said name shall be governed by the national law of the person.

(2) The effect of the change of nationality on the name shall be determined by the law of the State whose nationality the person has acquired. Where any such person is stateless, the effect of the change of his or her habitual residence on the name shall be determined by the law of the State in which the said person establishes his or her new habitual residence.

(3) The protection of the name shall be governed by the law which is applicable according to the provisions of Chapter Eleven herein.

(4) The name and the change thereof may be governed by Bulgarian law, should this be
requested by a person who is habitually resident in the Republic of Bulgaria.

Limitation and Deprivation of Capacity to Enter into Legal Relationships

**Article 54.** (1) The terms and consequences of limitation or deprivation of the capacity of a person to enter into legal relationships shall be governed by the national law of the said person. Where a person is habitually resident within the territory of the Republic of Bulgaria, the court may apply Bulgarian law.

(2) The law applied according to Paragraph (1) shall furthermore govern the terms for revocation of the limitation or deprivation of the capacity to enter into legal relationships.

Declaration of Absence Unheard from and Death

**Article 55.** (1) The terms and consequences of declaration of an absence unheard from and of death shall be governed by the law of State whose nationality the person held when last heard from. Where any such person is stateless, the terms and consequences of declaration of an absence unheard from and of death shall be governed by the law of State where the said person was last habitually resident.

(2) The provisional measures for conservation of the property of a person situated within the territory of the Republic of Bulgaria shall be governed by Bulgarian law.

(3) Any person, who was habitually resident in the Republic of Bulgaria, may be declared absent unheard from or dead under Bulgarian law, should this be requested by a justifiably interested party.

**Section II**

**Legal Status of Legal Persons, Unincorporated Entities and the State**

Legal Persons

**Article 56.** (1) Legal persons shall be governed by the law of the State where the said persons are registered.

(2) Where no registration is required for incorporation of the legal person, or where the legal person is registered in several States, the applicable law shall be the law of the State in which the statutory seat thereof is situated.

(3) If in the cases under Paragraph (2) the situs of the statutory seat is different from the situs of the actual place of management of the legal person, the law of the State where the actual place of management thereof is situated shall apply.

(4) The branch of a legal person shall be governed by the law of the State in which the said branch is registered.
Bodies Unincorporate

**Article 57.** Associations or organizations which are not legal persons shall be governed by the law of the State in which the said entities are registered or instituted.

Scope of Applicable Law

**Article 58.** The law applicable to the persons covered under Articles 56 and 57 herein shall govern:

1. the establishment, the legal nature, and the form of legal organization thereof;
2. the name or the corporate designation;
3. the legal personality and the system of management;
4. the composition, competence and functioning of the bodies;
5. the representation;
6. the acquisition and loss of membership, as well as the rights and duties thereto incidental;
7. the liability for obligations;
8. the consequences of violations of the law or of the basic instrument;
9. the transformation and dissolution.

Transfer of Central Administration and Transformation

**Article 59.** The transfer of the central administration to another State and the transformation of legal persons with central administration in different States shall take effect solely if carried out in accordance with the law of the said States.

Participation of State in Relationships at Private Law with International Element

**Article 60.** The provisions of this Code shall furthermore apply to the relationships at private law with an international element, whereto a State is a party, save as where otherwise established by statute.

**Chapter Six**

**LEGAL TRANSACTIONS, AGENCY AND EXTINCTIVE PRESCRIPTION**

Formal Requirements for Legal Transactions

**Article 61.** The formal requirements for legal transactions shall be governed by the law
applicable to the transaction. Compliance with the formal requirements as established by the law of the State where performance of the transaction is to be made shall, however, suffice.

Relationships between Principal and Third Party in Voluntary Agency

Article 62. (1) In the relationships between the principal and the third party, the existence and the extent of the authority of the agent, as well as the effects of the agent's actual or purported exercise of the authority thereof, shall be governed by the law of the State in which the agent had his or her principal place of business at the time of performance of the relevant acts.

(2) Notwithstanding the provision of Paragraph (1), the law of the State in which the agent has acted shall apply if:

1. the principal place of business of the principal or the habitual residence thereof is situated in that State, and the agent has acted in the name of the principal, or

2. the principal place of business of the third party or the habitual residence thereof is situated in that State, or

3. the agent has acted at an exchange or auction, or

4. the agent has no principal place of business.

(3) The agent or the third party may choose in writing the law governing the matters covered under paragraph (1). The choice of applicable law must be expressly accepted by the other party and must not prejudice the interests of the agent.

Extinctive Prescription

Article 63. The law governing the relevant relationship shall apply to extinctive prescription.

Chapter Seven

RIGHTS IN REM AND INTELLECTUAL PROPERTY RIGHTS

Section I

Rights in Rem

Common Provisions

Article 64. (1) Possession, ownership and other rights in rem in movable and immovable property shall be governed by the law of the State in which the property is situated (lex loci rei sitae).

(2) The evaluation as to whether a corporeal object is movable or immovable, as well as the
Acquisition and Termination of Rights in Rem

**Article 65.** (1) The acquisition and termination of proprietary and possessory rights shall be governed by the law of the State in which the corporeal object is situated during performance of the act or occurrence of the circumstance justifying the acquisition or termination.

(2) The acquisition of ownership and other rights in rem on the grounds of acquisitive prescription shall be governed by the law of the State in which the corporeal object was situated at the time of lapse of the period of acquisitive prescription. The time of possession in another State shall be assimilated to the said period.

Acquired Rights

**Article 66.** Upon change of the place in which the corporeal object is situated, the rights acquired pursuant to the law of the State in which the corporeal object was situated may not be exercised to the prejudice of the law of the State in which the said object is newly situated.

Corporeal Objects in Transit

**Article 67.** (1) The acquisition and termination of rights in rem in corporeal objects in transit shall be governed by the law of the State of destination of the said objects.

(2) The rights in rem in corporeal objects for personal use carried by a passenger shall be governed by the law of the State where the passenger is habitually resident.

Means of Transport

**Article 68.** The acquisition, transfer and termination of rights in rem in means of transport shall be governed by:

1. the law of the flag of the ship;

2. the law of the State where the aircraft is registered;

3. the law of the State where the person operating the railway rolling stock and land motor vehicles has its place of business.

Recording

**Article 69.** The recording of legal transactions for the acquisition, transfer and extinguishment of rights in rem shall be governed by the law of the State in which the corporeal object was situated at the time of performance of the transaction.

Cultural Property

**Article 70.** Where a given corporeal object belonging to the cultural heritage of a specific State has been wrongfully removed from the territory of the said State, the request of the said State for return of the said object shall be governed by the law of the said State, except where
the said State has opted for application of the law of the State in which the object is situated at the time of making the request for return.

Section II

Intellectual Property Rights

Common Provisions

Article 71. (1) The arising, content, transfer and termination of copyright and of rights neighbouring on copyright shall be governed by the law of the State for which the protection of the said rights is sought (lex loci protectionis).

(2) The arising, content, transfer and termination of industrial property rights shall be governed by the law of the State in which the patent has been issued or the registration has been effected or, respectively, in which an application for a patent or for registration has been filed.

Rights in Intellectual Property Items Prepared within the Scope of Employment

Article 72. The law governing the contract of employment shall furthermore apply to the relationships between the employer and the author, the holder of intellectual property rights in respect of intellectual property items prepared within the scope of employment.

Law Applicable to Agreements

Article 73. The agreements transferring rights or granting consent to the use of intellectual property rights shall be governed by the law applicable according to Chapter Ten herein.

Section III

Scope of Law Applicable to Rights in Rem and to Intellectual Property Rights

Scope of Applicable Law

Article 74. The applicable law, determined according to the provisions of Sections I and II of this Chapter, shall govern:

1. the existence, type, content and scope of the rights;

2. the holders of the rights;

3. the transferability of the rights;

4. the methods of creation, modification, transfer and extinguishment of the rights;
5. the need of recording and the enforceability of the rights against third parties.

Chapter Eight
FAMILY RELATIONSHIPS

Formal Requirements for Marriage

Article 75. (1) The formal requirements for marriages shall be governed by the law of the State of celebration.

(2) The formal requirements for marriages celebrated by a duly empowered diplomatic agent or consular official shall be governed by the law of the sending State.

(3) The validity of a marriage celebrated abroad shall be recognized in the Republic of Bulgaria if the formal requirements established in the law applicable under Paragraphs (1) and (2) have been satisfied.

Substantive Requirements for Entry into Marriage

Article 76. (1) (Amended, SG No. 100/2010, effective 21.12.2010) The substantive requirements for entry into marriage shall be governed for each of the future spouses by the law of the State of which the person was a national at the time of celebration of the marriage. In respect of a Bulgarian national who enters into marriage abroad, the authorization referred to in Article 6 (2) of the Family Code may be granted by the Bulgarian diplomatic agent or consular official.

(2) Where one of the future spouses is a Bulgarian national or is habitually resident in the Republic of Bulgaria, the marriage shall be celebrated by a Bulgarian civil-status registrar and if the applicable foreign internal law establishes any impediment to the entry into marriage which, under Bulgarian law, is incompatible with the freedom to enter into marriage, the said impediment shall be disregarded.

Establishment of Absence of Impediments

Article 77. A foreign national or a stateless person must certify to the Bulgarian civil-status registrar that:

1. the national law of the said person recognizes the validity of a marriage celebrated by a foreign competent authority;

2. there are no impediments to entry into the said marriage under the national law of the said person.

Marriage Annulment

Article 78. Marriage annulment shall be governed by the law which was applicable to the substantive requirements for entry into the marriage.
Interspousal Relationships in Personam and in Rem

**Article 79.** (1) The relationships in personam between spouses shall be governed by the common national law thereof.

(2) The relationships in personam between spouses holding different nationalities shall be governed by the law of the State in which they have a common habitual residence or, in the absence of such habitual residence, by the law of the State with which both spouses are most closely connected.

(3) The relationships in rem between spouses shall be governed by the law applicable to the relationships in personam therebetween.

(4) Spouses may select an applicable law to govern the relationships in rem therebetween if this is admissible under the law determined in Paragraphs (1) and (2).

**Agreement on Choice of Applicable Law**

**Article 80.** (1) The choice of applicable law under Article 79 (4) herein must be evidenced in writing, dated and signed by the spouses.

(2) The entry into and the validity of the agreement on choice shall be governed by the selected law.

(3) The choice may be made before or after entry into the marriage. The spouses may change or revoke the choice of applicable law. Where the choice has been made after entry into the marriage, the said choice shall take effect as from the time of entry into the marriage unless otherwise agreed between the parties.

**Enforceability of Choice of Applicable Law**

**Article 81.** If the relationships in rem between spouses are governed by a selected foreign law, they shall be enforceable against third parties solely if the said parties were aware of the application of the said law or were unaware through negligence. Enforceability shall apply to rights in rem in immovable property solely if the requirements for recording, established by the law of the State in which the property is situated, have been satisfied.

**Divorce**

**Article 82.** (1) A divorce between spouses possessing the same foreign nationality shall be governed by the law of the State whose nationals the said spouses were upon submission of the application for divorce.

(2) A divorce between spouses possessing different nationalities shall be governed by the law of the State in which the said spouses have a common habitual residence at the time of submission of the application for divorce. Where the spouses have no common habitual residence, Bulgarian law shall apply.

(3) If the applicable foreign law does not admit the divorce and at the time of submission of the application for divorce one of the spouses was a Bulgarian national or was habitually
Establishment of Parenthood

Article 83. (1) Establishment of parenthood shall be governed by the law of the State whose nationality the child acquired at the time of birth.

(2) Notwithstanding the application of Paragraph (1), the following law may be applied should this be more favourable to the child:

1. the law of the State of which the child is a national or in which the child is habitually resident at the time of establishment of parenthood, or

2. the law applicable to the relationships in personam between the parents at the time of birth.

(3) Referral to the law of a third State shall be admissible where the said law admits establishment of the parenthood of the child.

(4) Affiliation shall be effective if it conforms to the national law of the affiliator or to the national law of the child at the time of affiliation, or by the law of the State in which the child has a habitual residence at the time of affiliation.

(5) The formal requirements for affiliation shall be governed by the law of the State were the affiliation has been effected, or by the law applicable according to Paragraph (4).

Adoption

Article 84. (1) The conditions for adoption shall be governed by the law of the State of which the adopter (or adopters) and the adoptee are nationals at the time of submission of the application for adoption.

(2) Should the said persons hold different nationalities, the national law of each of the persons shall apply.

(3) (Amended, SG No. 47/2009, effective 1.10.2009) The consent of the Minister of Justice shall be required where the adopted child is habitually resident in the Republic of Bulgaria, unless the adoptive parent is habitually resident in the Republic of Bulgaria. The terms and procedure for the grant of consent to adoption shall be established by an ordinance of the Minister of Justice.

(4) (Amended, SG No. 47/2009, effective 1.10.2009) Where the adoptee is a Bulgarian national, the adopter, whether habitually resident in another State, must satisfy the conditions for adoption under the law of that State as well.

(5) The effect of adoption shall be governed by the common national law of adopter and adoptee. If adopter and adoptee hold different nationalities, the law of the State in which they have a common habitual residence shall apply.

(6) Annulment of adoption shall be governed by the law which was applicable to the conditions for the adoption according to Paragraphs (1), (2) and (4).
(7) The grounds for revocation of adoption, apart from annulment under Paragraph (6), shall be governed by the law applicable to the act of adoption according to Paragraph (5).

(8) Upon revocation of adoption, regard must be had to the best interests of the adoptee who has not attained full legal age.

Relationships between Parents and Children

**Article 85.** (1) The relationships between parents and children shall be governed by the law of the State in which they have a common habitual residence.

(2) If parents and child have no common habitual residence, the relationships therebetween shall be governed by the law of the State in which the child has a habitual residence or by the national law thereof, should this be more favourable to the child.

Guardianship and Curatorship

**Article 86.** (1) The institution and termination of guardianship and curatorship shall be governed by the law of the State in which the person who is placed under guardianship or curatorship has a habitual residence.

(2) The relationships between the person placed under guardianship or curatorship and the guardian or curator shall be governed by the law which applied according to Paragraph (1).

(3) The obligation to accept guardianship or curatorship shall be governed by the national law of the person designated as guardian or curator.

(4) Provisional or urgent protection measures may be taken under Bulgarian law where the person or any movable or immovable property thereof is situated within the territory of the Republic of Bulgaria.

Maintenance

**Article 87.** (1) Maintenance obligations shall be governed by the law of the State in which the maintenance creditor has a habitual residence, save as where the national law thereof is more favourable to the said creditor. In such case, the national law of the maintenance creditor shall apply.

(2) Where the maintenance creditor and the maintenance debtor are nationals of the same State and the maintenance debtor is habitually resident in that State, the common national law of the two persons shall apply.

(3) Where the law applicable under Paragraphs (1) and (2) does not admit the award of maintenance, Bulgarian law shall apply.

(4) Where maintenance obligations between former spouses arise by reason of annulment of a marriage or by reason of divorce, the applicable law shall be the law which applied according to Article 78 or Article 82 herein, as the case may be.
Scope of Law Applicable to Maintenance

**Article 88.** (1) The law applicable to maintenance shall determine:

1. whether maintenance may be claimed, to what amount and by whom;
2. who can claim maintenance and within what time limits;
3. whether and under what terms the maintenance may be modified;
4. the grounds for extinguishment of the right to maintenance;
5. the obligation of the maintenance debtor to reimburse the authority which paid the maintenance instead of the said debtor.

(2) Upon determination of the amount of maintenance, account must be taken of the financial capabilities of the maintenance debtor and of the actual needs of the maintenance creditor, even where the applicable foreign law provides for otherwise.

**Chapter Nine**

**SUCCESSION RELATIONSHIPS**

Succession by Operation of Law

**Article 89.** (1) Succession to movable property shall be governed by the law of the State in which the antecessor had a habitual residence upon death.

(2) Succession to immovable property shall be governed by the law of the State in which the said property is situated.

(3) The antecessor may designate the law of the State of which the said antecessor was a national at the time of the designation to govern the succession to the whole of the estate thereof.

(4) The conditions for material validity of the act of designation of applicable law and the revocation of the said designation shall be governed by the law designated. The designation of applicable law and the revocation of the said designation must be expressed in a statement made in accordance with the formal requirements for testamentary dispositions.

(5) The choice of applicable law must not affect the reserved share of the heirs determined under the law applicable according to Paragraphs (1) and (2).

Testamentary Succession

**Article 90.** (1) The capacity of a person to dispose of the property thereof by means of a will (making and revocation) shall be governed by the law applicable according to Article 89 herein.

(2) A will shall be formally valid if it conforms to the law of the State:
1. in which it was made, or
2. of which the testator was a national at the time of making the will or upon death, or
3. in which the testator was habitually resident at the time of making the will or upon death, or
4. in which the immovable property subject to the will is situated.

(3) Paragraph (2) shall furthermore apply to the form of revocation of the testamentary disposition.

Scope of Applicable Law

**Article 91.** The law applicable to succession shall govern:
1. the time and place of opening of the succession;
2. the range and precedence of the heirs, devisees and legatees;
3. the respective shares of the heirs, devisees and legatees;
4. the capacity to inherit;
5. the assumption of the obligations of the deceased and the apportionment of the said obligations among the heirs, devisees and legatees;
6. the acceptance and renunciation of succession;
7. the time limits for acceptance of the succession;
8. the disposable part of the estate;
9. the conditions for material validity of the will.

Vacant Succession

**Article 92.** Where under the law applicable there is no heir, devisee or legatee under a disposition of property upon death and no natural person is an heir by operation of law, the assets of the estate situated within the territory of the Republic of Bulgaria shall be appropriated by the Bulgarian State or by the municipality.

**Chapter Ten**

**CONTRACTUAL RELATIONSHIPS**

Choice of Applicable Law

**Article 93.** (1) Contracts shall be governed by the law chosen by the parties. Any such choice
must be expressed or clearly demonstrated by the terms of the contract or by the circumstances whereunder the contractual relationship evolves.

(2) Unless otherwise agreed, the parties shall be presumed to have accepted as applicable the usage of which the parties are or ought to have been aware and which is widely known in international trade or commerce, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce involved.

(3) By their choice, the parties can select a law applicable to the whole or a part only of the contract.

(4) The parties may at any time agree to subject the contract in whole or in part to a law other than that which previously governed the said contract. Any variation by the parties of the law to be applied, made after the conclusion of the contract, shall not prejudice the formal validity of the contract according to Article 98 herein or adversely affect the rights of third parties.

(5) Where all the elements of a contract at the time of choice are connected with one State only, the choice of a foreign law must not prejudice the application of the mandatory rules of the said State which cannot be derogated from by contract.

(6) The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 97 and 98 herein.

Applicable Law in the Absence of Choice

Article 94. (1) To the extent that the parties have not chosen an applicable law, the law of the State with which the contract is most closely connected shall apply. If any part of the contract can be separated from the other clauses thereof and should the said part have a closer relation to another State, the law of the latter may apply as an exception.

(2) It shall be presumed that the contract is most closely connected with the State in which the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his or her habitual residence or central administration.

(3) If the contract is entered into in the course of the trade or profession of the party referred to in Paragraph (2), it shall be presumed that the contract is most closely connected with the State within whose territory the main place of business is situated. If the place where the performance is effected differs from the main place of business of the party, it shall be presumed that the contract is most closely connected with the State within whose territory, as of the moment of the contract conclusion, the place of business wherethrough the performance is to be effected is situated.

(4) The provisions of Paragraphs (2) and (3) shall not apply if the performance which is characteristic of the contract cannot be determined.

(5) Where the subject matter of the contract is a right in immovable property, it shall be presumed that the contract is most closely connected with the State in which the said immovable property is situated.
(6) The provisions of Paragraphs (2) and (3) shall not apply to a contract for the carriage of goods. It shall be presumed that a contract for the carriage of goods is most closely connected with the State within whose territory the principal place of business of the carrier is situated at the time of conclusion of the contract, subject to the condition that:

1. the place of loading, or
2. the place of discharge, or
3. the principal place of business of the consignor

is also situated in that State.

(7) The provision of Paragraph (6) shall furthermore apply to single voyage charter parties or to other contracts whereof the main purpose is the carriage of goods.

(8) The provisions of Paragraphs (2), (3), (5), (6) and (7) shall not apply if it appears from the circumstances as a whole that the contract is more closely connected with another State. In such case, the law of that other State shall apply.

Law Applicable to Consumer Contracts

Article 95. (1) Within the meaning given by this Code, "consumer contract" shall be a contract under which one of the parties is a person who acquires goods, uses services, or is granted credit for the needs thereof or for the needs of the family thereof rather than for sale, production or practice of a trade.

(2) A consumer contract shall be governed by a law chosen by the parties. A choice of applicable law must not deprive the consumer of the protection afforded thereto by the mandatory rules of the State in which the said consumer is habitually resident where:

1. the conclusion of the contract in that State was preceded by a specific invitation addressed to the consumer or by advertising, and the consumer had taken in that State all the steps required for the conclusion of the contract, or
2. the other party or an agent of the said party received the consumer's order in that State, or
3. the contract is for the sale of goods and, for the purpose of inducing the consumer to buy goods, the seller arranged the consumer's journey to another State where the consumer gave his or her order.

(3) Where the parties have not chosen an applicable law, the contracts entered into in the circumstances described in Paragraph (2) shall be governed by the law of the State in which the consumer is habitually resident.

(4) The provisions of Paragraphs (2) and (3) shall not apply to contracts of carriage and to contracts for the supply of services where the services are to be supplied to the consumer exclusively in a State other than that in which the consumer is habitually resident. Any such contracts shall be governed according to Articles 93 and 94 herein.
(5) The contracts which, for an inclusive price, provide for a combination of travel and accommodation, shall be governed by the law determined as applicable under Paragraphs (2) and (3).

Law Applicable to Individual Employment Contracts

**Article 96.** (1) An employment contract shall be governed by the law chosen by the parties. A choice of applicable law must not deprive the factory or office worker of the protection afforded thereto by the mandatory rules of the law which would be applicable in the absence of choice of applicable law.

(2) In the absence of choice of applicable law, a contract of employment shall be governed by the law of the State in which the factory or office worker habitually carries out his or her work, even if he or she is temporarily employed in another State.

(3) Where the factory or office worker does not habitually carry out his or her work in any one State, the law of the State in which the employer is habitually resident or in which the employer's principal place of business is situated shall apply.

(4) If, in the cases covered under Paragraphs (2) and (3), it appears from the circumstances as a whole that the contract is more closely connected with another State, the law of that other State shall apply.

Conclusion and Material Validity of Contracts

**Article 97.** (1) The conclusion and material validity of a contract, or of any separate provision of a contract, shall be governed by the law of the State which, according to this Chapter, would be applicable if the contract or provision were valid.

(2) To establish that he or she did not consent, each party may invoke the law of the State in which the said party is habitually resident if it appears from the circumstances that it would not be reasonable to determine the effect of his or her conduct in accordance with the law specified in Paragraph (1).

Formal Requirements for Contracts

**Article 98.** (1) A contract shall be formally valid if it satisfies the formal requirements established by the law applicable to the contract according to the provisions of this Chapter or by the law of the State in which the contract is concluded.

(2) A contract concluded at a time when the parties are present in different States shall be formally valid if it satisfies the formal requirements established by the law applicable to the contract according to the provisions of this Chapter or by the law of one of those States.

(3) Where a contract is concluded by an agent, account must be taken of the law of the State within whose territory the agent is present upon application of Paragraphs (1) and (2).

(4) A consumer contract concluded in the circumstances described in Article 95 (2) herein shall be formally valid if it satisfies the formal requirements established by the law of the State in which the consumer is habitually resident.
(5) A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements established by the law which, by virtue of the provisions of this Chapter, governs or would govern the contract, or by the law of the State where the act was done.

(6) A contract whereof the subject matter is a right in rem in immovable property shall be subject to the mandatory formal requirements established by the law of the State in which the immovable property is situated, to the extent that by the law of the State the said requirements are imposed irrespective of the State where the contract is concluded and irrespective of the law governing the contract.

Subrogation

Article 99. (1) Where a third party has a duty to satisfy a creditor or has satisfied a creditor, the law which governs the third party's duty to satisfy the creditor shall determine whether and to what extent the said third party is entitled to exercise against the debtor in full or to a limited extent the rights which the satisfied creditor had against the debtor under the law governing their relationship.

(2) Paragraph (1) shall furthermore apply in the cases where several persons are subject to the same duty and one of the said persons has satisfied the creditor.

Assignment of Claim

Article 100. (1) The relationship between an assignor and an assignee of a claim shall be governed by the law which, according to the provisions of this Chapter, applies to the contract of assignment.

(2) The law governing the claim assigned shall determine the assignability of the said claim, the relationship between assignee and debtor, the conditions whereunder the assignment can be invoked against the debtor, and the discharging effect of payment by the debtor.

Burden of Proof

Article 101. (1) The law governing the contract according to the provisions of this Chapter shall furthermore apply in connection with the proving of the contract, to the extent that the said law contains rules which raise presumptions of law or other provisions regarding the burden or proof.

(2) A contract or a unilateral act intended to have legal effect may be proved by any mode of proof admissible under the law of the State of the court seised (lex fori) or under the law referred to in Article 98 herein, according to which the said contract or act is formally valid.

Scope of Applicable Law

Article 102. (1) The law applicable to the contract, as determined by the provisions of this Chapter, shall govern:

1. the interpretation of the contract:
2. the performance of the obligations;
3. the consequences of full or partial non-performance of obligations;
4. the assessment of damages;
5. the grounds for extinguishment of the obligations;
6. the consequences of nullity of the contract;
7. the extinctive prescription;
8. the termination of rights consequent to the lapse of a specified period.

(2) In relation to the manner of performance and the steps that the creditor may take in the event of non-performance, the court shall have full or partial regard to the law of the State in which performance of the contract takes place (lex loci solutionis).

Interpretation and Application of the Provisions of this Chapter

**Article 103.** In the interpretation and application of the provisions of this Chapter, regard must be had to:

1. the circumstance that the said provisions are aligned with the Convention on the Law Applicable to Contractual Obligations of 19 June 1980, concluded in Rome by the Member States of the European Community, and
2. the need to achieve uniformity in the manner in which the rules of the said Convention are interpreted and applied in the States for which it is in force.

Inapplicability of the Provisions of this Chapter

**Article 104.** The provisions of this Chapter shall not apply to any obligations arising under a bill of exchange, a promissory note and a cheque.

Chapter Eleven

NON-CONTRACTUAL RELATIONSHIPS

Section I

Tort or Delict

Common Provisions

**Article 105.** (1) The obligations arising out of a tort or delict shall be governed by the law of the State within whose territory the direct damage arises or is likely to arise (lex loci delicti commissi).
(2) Where the author of the tort or delict and the person sustaining damage both have their habitual residence or a place of business in the same State at the time when the damage occurs, the law of that State shall apply.

(3) Notwithstanding the provisions of Paragraphs (1) and (2), if it appears from the circumstances as a whole that the tort or delict is manifestly more closely connected with another State, the law of that other State shall apply. A manifestly closer connection may be based on a pre-existing relationship between the parties, such as a contract that is closely connected with the tort or delict in question.

Product Liability

Article 106. (1) Where the damage is caused or there is a risk of damage being caused by a defective product, the obligation for compensation shall be governed by the law of the State in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was introduced into the market of that State without the consent of the said person. In such case, the applicable law shall be the law of the State of the habitual residence or the place of business of the person claimed to be liable.

(2) Paragraph (1) shall not affect the application of the provisions of Article 105 (2) and (3) herein.

Unfair Competition and Restriction of Competition

Article 107. (1) The obligations arising out of an act of unfair competition and of restriction of competition shall be governed by the law of the State within whose territory the interests of competitors in the relationships therebetween or the collective interests of consumers are or are likely to be directly and substantially affected.

(2) Where an act of unfair competition affects exclusively the interests of a specific competitor, the provisions of Article 105 (2) and (3) herein shall apply.

Violation of Rights Relating to the Personality

Article 108. (1) The obligations arising out of a violation of rights relating to the personality by the mass communication media, and in particular print publications, radio, television or other means of dissemination of information, shall be governed, at the election of the person sustaining damage, by:

1. the law of the State in which the said person is habitually resident, or

2. the law of the State within whose territory the damage occurred, or

3. the law of the State of the habitual residence or the place of business of the person claimed to be liable.

(2) In the cases referred to in Items 1 and 2 of Paragraph (1), the person claimed to be liable must have reasonably foreseen that the damage would occur within the territory of the relevant State.
(3) The right of reply upon violation of rights relating to the personality by the mass communication media shall be governed by the law of the State in which the place of publication or transmission of the broadcast is situated.

(4) The provision of Paragraph (1) shall furthermore apply to obligations arising from violation of rights related to protection of personal data.

Violation of the Environment

**Article 109.** The obligations arising out of a violation of the environment shall be governed by the law of the State within whose territory the damage arises or is likely to arise, unless the person sustaining damage prefers to base the claim thereof on the law of the State in which the harmful act was committed.

Infringement of Intellectual Property Rights

**Article 110.** The obligations arising from an infringement of copyrights, of rights neighbouring on copyright, and on industrial property rights, shall be governed by the law of the State for which protection of the right is sought (lex loci protectionis).

Section II

Unjust Enrichment. Agency without Authority

Unjust Enrichment

**Article 111.** (1) The obligations arising out of unjust enrichment shall be governed by the law of the State in which the enrichment takes place.

(2) Where the unjust enrichment takes place in connection with another relationship between the parties, such as a contract that is closely connected with the unjust enrichment in question, the law governing that other relationship shall apply.

(3) Where at the time of the unjust enrichment taking place the parties had their habitual residence or place of business in the same State, the law of that State shall apply.

(4) If it appears from the circumstances as a whole that the unjust enrichment is manifestly more closely connected with another State, the law of that other State shall apply.

Agency without Authority

**Article 112.** (1) The obligations arising out of agency without authority shall be governed by the law of the State of habitual residence or place of business of the party concerned at the time of assuming the agency.

(2) Where the agency has been assumed in connection with another relationship between the parties, such as a contract that is closely connected with the agency without authority in question, the law governing that other relationship shall apply.

(3) Where the obligation arising out of agency without authority is connected to protection of
a natural person or of a specific property, the applicable law shall be the law of the State in which the person was present or the property was situated at the time of agency without authority.

(4) If it appears from the circumstances as a whole that the agency without authority is manifestly more closely connected with another State, the law of that other State shall apply.

Section III
Common Provisions on Non-Contractual Relationships

Choice of Applicable Law

Article 113. (1) After an obligation arising out of a non-contractual relationship regulated in Section I and II comes into existence, the parties may submit the said obligation to a law of their choice. The choice of applicable law must be expressed or clearly demonstrated by the circumstances of the case and may not affect the rights of third parties.

(2) Where at the time when the obligation comes into existence all the elements of the non-contractual relationship are connected to a State other than the State whose law has been chosen, the choice must be without prejudice to the application of the mandatory rules of that State, which cannot be derogated from by contract.

(3) The provisions of Paragraphs (1) and (2) shall not apply to the obligations regulated in Article 111 herein.

(4) The provisions of Articles 97 and 98 herein shall apply, mutatis mutandis, to the existence and material validity of the agreement on choice of applicable law.

Scope of Law Applicable to Non-Contractual Relationships

Article 114. (1) The law applicable to obligations arising out of a non-contractual relationship shall govern:

1. the conditions and extent of liability, including the determination of persons who are liable for acts performed thereby;

2. the grounds for exemption from liability, as well as any limitation of liability and any division of liability;

3. the measures which the court has power to take so as to ensure to prevention, termination of compensation of injury or damage;

4. the kinds of injury or damage for which compensation may be due;

5. the assessment of the damage or injury, in so far as prescribed by legal standards;

6. the assignability of a right to compensation;

7. the persons entitled to compensation for injury or damage sustained personally;
8. liability for injury caused by another person;

9. the manners in which an obligation may be extinguished, the extinctive prescription and the termination of rights consequent to the lapse of a specified period.

10. the proving of the obligations, to the extent that the applicable law contains rules which raise presumptions of law or other provisions regarding the burden of proof.

(2) The applicable law shall not govern the liability of the State and of bodies governed by public law, as well as of the authorities and representatives thereof, for acts performed thereby in the course of exercise of the powers thereof.

Taking Account of Rules of Safety and Conduct

**Article 115.** Whatever may be the applicable law, in determining liability, regard must be had to the rules of safety and conduct which were in force at the place and time of commission of the harmful act.

**Direct Action against the Insurer**

**Article 116.** The right of persons who have suffered injury or damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable to the obligation arising out of the relevant non-contractual relationship, unless the person who has suffered injury or damage prefers to base the claims thereof on the law applicable to the insurance contract.

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**Part Four**

**RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND OTHER AUTHENTIC ACTS**

**Chapter Twelve**

**CONDITIONS OF AND PROCEDURE FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND OTHER AUTHENTIC ACTS**

**Conditions of Recognition and Enforcement**

**Article 117.** The judgments and authentic acts of the foreign courts and other authorities shall be entitled to recognition and enforcement where:

1. the foreign court or authority had jurisdiction according to the provisions of Bulgarian law, but not if the nationality of the plaintiff or the registration thereof in the State of the court seised was the only ground for the foreign jurisdiction over disputes in rem;
2. the defendant was served a copy of the statement of action, the parties were duly summoned, and fundamental principles of Bulgarian law, related to the defence of the said parties, have not been prejudiced;

3. if no effective judgment has been given by a Bulgarian court based on the same facts, involving the same cause of action and between the same parties;

4. if no proceedings based on the same facts, involving the same cause of action and between the same parties, are brought before a Bulgarian court earlier than a case instituted before the foreign court in the matter of which the judgment whereof the recognition is sought and the enforcement is applied for has been rendered;

5. the recognition or enforcement is not contrary to Bulgarian public policy.

Jurisdiction upon Recognition

Article 118. (1) A foreign judgment shall be recognized by the authority whereto the said judgment is presented.

(2) Should the conditions of recognition of the foreign judgment be raised as the issue in a dispute, an action for ascertainment may be brought before the Sofia City Court.

Jurisdiction upon Enforcement

Article 119. (1) An action for enforcement of a foreign judgment shall be brought before the Sofia City Court.

(2) A true copy of the judgment, authenticated by the rendering court, and a certificate issued by the same court, to the effect that the said judgment has taken effect, shall be attached to the statement of action. These documents must be certified by the Ministry of Foreign Affairs of the Republic of Bulgaria.

(3) Paragraph (2) shall furthermore apply in the cases referred to in Article 118 herein.

Verification of Conditions of Recognition and Enforcement

Article 120. (1) The court shall of its own motion verify the conditions covered under Article 117 herein.

(2) The defendant in the proceedings for recognition and enforcement of the foreign judgement may not invoke violations under Item 2 of Article 117 herein, which the said defendant could have raised before the foreign court.

Scope of Verification and Defence of Debtor

Article 121. (1) The court shall not examine the merits of the dispute decided by the foreign court.

(2) The debtor may raise the defence of extinguishment of the obligation on the basis of
circumstances that have occurred after the foreign judgment took effect.

(3) The debtor may not raise the defence of extinguishment of the obligation on the basis of the circumstances referred to in Paragraph (2) after the judgment admitting enforcement has taken effect.

Recognition and Enforcement of Court Settlements

Article 122. The provisions of Article 117 to 121 herein shall furthermore apply to court settlements, if the said settlements enjoy equal status as judgments of court in the State in which the said settlements are reached.

Enforceability of Foreign Authentic Instruments

Article 123. The conditions covered under Articles 117 to 121 herein shall furthermore apply to the issue of a declaration of enforceability in the Republic of Bulgaria for a foreign authentic instrument which certifies a claim enforceable in the State in which the instrument was issued.

Recognition of Effects of Foreign Writs of

Enforcement and Protection

Article 124. The civil effects of foreign writs of enforcement and protection shall be respected in the Republic of Bulgaria in connection with the presentment thereof, if the said writs were issued by a body which has international jurisdiction under Bulgarian law and if they are not contrary to Bulgarian public policy.

FINAL PROVISIONS

§ 1. In the Consumer Protection and Rules of Trade Act (promulgated in the State Gazette No. 30 of 1999; amended in Nos. 17 and 19 of 2003), Article 37a shall be repealed.


§ 5. The Family Code (promulgated in the State Gazette No. 41 of 1985; amended in No. 11 of 1992; corrected in No. 15 of 1992; amended in Nos. 63 and 84 of 2003) shall be amended as follows:

1. Article 129 to 135 and 137 to 143 inclusive shall be repealed.

2. In Article 136:

(a) Paragraph (1) shall be repealed;

(b) Paragraph (2) shall be amended to read as follows:

"(2) A Bulgarian national who has attained the age of one year may be adopted by a foreigner who has presented an authorization to adopt a child according to his or her national law. By way of exception, considering the state of health of the child or where other important circumstances exist, any such child may be adopted even before attaining the age of one year, if this is in the child's best interests."

(c) Paragraphs (3), (4), (5), (7), (8) and (9) shall be repealed.

§ 6. The Not-for-Profit Legal Entities Act (promulgated in the State Gazette No. 81 of 2000; amended in Nos. 41 and 98 of 2001, Nos. 25 and 120 of 2002) shall be amended as follows:

1. The heading of Chapter Four shall be amended to read as follows: "Branches of Foreign Not-for-Profit Legal Entities".

2. Article 51 shall be repealed.

3. In Article 52:

(a) the heading shall be amended to read as follows: "Incorporation of a Branch";

(b) Paragraph (1) shall be repealed.


This Code was passed by the 39th National Assembly on the 4th day of May 2005 and the Official Seal of the National Assembly has been affixed thereto.
Chapter One
GENERAL PROVISIONS

Purpose of the Act

Article 1. (1) (Previous Article 1, SG No. 36/2003, amended, SG No. 38/2006) This Act shall govern the rights of the child; the principles and the measures for child protection; the state and municipal bodies and their interaction in the process of performing child protection activities, as well as the participation of legal entities and natural persons in the said activities.

(2) (New, SG No. 36/2003) The state shall protect and guarantee the basic children's rights in all spheres of public life for all groups of children in view of the age, social status, physical, health and mental development, as providing appropriate economic, social and cultural environment, education, freedom of expression and security.

(3) (New, SG No. 36/2003, amended, SG No. 38/2006) The state policy for child protection shall be implemented on the basis of a National Strategy for the Child adopted by the National Assembly on a proposal by the Council of Ministers, and founded on the principles of this Act. In implementation of the national strategy the Council of Ministers shall adopt a National Programme for Child Protection proposed by the minister of labour and social policy and the Chairperson of the State Agency for Child Protection.
(4) (New, SG No. 36/2003) State bodies within the framework of their competence shall carry out the state policy for child protection and shall promote appropriate environment for the development of the child.

Definition of "a child"

**Article 2.** Within the meaning of this Act a child shall be any natural person, who has not reached the age of 18.

**Principles of Protection**

**Article 3.** Child protection shall rest on the following principles:

1. recognition and respect for the child's personality;
2. the child shall be brought up in a family environment;
3. (amended, SG No. 14/2009) the best interest of the child shall be secured;
4. (amended, SG No. 14/2009) special protection shall be provided to children at risk;
5. voluntary participation in child protection activities shall be encouraged;
6. persons directly involved in child protection activities shall be selected in accordance with their personal qualities and social communication abilities, and with care as to their professional training
7. restrictive measures shall be of temporary nature;
8. (new, SG No. 36/2003) child protection actions shall be immediate;
10. (new, SG No. 14/2009) the development of children of prominent talent shall be ensured;
11. (new, SG No. 14/2009) responsible parenthood shall be encouraged;
12. (new, SG No. 14/2009) support for the family;
14. (renumbered from Item 8, SG No. 36/2003, renumbered from Item 10, SG No. 38/2006, renumbered from Item 11, SG No. 14/2009) the effectiveness of measures undertaken shall be controlled.

**Protection Measures**
**Article 4.** (Amended, SG No. 36/2003) (1) Child protection under this Act shall be carried out through:

1. assistance, support and services rendered in the child's family environment;
2. placement of the child with relatives or close families;
3. (repealed, SG No. 63/2003, new, SG No. 38/2006) adoption;
4. placement of the child with a foster family;
5. (new, SG No. 14/2009) provision of social services - resident type;
6. (renumbered from Item 5, SG No. 14/2009) placement of the child in a specialised institution;
7. (renumbered from Item 6, SG No. 14/2009) police protection;
8. (renumbered from Item 7, SG No. 14/2009) specialised protection at public places;
9. (renumbered from Item 8, SG No. 14/2009) provision of information with regard to the rights and obligations of children and parents;
10. (renumbered from Item 9, SG No. 14/2009) provision of preventative measures for security and protection of the child;
11. (renumbered from Item 10, SG No. 14/2009) provision of legal assistance by the state;

(2) (New, SG No. 63/2003, amended, SG No. 14/2009) A child may be adopted under the terms and conditions laid down in the Family Code.

(3) (Renumbered from Paragraph (2), SG No. 63/2003, amended, SG No. 14/2009) The criteria and standards for social services for children regarding application of the measures under Items 1, 2, 4 and 6 of Paragraph (1), shall be determined in a Regulation, adopted by the Council of Ministers under a proposal of the Minister of Labour and Social Policy.

(2) The conditions and procedure for implementing measures to prevent the abandonment of children and their placement in specialised institutions as well as their reintegration shall be determined in a Regulation of the Council of Ministers at the proposal of the Minister of Labour and Social Policy and the State Agency for Child Protection.

Protection of children of prominent talent

Article 5a. (New, SG No. 14/2009, amended, SG No. 50/2010) The protection of children of prominent talent shall be implemented under the conditions and the procedure determined in a Regulation of the Council of Ministers at the proposal of the Minister of Culture, the Minister of Education, Youth and Science, the Chairperson of the State Agency for Child Protection and the Minister of Physical Education and Sports, which shall also provide measures for:

1. promotion of the talent and the needs of the children;
2. provision of opportunities and conditions for the enrolment of the children in sports and art schools;
3. financial support and incentives through scholarships and specialised educational programmes.

Specialised protection of children at public places

Article 5b. (New, SG No. 14/2009) (1) (Amended, SG No. 98/2010, effective 1.01.2011) The specialised protection of children at public places shall be ensured by the bodies of the Ministry of the Interior, the Social Assistance directorates, the mayors, regional educational inspectorates of the Ministry of Education, Youth and Science, the regional health Inspectorates and by the owners, renters and users of commercial sites, cinemas or theatres, as well as by the organisers of public events.

(2) The specialised protection of children at public places shall be ensured under the conditions and the procedure determined in a Regulation of the Council of Ministers at the proposal of the Minister of Labour and Social Policy, the Minister of the Interior and the Chairperson of the State Agency for Child Protection.

(3) The offering and sale of alcoholic beverages and tobacco products to children shall be prohibited.

Child Protection Bodies

Article 6. Child protection shall be implemented by:

1. (amended, SG No. 36/2003) the Chairperson of the State Agency for Child Protection and the administration that shall assist her/him in exercising his/her powers;
2. the Social Assistance Directorates;

The minister of labour and social policy, the minister of the interior, the minister of education, youth and science, the minister of justice, the Minister of Foreign Affairs, the minister of culture, the minister of health care and the mayors of municipalities.

Responsibilities of the child protection bodies under Item 3 of Article 6

**Article 6a.** (New, SG No. 14/2009) (1) The bodies under Item 3 of Article 6 shall develop and take part in the implementation of the state policy in the field of child protection,

(2) The bodies under Item 3 of Article 6 shall develop and take part in the implementation and reporting on the National Strategy for the Child and the National Programme for Child Protection,

(3) The bodies under Item 3 of Article 6 shall, jointly with the Chairperson of the State Agency for Child Protection, develop a coordination mechanism for interaction in accordance with their competences in the field of child protection towards ensuring an effective prevention and control system on the observance of the rights of children.

(4) Within the scope of his powers:

1. The Minister of Labour and Social Policy shall:

   a) govern, coordinate and control the implementation of the social policy of the state for the family and children;

   b) assist and encourage the cooperation with citizens organisations aimed at their active participation in the process of the formulation, implementation and monitoring of the policy of child protection;

   c) govern, coordinate and control the activities for encouraging and supporting responsible parenthood;

   d) govern, coordinate and control the drafting of legislative acts, strategies, programmes, action plans and reports in the field of demographic policy, the family and children;

2. The Minister of the Interior shall:

   a) provide police protection to a child through the specialised bodies of the Ministry of the Interior;

   b) take part in the implementation and control of the specialised protection of children at public places;

   c) effect control with regard to children crossing the Bulgarian state border;

3. The Minister of Education, Youth and Science shall:
a) ensure the safety of children in the state schools, kindergartens and service teams in the system of national education;

b) through the regional educational inspectorates, ensure interaction with the management bodies of the specialised institutions and of the social services - resident type, for establishing the educational needs of each child and providing suitable training;

c) implement activities on preventing and for solving the problem of pupils who do not go to school

d) takes part in implementing the special protection of children of prominent talent;

4. The Minister of Justice shall:

a) govern the activities related to intercountry adoption under the Family Code, and implement the functions assigned to the Ministry of Justice as a central body on the international conventions in the field of intercountry adoption and the protection of children;

b) ensure the safety of children who serve punishments of deprivation of liberty in reformatory establishments, are in prisons or prison communities or have been detained in custody;

c) take actions to study the possibilities for proposing and concluding bilateral accords with the states - parties to the Convention on Protection of Children and cooperation in the field of intercountry adoption, concluded in The Hague on 29 May 1993 (ratified by law - SG No. 16/2002) (SG No. 78/2002) in respect of intercountry adoption of children with health problems and specific needs;

5. The Minister of Foreign Affairs shall:

a) ensure the protection of the rights and interests of children - Bulgarian citizens, outside the country;

b) take part in the development and control on the implementation of the obligations of the Republic of Bulgaria to other state and international organisations in the field of the rights of children;

c) coordinate and take part in the preparation, conclusion and implementation of international accords in the field of the rights of children;

6. The Minister of Culture shall:

a) ensure the discovery, support and education of children of prominent talent in the field of culture;

b) implement a policy for the protection and development of culture, assisting the mental, spiritual, moral and social development of the child;

c) ensure the safety of children in the schools and organisational structures in the system of the Ministry of Culture;
7. The Minister of Health Care shall:

a) effect control on providing accessible and quality medical services with a priority on children, pregnant women and mothers of children under the age of one year;

b) control the activities of the homes for medical and social care for children;

c) govern and control the activities on the protection of the health of children towards securing the highest attainable for the country standard of their state of health;

8. The mayors of municipalities shall:

a) ensure the implementation of the state policy for the protection of the child in the municipality and coordinate the activities on child protection at local level;

b) ensure the safety of children in the municipal schools, kindergartens and service teams;

c) take measures to ensure the safety of children in the structures and teams on the territory of the respective municipality;

d) assist and encourage the cooperation with citizens organisations at local level aimed at their active participation in the process of the formulation, implementation and monitoring of the policy of child protection;

Obligation to Cooperate


(2) The same obligation shall be undertaken by all persons, who become aware of the said situation in the course of exercising their profession or occupation, irrespective of them being bound by an occupational secret.

(3) (New, SG No. 38/2006) Upon submission of a report to the State Agency for Child Protection that a child needs protection, the chairman thereof shall immediately forward the said report to the Child Protection Department of the Social Assistance Directorate at the child’s current address.

(4) (New, SG No. 38/2006) Upon receipt of information under Paragraph (1) relating to the activity of another institution, the information shall be sent to that institution on grounds of competence.

(5) (New, SG No. 36/2003, renumbered from Paragraph 3, SG No. 38/2006) Central and regional bodies of the executive power, as well as the specialised institutions for children in view of their official duties shall render timely assistance and provide information to the State Agency for Child Protection and to the Social Assistance Directorates under terms and according to a procedure established by the Personal Data Protection Act.
Rights and Obligations of Parents, Tutors, Curators or Other Persons Who Take Care of a Child

(Title supplemented, SG No. 14/2009)

**Article 8.** (1) (Supplemented, SG No. 14/2009) All parents, tutors, curators or other persons who take care of a child may request and be granted assistance from the bodies pursuant to this Act.

(2) (Amended, SG No. 14/2009) Parents, tutors, curators or other persons who take care of a child shall have the right to be informed and consulted on all the measures and activities undertaken pursuant to this Act, with the exception of cases under Article 13, and may request alteration of measures in the event of a change of circumstances.

(3) (New, SG No. 36/2003, amended, SG No. 38/2006, SG No. 14/2009) Parents, tutors, curators or other persons who take care of a child shall accompany him or her at public places after 8 p.m. if the child has not reached the age of 14, respectively after 10 p.m. if the child has reached the age of 14, but has not reached the age of 18.

(4) (New, SG No. 14/2009) It the parents, tutors, curators or other persons who take care of a child are unable to accompany him or her, they shall provide an active adult person to accompany the child at public places after 10 p.m. if the child has reached the age of 14, but has not reached the age of 18.


(6) (Renumbered from Paragraph 3, SG No. 36/2003, renumbered from Paragraph 4, amended, SG No. 14/2009) The parent, tutor, curator or person who takes care of a child shall bring into effect the measures undertaken under this Act and shall provide assistance towards the implementation of child protection activities.

(7) (New, SG No. 14/2009) The parent, tutor, curator or person who takes care of a child shall certify his capacity of accompanying person of the child pursuant to Paragraph (4) according to the procedure established by the regulation under Article 56 (2).

(8) (New, SG No. 14/2009) Parents, tutors, curators or other persons who take care of a child shall not leave without supervision or care children under 12 years of age if this creates a danger for their physical, mental and moral development.

(9) (New, SG No. 59/2010) Parents, tutors, curators or other persons who take care of a child shall not permit the child's participation in advertisements or other types of commercial messages for genetically modified foodstuffs.

(10) (New, SG No. 28/2011) Parents, tutors, curators or other persons who take care of a child shall not allow the participation of children in broadcasts within the meaning of the Radio and Television Act which are detrimental or pose threats to their physical, psychological, moral and/or social development.
Rights and obligations of the management bodies of the specialised institutions, the social services - resident type, and of the social services in the community

Article 8a. (New, SG No. 14/2009) (1) The management bodies of the specialised institutions, the social services - resident type, and of the social services in the community shall have the rights and obligations pursuant to Article 8.

(2) The bodies under Paragraph (1) shall provide security of the facilities in which the services are provided.

(3) The bodies under Paragraph (1) shall ensure, monitor and assess the professional capacity of the persons working in the respective institution, social service - residence type, or service in the community.

(4) The professional capacity shall be assessed prior to the appointment of all employees and every three years thereafter. If necessary and at the discretion of the respective body, the assessment may also be made in shorter terms.

(5) The conditions and procedure for carrying out the assessment pursuant to Paragraph (3) shall be established by the regulation under Article 17a, Item 4.

(6) The management bodies of the specialised institutions and of the social services - resident type, in case of placement of a child according to the procedure under Article 25 (1), Item 3 shall:

1. inform in writing the parents, tutors or curators of every child about the coming assessments of the child's educational needs and its referral for training in a special school or for integrated training;

2. ensure the implementation of the decision of the comprehensive pedagogical assessment teams for the referral of the children or pupils to a specific type of training in cases when the parents, tutors or curators of the child fail to meet their obligations pursuant to the Public Education Act and the Implementing Regulations of the Public Education Act.

(7) The bodies under Paragraph (1) shall take actions to ensure disciplinary responsibility according to the procedure of the Labour Code in cases of checks performed by the Chairperson of the State Agency for Child Protection and the recommendation made for imposing a disciplinary punishment.

Participation of Legal Entities

(Title amended, SG No. 38/2006)

Article 9. (1) (Amended, SG No. 38/2006) Legal entities, as well as individual natural persons shall participate in the activities related to child protection under the terms and conditions prescribed by law.
(2) The persons under Paragraph (1) and the state and municipal bodies shall cooperate in child protection activities.

Chapter Two
RIGHTS OF A CHILD

Right to Protection

Article 10. (1) Every child has a right to protection with a view to his/her normal physical, intellectual, moral and social development and to protection of his/her rights and interests.

(2) (Supplemented, SG No. 36/2003) There shall be no limitation of rights, nor any privilege, on the grounds of race, nationality, ethnic background, sex, origin, property status, religion, education and convictions or disability.

Protection against Violence

Article 11. (1) Every child has a right to protection against involvement in activities that are harmful to his or her physical, mental, moral and educational development.

(2) Every child has a right to protection against all methods of upbringing, that undermine his or her dignity; against physical, psychical or other types of violence; against all forms of influence, which go against his or her interests.

(3) Every child has a right to protection against the use of children for purposes of begging, prostitution, dissemination of pornographic material, receipt of unlawful pecuniary income, as well as protection against sexual abuse.

(4) Every child has a right to protection against forcible involvement in political, religious and trade union activities.

Protection of the Child's Personality

Article 11a. (New, SG No. 14/2009) (1) No information or data about a child may be disclosed without the consent of his/her parents or legal representatives save in the cases pursuant to Article 7 (1).

(2) In cases when a measure for the protection of a child has been taken, no information or data about a child may be disclosed without the written opinion of the child protection body taking the measure.

(3) When the child has reached the age of 14, his/her consent for the disclosure of information or data shall also be required.

Right to Freedom of Expression

Article 12. Every child has a right to express freely his or her opinion on all issues affecting
his or her interests. He or she may seek the assistance of the bodies and persons, to whom his or her protection pursuant to this Act has been assigned.

Information and Consultation

Article 13. Every child has a right to be informed and consulted by the child protection body even without the knowledge thereof of his or her parents or of the persons who take care of his or her rearing and upbringing, should that be deemed necessary in view of protecting his or her interests in the best possible way and in case where informing the said persons might harm the child's interests.

Protection of Religious Beliefs

Article 14. (1) The attitude of children under 14 years of age towards religion shall be decided upon by their parents or legal guardians; while those of children between 14 and 18 shall be decided by common consent between them and their parents or their guardians.

(2) Where such consent cannot be reached, the under-age person may refer through the bodies pursuant to this Act to the regional court to settle the dispute.

Participation in Procedures

Article 15. (1) All cases of administrative or judicial proceedings affecting the rights and interests of a child should provide for a mandatory hearing of the child, provided he or she has reached the age of 10, unless this proves harmful to his or her interests.

(2) In cases where the child has not reached the age of 10, he or she may be given a hearing depending on the level of his or her development. The decision to hear the child shall be substantiated.

(3) Before the child is given a hearing, the court or the administrative body shall:

1. provide the child with the necessary information, which would help him or her form his or her opinion;

2. inform the child about the possible consequences of his or her desire, of the opinion supported by him or her, as well as about all the decisions made by the judicial or administrative body.

(4) (Amended, SG No. 36/2003, SG No. 14/2009) The judicial and administrative bodies shall ensure appropriate surroundings for hearing the child in accordance with his/her age. The hearing and the consultation of a child shall mandatorily take place in the presence of a social worker from the Social Assistance Directorate at the current address of the child and when necessary - in the presence of another appropriate specialist.

(5) (New, SG No. 36/2003, amended, SG No. 38/2006, SG No. 14/2009) The court or the administrative body shall order that the hearing of the child shall take place also in the presence of a parent, tutor, curator, other person who takes care of the child, or another close person known to the child, except where this does not correspond to the child's interest.
(6) (Renumbered from Paragraph 5, amended, SG No. 36/2003, amended and supplemented, SG No. 38/2006, amended, SG No. 14/2009) In every legal case the court or the administrative body shall notify the Social Assistance Directorate at the current address of the child, whereby the provisions of the Code of Civil Procedure shall apply to the notification by the court, and the provisions of the Administrative Procedure Code shall apply to the notification by the administrative body. The Social Assistance Directorate shall send its representative who shall express an opinion, and if unfeasible, he/she shall present a report.

(7) (Renumbered from Paragraph 6, SG No. 36/2003) The Social Assistance Directorate may represent the child in cases provided for by law.

(8) (Renumbered from Paragraph 7, SG No. 36/2003) The child has a right to legal aid and appeal in all proceedings, affecting his or her rights or interests.

Respect for the Parents, Tutors, Curators and Other Members of Society

Article 15a. (New, SG No. 38/2006, amended, SG No. 14/2009) In the exercise of its rights the child shall respect and observe the rights of its parents, tutors, curators, other persons caring for the upbringing of the child, as well as of the other members of society, observe public order and the requirements of public health and morality.

Confidentiality of Information

Article 16. (1) (Supplemented, SG No. 14/2009) All information, obtained through administrative or judicial proceedings and concerning a child shall not be disclosed without the consent of the parents or of the legal representatives, or without the child's consent where the child has reached the age of 10.

(2) The court may permit the bodies under this Act to use information pursuant to Paragraph (1) without the consent of persons under Paragraph (1), should it become necessary in view of the child's interests or for purposes of undertaking child protection measures.

(3) (New, SG No. 36/2003) Social workers and officials who become aware of personal data when implementing their duties are obliged to keep the legal provisions regarding the protection of personal data as well as to respect the personal dignity.

Chapter Three
CHILD PROTECTION BODIES

Chairperson of the State Agency for Child Protection

Article 17. (Amended, SG No. 36/2003) (1) The chairperson of the State Agency for Child Protection is a specialised body under the Council of Ministers in charge of the governance, co-ordination and control of child protection activities.

(2) The State Agency for Child Protection is a legal entity maintained from state budget funds, having its seat in the city of Sofia.
(3) The Agency is governed and represented by a Chairperson, who shall be determined by a decision of the Council of Ministers.

(4) A Deputy Chair shall assist the activities of the Agency Chairperson.

(5) The Agency's activities, structure, work organisation and staff shall be determined by a Regulation, adopted by the Council of Ministers upon a proposal of the Chairperson.

Functions of the Chairperson of the State Agency for Child Protection

**Article 17a.** (New, SG No. 36/2003) (1) (Previous Article 17a, SG No. 14/2009) The chairperson of the State Agency for Child Protection shall have the following powers to:

1. (amended, SG No. 28/2005, SG No. 94/2005, SG No. 103/2005, SG No. 50/2010) work out the state policy for child protection, together with the Minister of Labour and Social Policy, the Minister of Health Care, the Minister of Education, Youth and Science, the Minister of Justice, the Minister of the Interior, the Minister of Culture, the Minister of Finance, the Minister of Physical Education and Sports, the head of the National Insurance Institute, the Secretary of the Central Commission for Juvenile Antisocial Behaviour under the Council of Ministers and the National Association of Municipalities in the Republic of Bulgaria.

2. work out and control the implementation of national and regional programmes for child protection.

3. (amended, SG No. 14/2009) monitor and analyse the implementation of the state policy for child protection, provide methodological instructions to the Child Protection Departments within the Social Assistance Directorates and provide methodological guidance on the protection of the rights of the child.

4. (amended, SG No. 63/2003, SG No. 14/2009) work out a Regulation for the criteria and standards for social services for children in the application of the measures under Items 1, 2, 4 and 6 of Article 4 (1) and propose it to the Minister of Labour and Social Policy.

5. (amended, SG No. 38/2006, effective as of the date of entry into force of the Treaty of Accession of the Republic of Bulgaria to the European Union - regarding the words "persons under Items 3 and 4 of Article 18 (1) of the Social Assistance Act") issue a license to persons under Items 3 and 4 of Article 18 (1) of the Social Assistance Act for provision of social services to children under the age of 18, under the terms and according to the procedure of Chapter Four "a".

6. assist the Minister of Labour and Social Policy, the Minister of Health Care, the Minister of Education, Youth and Science, the Minister of Justice, and the Minister of the Interior in the process of the formulation and implementation of the EU integration policy in the field of child protection.

7. may represent the State in international organizations and programmes in the field of child protection, when entitled by the Council of Ministers;

8. work out and participate in the deliberations of draft legislative acts in the field of child
protection.

9. (amended, SG, No. 38/2006) develop and maintain a national information system, whose functioning shall be regulated by the Implementing Regulation on this Act; the system shall contain data:

a) on children at risk;
b) on children of prominent talent;
c) from the registers kept by the Regional Social Assistance Directorates with the Social Assistance Agency according to the procedure of the Family Code;
d) on specialised institutions for children;
e) on not-for-profit legal entities working on child-related programmes;
f) on children not attending school;
g) on providers of social services for children;
h) other data relevant to child protection.

10. assist the activities of the not-for-profit legal entities working in the field of child protection.

11. organize and conduct scientific research and educational activities in the field of child protection.

12. work out a Regulation on the structure, organization and the activities of the National Council for Child Protection, adopted by the Council of Ministers;

13. organize and chair the National Council for Child Protection activities as a Chairperson of the Council.

14. (supplemented, SG No. 38/2006, amended and supplemented, SG No. 14/2009) make checks with regard to the observance of children's rights by all state, municipal and private schools, kindergartens, serving units, medical establishments, Social Assistance Directorates, providers of social services for children and not-for-profit legal entities working in the field of child protection and when violations are established shall issue compulsory prescriptions to remedy the breaches, personally or through a person empowered by him;

15. (amended, SG No. 14/2009) carry out monitoring and control of the specialized institutions for upbringing of children with respect to the observance of children's rights and when violations are established shall issue compulsory prescriptions to remedy the breaches, personally or through a person empowered by him;

16. (new, SG No. 14/2009) organize checks for the observance of the standards of social services for children and when violations are established shall issue compulsory prescriptions to remedy the breaches, personally or through an official empowered by him;
17. (new, SG No. 14/2009) establish and maintain a harmonized telephone number with national coverage providing information, consultation and help for children;

18. (renumbered from Item 16, SG No. 14/2009) submit to the Council of Ministers the annual report on the activities of the Agency.

19. (new, SG No. 14/2009) perform other activities defined by law or by an act of the Council of Ministers.

(2) (New, SG No. 14/2009) The compulsory prescriptions under Paragraph (1) Item 14 - 16 shall be accompanied by methodological instructions for their implementation and a mechanism for interaction between the responsible institutions.

(3) (New, SG No. 14/2009) The compulsory prescriptions under Paragraph (2) may be appealed under the procedure of the Administrative Procedure Code.

National Council on Child Protection

**Article 18.** (1) (Amended, SG No. 75/2002, SG No. 36/2003, SG No. 28/2005, SG No. 94/2005, SG No. 103/2005, supplemented, SG No. 38/2006, SG No. 14/2009, amended, SG No. 50/2010) A National Council on Child Protection with consultative and coordinating functions shall be set up to the State Agency for Child Protection and shall comprise representatives of the Ministry of Labour and Social Policy, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Education, Youth and Science, the Ministry of Health, the Ministry of the Interior, the Ministry of Finance, the Ministry of Culture, Minister of Physical Education and Sports, the Agency for Social Assistance, the National Anti-Trafficking Commission, the National Drugs Council, the National Statistical Institute, the National Insurance Institute, the Central Commission for Juvenile Antisocial Behaviour under the Council of Ministers and the National Association of Municipalities in the Republic of Bulgaria, as well as not-for-profit legal entities, whose purpose of activity is child protection.

(2) (New, SG No. 14/2009) The draft legislative acts which contain provisions related to the rights of the children shall be submitted to the Council of Ministers after a preliminary opinion by the National Council on Child Protection.

(3) (Renumbered from Paragraph 2, SG No. 14/2009) The structure, organisation and activities of the National Council of Child Protection shall be determined by a Regulation, adopted by the Council of Ministers.

Functions of the Agency

**Article 19.** (Repealed, SG No. 36/2003).

Social Assistance Directorate

**Article 20.** (1) (Amended, SG No. 36/2003) The Social Assistance Directorate is a specialised body in charge of conducting child protection policies within the municipality. A child protection department shall be set up in the Social Assistance Directorate.
Commission for the Child

Article 20a. (New, SG No. 36/2003, amended, SG No. 82/2006, SG No. 69/2008, SG No. 14/2009) (1) (Amended, SG No. 98/2010, effective 1.01.2011) A Commission for the Child with consultative and coordinating functions shall be set up with every municipality and shall comprise representatives of the municipal administration, the regional Directorate of the Ministry of Interior, the regional educational inspectorate, the regional Health Inspectorate, the Social Assistance Directorate, the local commission for juvenile antisocial behaviour as well as not-for-profit legal entities and others, whose purpose of activity is child protection.

(2) Chairperson of the Commission under Paragraph (1) is the mayor of the municipality or an official empowered by him.

(3) The Commission under Paragraph (1) is the coordinating team of the policies for all children on the territory of the municipality and shall form and secure the implementation of local policy on child protection.

Functions of the Social Assistance Directorate

Article 21. (Amended, SG No. 36/2003) (1) Pursuant to this Act the social assistance directorate shall:

1. perform the current practical activities of child protection within the municipality and shall make proposals to the municipal councils for municipal programmes for child protection;

2. determine and bring into effect concrete measures on child protection and shall control their implementation;

3. (supplemented, SG No. 14/2009) make checks relating to complaints and signals for violation of children's rights and shall make compulsory prescriptions to remedy the breaches under the terms and procedure determined by the implementing regulations of the act;

4. give advices and consultations on child rearing and upbringing;

5. provide information on services offered and render assistance and support to the parents and families of children in need thereof;

6. compile and update registers on:

   a) children in need of special protection;
   
   b) children under police protection;
   
   c) (amended, SG No. 38/2006) children not attending school;
d) children placed to live with relatives' or close friends' families;

e) children placed in foster families;

f) children placed in specialised institutions;

g) candidate and approved foster families;

h) not-for-profit legal entities, working on child protection programs;

i) (repealed, SG No. 38/2006).

7. render assistance and cooperation to not-for-profit legal entities, performing child protection activities;

8. assist children in their occupational orientation and qualification of children at risk, including persons that have completed their secondary education after they had come of age;

9. organise the training and consultations for foster parents and shall cater for the selection of the latter;

10. alert the police authorities, the prosecution and the courts, who shall take immediate steps to ensure child protection;

11. organize immediate assistance for children in disastrous (force-major) situation including the cases under Article 41 when the 48 hours police protection is over.

12. propose for appointment guardian councils and trustees;

13. (amended, SG No. 38/2006) investigate adoption candidates from the country and provide a written conclusion concerning the candidates suitability to adopt a child; provide an opinion in the cases, envisaged in the Family Code; organize consultations and training for the adoption candidates and for the adopters and provide a monitoring of the child for a period of two years after the date of the adoption;

14. bring claims to the court for deprivation or limitation of parental rights in interest of the child or enter as a party into court proceedings that have been already commenced.

15. (amended, SG No. 38/2006, SG No. 14/2009) prepare written reports and opinions in the cases under Article 15 (6) while prior to submission to the requiring body, the report shall be brought to the knowledge of the child's parents, tutors, curators or other persons who take care of the child, as well as to the child if aged over 14 unless this would harm his/her interest.

(2) The Director of the Social Assistance Directorate shall nominate the persons in charge of representative functions under Article 15 (6).

(3) (New, SG No. 59/2007) In pursuance of Article 35, paragraph 2 of the Convention of 1996, the Social Assistance Directorate, exercising competence over the permanent address of the parent who has approached the relevant competent authority with a request to obtain or
to maintain access to the child who does not habitually reside in the Republic of Bulgaria, shall gather information or evidence and shall make a finding on the suitability of that parent to exercise the rights of access, as well as on the conditions under which access is to be exercised.

Cooperation with the Guardianship and Trustee Body

Article 22. The Social Assistance Directorate shall work in cooperation with the guardianship and trustee body.

Chapter Three A
(New, SG No. 59/2007)

PROCEEDINGS CONCERNING RETURN OF A
CHILD OR EXERCISE OF RIGHTS OF ACCESS

Article 22a. (New, SG No. 59/2007) (1) An application for the return of a child or for the exercise of rights of access under the Hague Convention on the Civil Aspects of International Child Abduction, done at The Hague on the 25th day of October 1980 (ratified by law, promulgated in the State Gazette No. 20 of 2003) (Convention promulgated in the State Gazette No. 82 of 2003), hereinafter referred to as "the Hague Convention", shall be examined by the Sofia City Court in public session with the participation of:

1. the Ministry of Justice or the applicant;
2. the interested parties;
3. a prosecutor.

(2) The Social Assistance Directorate with the municipality wherein the child has its current address shall submit an opinion in the proceeding under Paragraph (1). The court shall hear the child in accordance with Article 15 herein.

(3) The Ministry of Justice shall represent the applicant, where application has been lodged care of the said Ministry. The said Ministry may appoint a representative to act on its behalf.

Article 22b. (New, SG No. 59/2007) The court, acting on a motion as submitted or ex officio, may rule on a suitable provisional measure for the protection of the child for the purpose of avoiding any further dangers to the child or detriment to the parties.

Article 22c. (New, SG No. 59/2007) (1) The court shall render judgment within one month after submission of the application.

(2) In the proceeding under Article 22a (1), the court shall not examine the question of exercise of the rights of custody on the merits.

Article 22d. (New, SG No. 59/2007) (1) The judgment of the Sofia City Court shall be appealable by the persons covered under Article 22a (1) before the Sofia Appellate Court.
(2) Within one month after lodgement of any such appeal, the court shall render judgment which shall be final.

**Article 22e.** (New, SG No. 59/2007) In this proceeding, the court may collect evidence of its own motion, as well as assist the parties in exercising their procedural rights.

**Article 22f.** (New, SG No. 59/2007) Where a foreign court applies Article 15 of the Hague Convention, the Bulgarian authority competent to determine that the removal or retention of a child was wrongful shall be the court which has examined or is examining the questions regarding the rights of custody, or the Ministry of Justice, where the said questions have not been subject of a court proceeding.

**Article 22g.** (New, SG No. 59/2007) (1) The rules of this Chapter shall furthermore apply, mutatis mutandis, in respect of the Convention of 1996 concerning parental responsibility and measures for the protection of children.

(2) In the cases and under the terms of Articles 8, 9 and 13 of the Convention of 1996, the competent court first seised, if it considers that this is in the child's best interests, may decline jurisdiction in favour of a foreign court second seised or accept to examine the case and render judgment, where the foreign court first seised has declined jurisdiction in favour of the said competent court.

(3) In the cases referred to in Paragraph (2), the judgment rendered by the foreign court shall be recognizable and enforceable according to the procedure established by Chapter Three B.

**Chapter Three B**

*(New, SG No. 59/2007)*

**SPECIAL RULES FOR RECOGNITION AND ADMISSION TO ENFORCEMENT OF DECISIONS OF FOREIGN COURTS AND OF OTHER FOREIGN BODIES CONCERNING CUSTODY AND MEASURES FOR THE PROTECTION OF CHILDREN**

**Article 22h.** (New, SG No. 59/2007) (1) An application for recognition and admission to enforcement of a decision of a foreign court or another foreign authority concerning the exercise of rights of custody and restoration of the exercise of rights of custody upon improper removal of a child, based on the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 1980, done at Luxembourg on the 20th day of May 1980 (ratified by law, promulgated in the State Gazette No. 21 of 2003) (Convention promulgated in the State Gazette No. 104 of 2003), hereinafter referred to as "Luxembourg Convention", shall be examined by the Sofia in public session with the participation of:

1. the Ministry of Justice;

2. the parties to the foreign decision;
3. a prosecutor.

(2) Paragraph (1) shall not apply where the applicant has seised the court directly.

(3) The Social Assistance Directorate with the municipality wherein the child has its current address shall submit an opinion in the proceeding under Paragraph (1). The court shall hear the child in accordance with Article 15 herein.

(4) The court, acting on a motion as submitted or ex officio, may rule on a suitable provisional measure for the protection of the child for the purpose of avoiding any further dangers to the child or detriment to the parties.

**Article 22i.** (New, SG No. 59/2007) (1) The court shall suspend the proceeding under Article 22g (1) here where:

1. the decision is subject to appeal;

2. a proceeding on the merits of the dispute, which has commenced before the proceeding in the State of origin of the decision whereof the recognition and/or admission to enforcement is applied for, is pending before a Bulgarian court;

3. another decision concerning the exercise of the rights of custody is the subject of a proceeding for recognition and/or admission to enforcement of the said decision.

(2) In the cases referred to in Item 2 of Paragraph (1), the court shall immediately notify the relevant court, which shall be obligated to pronounce within one month after notification.

**Article 22j.** (New, SG No. 59/2007) (1) The court shall render judgment within one month after submission of the application.

(2) The judgment of the court shall be appealable before the Sofia Appellate Court.

(3) The Sofia Appellate Court shall render judgment within the time limit referred to in Paragraph (1). The said judgment shall be final.

**Article 22k.** (New, SG No. 59/2007) (1) Recognition and enforcement of a decision on exercise of the rights of custody, rendered after the removal of the child, may be applied for according to the procedure established by this Chapter, if the said removal has been declared improper by the said decision.

(2) A recognition and enforcement of the decision of another State party to the Luxembourg Convention shall be refused in the cases covered by Articles 8 and 9, where the grounds provided under Article 10, paragraph 1 of the Convention exist.

(3) A recognition and enforcement of the decision shall be admitted solely in so far as the said decision is enforceable in the State of origin of the said decision.

**Article 22l.** (New, SG No. 59/2007) Save in so far there are no special rules concerning this proceeding, the standard action proceeding rules in the Code of Civil Procedure shall apply.
Article 22m. (New, SG No. 59/2007) The rules of this Chapter shall furthermore apply, mutatis
mutandis, in respect of the Convention of 1996 concerning the recognition and
enforcement of decisions of foreign courts and of other foreign bodies.

Chapter Four
CHILD PROTECTION MEASURES

Protection Measures in a Family Environment

Article 23. The following shall constitute protection measures in a family environment:

1. provision of pedagogic, psychological and legal aid to parents and to persons, entrusted
with parental functions, concerning problems with child rearing, upbringing and education;

2. (amended, SG No. 38/2006) referring persons to appropriate social services in the
community;

3. (supplemented, SG No. 14/2009) consulting and informing the child in accordance with his
or her age and with the level of his or her development;

4. (amended, SG No. 14/2009) consulting and assistance on issues of social assistance and
services;

5. (amended, SG No. 14/2009) assistance with a view to improve living conditions;

6. conducting social work to facilitate child-parent relations and solution of relations conflicts
and crises;

7. studying the individual abilities and interests of a child and referring him or her to a
suitable educational establishment;

8. assistance in finding appropriate jobs for children in need thereof, who have reached the
age of 16, under the conditions set forth by the labour legislation;

9. referring the child to appropriate activities to fill up his or her spare time;

10. assisting the adoptive parents in their preparation to assume their parental responsibilities,
to complete the act of adoption, as well as protecting the child's rights in cases of termination
of adoption.

and performance of their functions.

 Provision of Protection Measures in a Family Environment

Article 24. (1) (Amended, SG No. 14/2009) The child protection measures pursuant to
Article 23 shall be undertaken by the Social Assistance Directorate upon the request of
parents, tutors, curators, other persons who take care of the child, as well as at the discretion
of the Social Assistance Directorate and shall be implemented by social service providers for children or by the Social Assistance Directorate.

(2) The protection measures under Paragraph (1) may be rendered in combination with other protection measures pursuant to this Act.

Grounds for Placement out of the Family

**Article 25.** (1) (Amended, SG No. 36/2003, previous text of Article 25, SG No. 14/2009) A child may be placed to live out of his or her family in cases where:

1. the parents have passed away, are unknown or have their parental rights deprived or limited;

2. (supplemented, SG No. 14/2009) the parents, tutors or curators without a valid reason continuously do not provide care for the child;

3. (supplemented, SG No. 14/2009) the parents, tutors or curators are in a position of permanent inability to rear the child;

4. the child is a victim of violence in the family and is in danger of his/her physical, mental, moral, intellectual and social development.


6. (new, SG No. 28/2011) whose parents, tutors or curators have consented to, and refuse to terminate the child's participation in broadcasts within the meaning of the Radio and Television Act which are detrimental or pose threats to his/her physical, psychological, moral and/or social development.

(2) (New, SG No. 14/2009) The placement of the child outside the family shall be imposed as a measure of protection after all possibilities for protection within the family have been exhausted save in the cases when urgent removal is necessary.

Placement out of the Family

**Article 26.** (1) (Supplemented, SG No. 36/2003, SG No. 14/2009) The placement of a child with a family of relatives or friends, as well as placement of a child to be reared by a foster family, social service - resident type or a specialised institution shall be done by the court. Until the court comes out with a ruling, the Social Assistance Directorate at the current address of the child shall provide for temporary placement by an administrative order.

(2) (Amended, SG No. 38/2006) The request to apply measures under Paragraph (1) shall be submitted to the court by the Social Assistance Directorate, by the prosecutor or the parent. They shall refer to the regional court.

(3) (New, SG No. 14/2009) The request for placement made by the Social Assistance Directorate shall be accompanied by:

1. a report of the Social Assistance Directorate at the current address of the child;
2. the declarations of the child's family or relatives in the cases under Article 27 (3) and (4);

3. information from the register of the Social Assistance Directorate about the entered foster families with which children may be placed.

(4) (New, SG No. 14/2009) When the request is made by the prosecutor or by a parent, the court shall request ex officio the documents pursuant to Paragraph (3) from the Social Assistance Directorate.

(5) (New, SG No. 14/2009) The placement of a child in a social service together with a parent shall take place with a referral by the Social Assistance Directorate.

Temporary Placement by an Administrative Order

**Article 27.** (1) (Amended, SG No. 38/2006, supplemented, SG No. 14/2009) The placement of a child with the family of relatives or friends, with a foster family, social service - resident type or in a specialised institution shall be done by the order of the Director of the Social Assistance Directorate at the current address of the child.

(2) (New, SG No. 38/2006, amended, SG No. 14/2009) Within one month of the issue of the order under Paragraph (1), the Social Assistance Directorate shall make a request to the regional court at the current address of:

1. the child - in case or urgent measures;

2. the parents - in all other cases.

(3) (Renumbered from Paragraph (2), amended, SG No. 38/2006, SG No. 14/2009) In cases of placement with the family of relatives or friends, it is necessary to obtain the consent of the person with whom the child will be placed, and his suitability is examined. The consent of the receiving person shall be expressed with a sample declaration.

(4) (New, SG No. 14/2009) The disagreement of the relatives or friends to raise the child shall be certified by them with a sample declaration.

(5) (Renumbered from Paragraph (3), amended, SG No. 38/2006, renumbered from Paragraph (4), amended, SG No. 14/2009) In cases of placement with a foster family, placement shall be done after a check has been performed on the suitability of the candidate foster family. After placement by an administrative order, a contract shall be signed between the director of the Social Assistance Directorate at the current address of the foster family and the foster family.

(6) (Amended, SG No. 30/2006, renumbered from Paragraph (4), SG No. 38/2006, renumbered from Paragraph (5), SG No. 14/2009) The acts of the Director of the Social Assistance Directorate shall be issued and appealed against according to the procedure established by the Administrative Procedure Code.

Placement by Order of the Court
Article 28. (1) (Supplemented, SG No. 36/2003, amended, SG No. 38/2006, amended and supplemented, SG No. 14/2009) The requests for placing a child with the family of relatives or friends, with a foster family, social service - resident type or in a specialised institution shall fall within the jurisdiction of the regional court at the current address of the child.

(2) (New, SG No. 14/2009) In the proceeding under Paragraph (1) the court may collect evidence at its own initiative.

(3) (Supplemented, SG No. 38/2006, renumbered from Paragraph (2), SG No. 14/2009) The court shall immediately consider the request in an open session, where the bodies or the persons, that have submitted the request shall participate along with the child pursuant to the provision of Article 15.

(4) (Renumbered from Paragraph (3), SG No. 14/2009) The court shall come out with a ruling within one month. The ruling shall be disclosed to the parties concerned and shall be brought to immediate effect. In specifying the child protection measures the court shall follow the order established by Article 26 (1), unless that goes against the child's interests.


(6) (Renumbered from Paragraph (4), SG No. 38/2006, renumbered from Paragraph (5), SG No. 14/2009) The ruling shall be appealable to the district court within seven days. In cases where a complaint or a letter of protest has been submitted, the court shall schedule the hearing within a period of less than seven days. The district court shall come out with a ruling, which shall be final.

(7) (Renumbered from Paragraph (5), SG No. 38/2006, renumbered from Paragraph (6), SG No. 14/2009) The court may change the measure that has been ruled out upon request of the persons under Article 26 (2) where this is in the child's interest.

Grounds for Termination of the Placement

Article 29. The placement out of the family shall be terminated:

1. upon cancellation of the contract;

2. at the expiration of the term;

3. by mutual consent of the parties to the contract;

4. at the adoption of the child;

5. (supplemented, SG No. 14/2009) at the child's coming of age, and if studying - until the completion of secondary education, but not after the age of 20.

6. (supplemented, SG No. 14/2009) at the invalidation of grounds under Article 25 (1);

7. at the death of the spouses or of the foster family person;
8. at a change in the protection measure;

9. (new, SG No. 14/2009) in the event of changes in the circumstances relating to the child, if it is in his/her interest;

10. (new, SG No. 38/2006, renumbered from Item 9, SG No. 14/2009) in the event of death of the person/persons of the family of relatives or friends;


Procedure for Placement Termination

**Article 30.** (1) (Amended, SG No. 38/2006, SG No. 14/2009) The placement shall be terminated by the regional court upon request of the foster family, of the family of relatives of friends, of the Social Assistance Directorate, of the child's parents or of the prosecutor, except in the cases under Items 4, 5, 7, 10 and 11 of Article 29.

(2) (Amended, SG No. 14/2009) The placement may be terminated temporarily by the Social Assistance Directorate until the ruling of the court comes out. In that case, the Social Assistance Directorate may make a decision concerning the future rearing and upbringing of the child; or it may adopt another temporary protection measure if the best interests of the child are ensured in this way.

(3) The ruling of the regional court may be appealed against in front of the district court. The act of appeal may not stop the execution. The ruling of the district court shall be final and is not subject of cassation appeal.

(4) The ruling to terminate the placement shall be executed in the administrative procedure.

Alteration of the Child Protection Measure


Foster Family

**Article 31.** (1) A foster family shall consist of two spouses or of a separate individual, with whom a child is placed to be reared and brought up pursuant to a contract under Article 27.

(2) (New, SG No. 38/2006, effective 1.01.2007) The foster family may be a professional foster family.

(3) (New, SG No. 38/2006, effective 1.01.2007, amended, SG No. 14/2009) A professional foster family must also have additional qualifications to rear and bring up children, acquired according to the procedure established by the regulation under Paragraph (6). The professional foster family shall sign a contract of service with the provider of the "foster care" social service under the Labour Code.
(4) (New, SG No. 38/2006, effective 1.01.2007) The terms and procedure for financing of the professional foster family shall be established by the Implementing Regulation on this Act.

(5) (Renumbered from Paragraph (2), SG No. 38/2006, effective 1.01.2007) The spouses or the individual of the foster family shall not bear parental rights and responsibilities.

(6) (New, SG No. 36/2003, renumbered from Paragraph (3), SG No. 38/2006, effective 1.01.2007) The terms and procedure for application, selection and approval of the foster families as well as the placement of children with the foster family shall be established by a Regulation of the Council of Ministers upon a proposal of the Minister of Labour and Social Policy.

Persons Who Are Ineligible to Become a Foster Family

**Article 32.** (1) The persons who are ineligible to become a foster family are those that:

1. have not come of age;
2. have been placed under prohibitory injunction;
3. have been deprived of their parental rights or whose parental rights have been limited, unless that has happened for objective reasons and their parental rights have been restored;
4. may not act as guardians;
5. are guardians or trustees, as well as foster families, who have been discarded of that activity for culpable failure to fulfil obligations;
6. are unsuitable to perform parental functions as they lack the personal qualities to bring up a child and they do not have financial means to rear and care for a child.
7. are adoptive parents at the moment of adoption termination, which has been caused through their fault pursuant to the procedure established by the Family Code;
8. (amended, SG No. 70/2004 - effective 1.01.2005) are afflicted with AIDS and illnesses pursuant to Article 61 (1) and Items 1 and 2 of Article 146 (1)of the Health Act.
9. (new, SG No. 38/2006) who have been convicted of a premeditated offence at public law;
10. (new, SG No. 38/2006) against whom criminal proceedings have been instituted for a premeditated offence at public law.

Relations with Birth Parents

**Article 33.** (1) (Amended, SG No. 38/2006) The foster family and the family of relatives or friends must provide information about the child to his or her parents and must assist them in their personal relations with the child. Where such relations are to the interest of the child, the regional court shall rule out on their regime by a decision.

(2) (Supplemented, SG No. 38/2006) The decision under Paragraph (1) may be appealed
pursuant to the procedure established by the Code of Civil Procedure by the parents, the child, the prosecutor, the Social Assistance Directorate, the family of relatives or friends or the foster family.

Expression of Opinion

**Article 34.** (Amended, SG No. 38/2006) The foster family and the family of relatives or friends shall have a right to express an opinion before a decision has been issued concerning a change in the child protection measure.

Foster Care

**Article 34a.** (New, SG No. 38/2006) (1) (Previous Article 34a, SG No. 14/2009) Foster care shall be the rearing and upbringing in the family environment of a child placed with the family of relatives or friends or with a foster family.

(2) (New, SG No. 14/2009) The persons directly providing the foster care may be supported by the "foster care" social service supplied by the provider of social services for children.

Placement in Specialised Institutions

**Article 35.** (1) (Repealed, SG No. 36/2003).

(2) (Amended, SG No. 36/2003) Children shall be placed in specialised institutions only where the opportunities for leaving the child in a family environment have been exhausted.

(3) (Amended, SG No. 36/2003) Establishments that provide services in a family environment shall not be considered as specialised institutions.

Control

**Article 36.** The Director of the Social Assistance Directorate shall exercise current control on the effectiveness of measures undertaken.

Police Protection

**Article 37.** (1) The provision of police protection to a child shall be done by the specialised bodies of the Ministry of the Interior.

(2) (Repealed, SG No. 14/2009).

Grounds

**Article 38.** (Supplemented, SG No. 14/2009) Police protection is an urgent measure to be applied when the child:

1. (amended, SG No. 14/2009) has become subject of a crime or there is an immediate threat for his or her life or health, as well as when there is a danger of the child getting involved in a crime;
2. (amended, SG No. 14/2009) has been lost or is in a helpless condition;

3. (amended, SG No. 14/2009) has been left without supervision.

Police Protection Measures

**Article 39.** (1) The specialised bodies of the Ministry of the Interior may:

1. accommodate the child in special premises, where they shall not permit any contacts with the child that may prove harmful to him or her;

2. (supplemented, SG No. 14/2009) place the child in specialised institutions or social service - resident type, and where necessary provide him or her with food;

3. (amended, SG No. 14/2009) return the child back to his or her parents or the persons who care for the child.

(2) The specialised bodies under Paragraph (1) shall inform the child and explain to him or her in an understandable manner the measures undertaken and the grounds for them.

(3) (New, SG No. 38/2006) The bodies under Paragraph (1) may conduct checks on receiving information and reports on the presence of circumstances under Article 38.

Obligation to Notify

**Article 40.** The police bodies, who have implemented the protection, shall notify immediately:

1. (supplemented, SG No. 14/2009) the child's parents, tutors, curators or persons who take care of the child;

2. the Social Assistance Directorate of the region where protection has been implemented;

3. (amended, SG No. 36/2003) the Social Assistance Directorate at the current address of the child;

4. the prosecutor's office.

5. (new, SG No. 14/2009) the regional directorate of the Ministry of the Interior at the current address of the child.

Term

**Article 41.** (Amended, SG No. 36/2003, SG No. 14/2009) Police protection shall be offered for up to 48 hours.

Search for a Disappeared Child

**Article 42.** The actions for the search of a disappeared child shall be undertaken immediately.
Regulation

Article 43. The terms and conditions to provide police protection shall be governed by an ordinance issued by the Minister of the Interior in consultation with the State Agency for Child Protection.

Specialised Protection of Children at Public Places


Chapter Four "A"
(New, SG No. 36/2003 - effective 1.01.2004)
LICENSING

License
(Title amended, SG 38/2006)

Article 43b. (1) (Amended, SG No. 38/2006) The Chairperson of the State Agency for Child Protection shall issue a license for the provision of social services for children upon a proposal of a commission, including representatives of the Ministry of Labour and Social Policy, the Ministry of Education, Youth and Science, the Ministry of Health, the Ministry of the Interior, the Ministry of Justice, the State Agency for Child Protection and the Agency for Social Assistance.

(2) (Amended, SG No. 38/2006) The license shall be personal and may not be ceded.

(3) (Amended, SG No. 38/2006) The license shall be issued for a period of three years.

Conditions for Issuing a License

(Title amended, SG 38/2006)

Article 43c. (Amended, SG No. 38/2006) The license shall be issued, when the applicant:

1. (amended, SG No. 38/2006, effective as of the date of entry into force of the Treaty of Accession of the Republic of Bulgaria to the European Union - 1.01.2007) shall be a person under Item 3 or 4 of Article 18 (1) of the Social Assistance Act;

2. has not been declared bankrupt or is not in bankruptcy proceedings;

3. is not in liquidation proceedings;

4. has not been convicted of a crime, as for the legal entities this requirement refers to the members of their managing bodies;
5. (Amended, SG No. 63/2003) provides social services that meet the standards determined in the Regulation under Article 4 (3).

Issuing of the License

(Title amended, SG 38/2006)

Article 43d. (1) (Amended, SG No. 38/2006) Within two months of the receipt of the application for issuing a license, the Chairperson of the State Agency for Child Protection, upon a proposal of the commission under Article 43b, shall issue or refuse to issue a license, if the candidate meets the requirements set out in Article 43c.

(2) (Amended, SG No. 38/2006) The license shall contain:

1. (amended, SG No. 38/2006) the holder of the license;
2. (amended, SG No. 38/2006) the social services covered by the license;
3. (amended, SG No. 38/2006) the time limit of the license.

(3) The licensing procedure shall be defined in the Implementing Regulation on the Child Protection Act.

Withdrawal of the License

(Title amended, SG 38/2006)

Article 43e. (Amended, SG No. 38/2006) The Chairperson of the State Agency for Child Protection may withdraw the license issued for the provision of social services for children, where the holder:

1. (new, SG No. 14/2009) fails to meet the compulsory prescription within term;
2. (amended, SG No. 38/2006, renumbered from Item 1, SG No. 14/2009) fails to start providing the services within 12 months of the issuing of the licence;
3. (renumbered from Item 2, SG No. 14/2009) fails to keep the standards concerning the provision of social services for children;
5. (new, SG No. 38/2006, renumbered from Item 4, SG No. 14/2009) fails to provide information within 14 days of any change in the circumstances certified by the documents to the application for issuing a licence.
6. (new, SG No. 14/2009) discontinues the provision of the social service for more than three months without citing a good reason leading to the discontinuation of the activity.

Appeal
Article 43f. The refusal as well as the withdrawal of the license shall be appealed against according to the procedure established by the Administrative Procedure Code.

Fees

Article 43g. (Amended, SG No. 51/2011) The fees collected by the issuing of licenses for provision of social services for children shall be paid in the Social Protection Fund set up to the Minister of Labour and Social Policy and shall be spent for child protection activities.

Registration

Article 43h. (Amended, SG No. 38/2006, effective as of the date of entry into force of the Treaty of Accession of the Republic of Bulgaria to the European Union - regarding the word "persons") Any persons licensed under Article 43b, shall provide social services for children after registration according to the procedure established by the Social Assistance Act.

Chapter Five
FINANCING OF CHILD PROTECTION ACTIVITIES

Sources of Financing

Article 44. (Amended, SG No. 36/2003) (1) Child protection activities are financed from:

1. The state budget;
2. Municipal budgets;
3. National and international programmes and agreements in the field of child care;
4. Donations of Bulgarian and international natural persons and legal entities;
6. Other sources.

(2) (Amended, SG No. 38/2006) The Social Assistance Directorates under the Agency for Social Assistance shall provide financial aid and/or assistance in the form of social investments under terms and according to a procedure established by the Implementing Regulation on the Child Protection Act.

(3) (Amended, SG No. 38/2006) The financial aid and/or assistance under Paragraph (2) shall be allocated by the Director of the Social Assistance Directorate under the Agency for social assistance at a decision given in writing.

(4) The financial aid is provision of special resources in cash as:
1. one-time aid;
2. monthly aid.

(5) (Amended, SG No. 38/2006) Social investments shall take the form of provision of goods and/or services necessary for the rearing and upbringing of the child.

(6) (Amended, SG No. 38/2006) The financial aid and/or assistance under Paragraph (2) shall be provided as to support the child and his/her family for the purpose of prevention and reintegration, rearing of the child in families of relatives or friends or in foster families.

(7) The financial aid and/or assistance under Paragraph (2) shall be free of taxes, fees and deductions.

Child Assistance Fund


Chapter Six
ADMINISTRATIVE PENALTY PROVISIONS

Sanctions

Article 45. (1) (New, SG No. 38/2006, amended, SG No. 14/2009) A fine or a pecuniary penalty of BGN 2,000 or exceeding this amount but not exceeding BGN 4,000 shall be imposed on any person who sells alcoholic drinks or tobacco products to children where no heavier administrative penalty is provided for by a special act or the act does not constitute a criminal offence. In the case of a repeated violation compulsory measures shall be taken for the temporary cessation of activity for a set term, but no longer than one year.

(2) (New, SG No. 38/2006, amended, SG No. 14/2009, supplemented, SG No. 42/2010, effective 2.06.2010) A fine or a pecuniary penalty of BGN 2,000 or exceeding this amount but not exceeding BGN 5,000 shall be imposed on any person who allows a child into a commercial establishment under his management between 10 p.m. and 6 a.m. in violation of Paragraphs (3),(4) and (5) of Article 8, and in the case of a repeated violation with a fine or a pecuniary penalty of BGN 5,000 or exceeding this amount but not exceeding BGN 8,000.

(3) (New, SG No. 38/2006, amended, SG No. 14/2009, supplemented, SG No. 42/2010, effective 2.06.2010) A fine of BGN 300 or exceeding this amount but not exceeding BGN 500 for a first violation, and a fine of BGN 500 or exceeding this amount but not exceeding BGN 1,000 for a second violation, shall be imposed on any parent, tutor, curator or other person who takes care of a child who violates Article 8 (3) and (5), or on a parent, curator or other person who takes care of a child who fails to provide a person to accompany the child pursuant to Article 8 (3).

(4) (New, SG No. 14/2009) A fine of BGN 1,000 or exceeding this amount but not exceeding BGN 2,000 for a first violation, and a fine of BGN 2,000 or exceeding this amount but not
exceeding BGN 5,000 for a second violation, shall be imposed on any person who in violation of Article 8 (7) leaves without supervision and adequate care a child under 12 years of age in his care, whereby he creates a danger for his or her physical, mental and moral development, unless liable to a heavier administrative penalty under a special law or unless the act constitutes a criminal offence.

(5) (New, SG No. 38/2006, renumbered from Paragraph (4), amended, SG No. 14/2009) A fine or a pecuniary penalty of BGN 2,500 or exceeding this amount but not exceeding BGN 10,000 shall be imposed on any person who provides social services without a license.

(6) (Amended, SG No. 36/2003, renumbered from Paragraph (1), amended and supplemented, SG No. 38/2006, renumbered from Paragraph (5), amended, SG No. 14/2009) Any person who fails to fulfil an obligation pursuant to this Act with the exception of the cases under Paragraphs (1) to (5) shall be liable to a fine of BGN 500 or exceeding this amount but not exceeding BGN 2,000 for a first violation, and a fine of BGN 1,000 or exceeding this amount but not exceeding BGN 4,000 for a second violation, unless liable to a heavier administrative penalty under a special law or unless the act constitutes a criminal offence.

(7) (Amended, SG No. 36/2003, renumbered from Paragraph (2), amended, SG No. 38/2006, renumbered from Paragraph (6), amended, SG No. 14/2009) Any official who fails to fulfil an obligation shall be liable to a fine of BGN 500 or exceeding this amount but not exceeding BGN 1,000 for a first violation, and a fine of BGN 1,000 or exceeding this amount but not exceeding BGN 2,000 for a second violation, unless liable to a heavier administrative penalty under a special law or unless the act constitutes a criminal offence.

(8) (New, SG No. 14/2009) An official in a specialised institution, social service - resident type, or social service in the community, who fails to fulfil an obligation pursuant to this Act, shall be liable to a fine of BGN 500 or exceeding this amount but not exceeding BGN 1,000 for a first violation, and a fine of BGN 1,000 or exceeding this amount but not exceeding BGN 2,000 for a second violation, unless liable to a heavier administrative penalty under a special law or unless the act constitutes a criminal offence.

(9) (New, SG No. 14/2009) Any person who fails to fulfil a compulsory prescription pursuant to this Act shall be liable to a fine or a pecuniary penalty of BGN 2,000 or exceeding this amount but not exceeding BGN 5,000 for a first violation, and a fine or a pecuniary penalty of BGN 5,000 or exceeding this amount but not exceeding BGN 10,000 for a second violation.

(10) (New, SG No. 14/2009) A management body of a specialised institution, social service - resident type, or social service in the community, who fails to fulfil an obligation pursuant to this Act, shall be liable to a fine or a pecuniary penalty of BGN 5,000 for a first violation, and a fine or a pecuniary penalty of BGN 5,000 or exceeding this amount but not exceeding BGN 10,000 for a second violation, unless liable to a heavier administrative penalty under a special law or unless the act constitutes a criminal offence.

(11) (New, SG No. 14/2009) Any person, who in violation of Paragraphs (1) and (2) of Article 7 fails to inform the Social Assistance Directorate, the State Agency for Child Protection or the Ministry of the Interior of the need for child protection, shall be liable to a fine of BGN 1,000 or exceeding this amount but not exceeding BGN 2,000 for a first
violation, and a fine of BGN 2,000 or exceeding this amount but not exceeding BGN 5,000 for a second violation, unless liable to a heavier administrative penalty under a special law or unless the act constitutes a criminal offence.

(12) (New, SG No. 14/2009, amended, SG No. 28/2011) Any person who, in violation of Article 11a, discloses information and data about the personality of a child shall be liable to a fine from BGN 1,000 to BGN 3,000, or a pecuniary penalty from BGN 3,000 to BGN 5,000 unless liable to a heavier administrative penalty under a special law or unless the act constitutes a criminal offence. In case of a recurrent violation, the pecuniary penalty shall be from BGN 5,000 to BGN 10,000.

(13) (New, SG No. 47/2009, effective 1.10.2009) An official failing to perform an obligation under Article 27, paragraph 2 shall be punished with a fine ranging from BGN 1,000 to BGN 2,000 for a first violation and from BGN 1,500 to BGN 3,000 for a repeated violation, unless the official is subject to a more severe administrative punishment prescribed by a special law or the action constitutes an offence.

(14) (New, SG No. 59/2010) Parents, tutors, curators or other persons who take care of a child and who violate Article 8, paragraph 9 shall be punished with a fine ranging from BGN 250 to BGN 500 for a first violation and from BGN 500 to BGN 1,000 for repeated violations.

(15) (New, SG No. 28/2011) Any parent, tutor, curator or another person taking care of a child who has, in violation of Article 8(10), allowed the participation of a child in broadcasts within the meaning of the Radio and Television Act and thus poses threats to his/her physical, psychological, moral and/or social development shall be liable to a fine from BGN 1,000 to BGN 2,000, unless liable to a heavier administrative penalty under a special law or unless the act constitutes a criminal offence. In case of a recurrent violation, the pecuniary penalty shall be from BGN 2,000 to BGN 5,000.

Proceeds from Sanctions Imposed

Article 45a. (New, SG No. 38/2006, supplemented, SG No. 14/2009) The proceeds from fines and pecuniary penalties imposed under this Act shall be credited to the Fund for Treatment of Children Centre with the Minister of Health Care, who shall submit to the National Assembly an annual report on the proceeds and expenditures of the Agency.

Procedure

Article 46. (Amended and supplemented, SG, No. 36/2003, SG No. 38/2006, amended, SG No. 69/2008, SG No. 14/2009) (1) Violations under Paragraphs (1) to (4) of Article 45 shall be ascertained by an act of the police bodies, and the penalty decree shall be issued by the Director of the regional directorate of the Ministry of the Interior or by an official empowered by him.

(2) (Amended, SG No. 59/2010, SG No. 28/2011) Violations under Paragraphs (5) (6), (8), (10), (11), (12), (14) and (15) of Article 45 shall be ascertained by an act of an official of the Child Rights Control Chief Directorate with the State Agency for Child Protection, and the penalty decree shall be issued by the Chairman of the State Agency for Child Protection or by an official empowered by him.
(3) (Supplemented, SG No. 47/2009, effective 1.10.2009) Violations under Article 45 (7) and (13) shall be ascertained:

1. of an official from the Social Assistance Directorate - by an act of an inspector from the Agency for Social Assistance, and the penalty decree shall be issued by the Executive Director of the Agency for Social Assistance or by an official empowered by him.

2. of other officials - by an act of an official of the Child Rights Control Chief Directorate with the State Agency for Child Protection, and the penalty decree shall be issued by the Chairman of the State Agency for Child Protection or by an official empowered by him.

(4) Violations under Article 45 (9) shall be ascertained:

1. by an act of a social worker from the Social Assistance Directorate - for failure to fulfil the compulsory prescriptions under Article 21 (1) Item 3 and the penalty decree shall be issued by the Director of the Social Assistance Directorate or by an official empowered by him.

2. by an act of an official of the Child Rights Control Chief Directorate with the State Agency for Child Protection - for failure to fulfil the compulsory prescriptions under Article 17a items 14 - 16, and the penalty decree shall be issued by the Chairman of the State Agency for Child Protection or by an official empowered by him.

(5) Upon ascertainment of violations, the persons under Paragraphs (2) - (4) may seek assistance from the police bodies of the Ministry of the Interior.

(6) Acts ascertaining violations and penalty decrees shall be drawn up and appealed against according to the procedure established by the Administrative Violations and Sanctions Act.

SUPPLEMENTARY PROVISION

§ 1. Within the meaning of this Act:

1. (New, SG No. 36/2003) "Protection" of the child" shall be a system of legislative, administrative and other measures for the implementation the rights of the child.

2. (New, SG No. 14/2009) "Information and data about the personality of a child" shall be any information about child within the meaning of the Protection of Personal Data Act.

3. (New, SG No. 14/2009) "Other persons who take care of the child" shall be the family or relatives or friends or a foster family with which the child has been placed pursuant to the procedure of Article 26, as well as the other persons where the child resides according to current address.

4. (New, SG No. 14/2009) "Harmonized telephone number with national coverage providing information, consultation and help for children" shall be a harmonized number for a service of social value of the range 116 for rendering assistance to children, accessible through a free telephone number.

5. (New, SG No. 14/2009) "The best interest of the child" shall be an assessment of:
a) the desires and feelings of the child;

b) the physical, mental and emotional needs of the child;

c) the age, gender, past and other characteristics of the child;

d) the danger or harm which has been caused or which is likely to be caused to the child;

e) the ability of the parents to care for the child;

f) the consequences which will ensue for the child with a change of circumstances;

g) other circumstances with a bearing on the child.

6. (New, SG No. 14/2009) "Care" shall be the totality of all actions proceeding from the
  rights and obligations of the parents, tutors, curators or other persons with whom the child
  lives by virtue of other legal grounds, for guaranteeing the rights of the child and the
  protection of his or her interests.

7. (Renumbered from Item 1, SG No. 36/2003, renumbered from Item 2, SG No. 14/2009) "A
  family environment" shall be the biological family of the child or the family of the adoptive
  persons, of the grandmother and grandfather or of the child's relatives, or a foster family, with
  whom the child is being placed pursuant to Article 26.

8. (Renumbered from Item 2, SG No. 36/2003, amended, SG No. 38/2006, renumbered from
   Item 3, SG No. 14/2009) "Services" within the meaning of Article 23 shall be the social
   services provided in the community under the Social Assistance Act.

9. (Renumbered from Item 3, SG No. 36/2003, repealed, SG No. 38/2006, renumbered from
    Item 4, SG No. 14/2009)

10. (Renumbered from Item 4, amended, SG No. 36/2003, renumbered from Item 5, SG No.
    14/2009) "Specialised institutions" are homes of boarding type for rearing and upbringing of
    children where the latter are permanently separated from their family environment.

11. (Renumbered from Item 5, SG No. 36/2003, amended, SG No. 38/2006, renumbered
    from Item 6, amended, SG No. 14/2009) "A child at risk" shall be a child:

    a) who does not have parents or has been permanently deprived of their care;

    b) who has become victim of abuse, violence, exploitation or any other inhuman or degrading
       treatment or punishment either in or out of his or her family;

    c) for whom there is a danger of causing damage to his or her physical, mental, moral,
       intellectual and social development;

    d) who is afflicted with disabilities and difficult to treat illnesses.

    e) for whom there is a risk for dropping out from school or whom is dropped out from school.
12. (Renumbered from Item 6, SG No. 36/2003, renumbered from Item 7, SG No. 14/2009) "A child of prominent talent" shall be a child that has demonstrated permanent capabilities and achievements in the field of science, arts or sports, and his or her achievements outdo those of his or her peers.

13. (New, SG No. 36/2003, renumbered from Item 8, amended, SG No. 14/2009) "Prevention" shall be protection of the child through information, assistance, support and services.

14. (New, SG No. 36/2003, renumbered from Item 9, amended, SG No. 14/2009) "Reintegration" shall be a process of lasting reunification of the child placed outside the family under Article 4, Items 2, 4 - 6, with his/her biological family or his/her adoption.

15. (New, SG No. 36/2003, renumbered from Item 10, SG No. 14/2009) "Current address of the child" shall be the address whereat the child resides.

16. (New, SG No. 38/2006, renumbered from Item 11, SG No. 14/2009) "Repeated violation" shall be any violation committed within one year of the entry into force of a penalty decree whereby the offender was penalised for a violation of the same kind.

17. (New, SG No. 14/2009) "Specialised protection of children at public places" shall be the creation of conditions that do not endanger the physical, mental and moral development of the children.

18. (New, SG No. 14/2009) "Suitability" are the financial and personal quality of the person who takes care of the child.

**TRANITIONAL AND FINAL PROVISIONS**

§ 2. Within a period of six months from the effective date of this Act, the Council of Ministers shall by decree establish a State Agency for Child Protection under the terms and according to the procedure established by the Administration Act. The financing under Items 1 and 2 of Article 44 shall become effective as of the 1st day of January 2001.

§ 3. Within a period of six months from the effective date of this Act, the state authorities, specified in the respective provisions, shall issue the secondary legislative acts provided for by the Act.

§ 4. The implementation of this Act is assigned to the Council of Ministers.

Act to Amend and Supplement the Child Protection Act


**FINAL PROVISIONS**

§ 32. The Minister of Justice, the Minister of Labour and Social Policy, the Minister of Education and Science, the Minister of Health Care and the Minister of the Interior shall adjust the secondary legislation they have issued to the provisions of this Act within six
months of its effective date.

§ 33. The Council of Ministers shall adopt the Implementing Regulations on this Act within six months of its effective date.

§ 34. This Act shall enter into force on the date of its promulgation in The State Gazette, except for § 27, which will enter into force on the 1.01.2004.

Act to Amend and Supplement the Child Protection Act

(SG No. 38/2006)

Final Provisions

§ 38. The Council of Ministers shall bring the acts of secondary legislation into conformity with the provisions of this Act within six months of the entry of the said Act into force.

§ 40. Paragraph (20) shall enter into force on the 1st day of January 2007, and Item 1 of § 10 (regarding the words "persons under Items 3 and 4 of Article 18 (1) of the Social Assistance Act"), § 28 (regarding the words "persons under Items 3 or 4 of Article 18 (1) of the Social Assistance Act") and § 31 (regarding the word "persons") shall enter into force as of the date of entry into force of the Treaty of Accession of the Republic of Bulgaria to the European Union.

Act to Amend and Supplement the Child Protection Act

(SG No. 14/2009)

FINAL PROVISIONS

§ 41. Nurseries, kindergartens, schools, the providers of social services for children, health and treatment facilities shall display prominently information about number 116 within a term of 6 months after its establishment.

§ 43. The Council of Ministers shall bring the acts of secondary legislation on the implementation of the Act into conformity with the provisions of this Act within six months of the entry of the said Act into force.

TRANSITIONAL AND FINAL PROVISIONS

to the Act amending and supplementing the Vocational Education and Training Act

(SG No. 74/2009, effective 15.09.2009)
Chapter One
GENERAL DISPOSITIONS
Scope of Application

Article 1. This Act regulates the relationships associated with mediation as an alternative method of resolution of legal and non-legal disputes.

Notion of Mediation

Article 2. Mediation is a voluntary and confidential procedure for out-of-court resolution of disputes, whereby a third party mediator assists the disputants in reaching a settlement.

Subject of Mediation

Article 3. (1) (Supplemented, SG No. 27/2011) Subject of mediation may be civil, commercial, labour, family and administrative disputes related to consumer rights, and other disputes between natural and/or legal persons, including when they are cross-border disputes.

(2) Mediation shall furthermore be conducted in the cases provided for in the Criminal Procedure Code.

(3) Mediation shall not be conducted if a law or another statutory instrument provides for another procedure for conclusion of an agreement.

Organization of Mediation

Article 4. Mediation shall be implemented by natural persons. Such persons may associate for the purpose of implementing the activity. No persons performing functions of administration of justice in the judiciary system may carry out mediation activities.

Chapter Two
PRINCIPLES OF MEDIATION
Voluntary Recourse and Equal Treatment

Article 5. The parties shall have equal opportunities to participate in a mediation
process. They shall participate in the process of their own free will and may withdraw at any time.

Neutrality and Impartiality

Article 6. (1) A mediator shall not display partiality and shall not impose a resolution of the dispute.

(2) Within a mediation process, all questions shall be resolved by mutual agreement between the parties.

Confidentiality

Article 7. (1) (Previous Article 7, SG No. 27/2011) Discussions in connection with the dispute shall be confidential. The participants in a mediation process shall be bound by the obligation to respect the confidentiality of all circumstances, facts and documents as have come to the knowledge thereof in the course of the process.

(2) (New, SG No. 27/2011) Mediators may not be interrogated as witnesses regarding circumstances which have been confided to them by mediation participants and which are relevant to the resolution of the dispute that is the subject of the mediation, unless having received the explicit consent of the confiding party.

(3) (New, SG No. 27/2011) An exception to mediation confidentiality is allowed where:

1. this is necessary for the purposes of criminal proceedings or in relation to the protection of public order;

2. this is required in order to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

3. disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Chapter Three
LEGAL STATUS OF MEDIATOR
General Eligibility Requirements

Article 8. (Amended, SG No. 86/2006) A mediator may be only a legally capable person who meets the following requirements:

1. has not been convicted for criminal offenses at public law;

2. has successfully undergone a course for mediators

3. has not been deprived of the right to exercise a profession or conduct an activity;

4. (Supplemented, SG No. 9/2011) has a permit for long-term or permanent residence in the Republic of Bulgaria, in the event the person is a foreign national;
5. has been entered in the Uniform Register of Mediators with the Minister of Justice

(2) (Effective as from the date of entry into force of the Treaty concerning the Accession of the Republic of Bulgaria to the European Union) The requirement under paragraph 1, item 4 does not apply to nationals of member-states of the European Union, the other states from the European Economic Area and Switzerland.

(3) The Minister of Justice shall issue a certificate to the mediator ascertaining his/her entering in the Uniform Register of Mediators.

(4) The Minister of Justice shall approve by issuing an order the organizations which deliver training to mediators. The terms and conditions for their approval, as well as the requirements for mediation training are to be defined in an ordinance of the Minister of Justice.

(5) In the event a person, applying for mediator and an organization, applying to deliver training for mediators, do not meet the statutory requirements, the Minister of Justice shall issue an order to refuse, respectively approve, their entering in the Uniform Register of Mediators. The order may be appealed before the Supreme Administrative Court following the procedure of the Administrative Procedure Code.

Uniform Register of Mediators

**Article 8a.** (New, SG No. 86/2006) (1) The Minister of Justice creates and maintains the Uniform Register of Mediators

(2) The following is entered in the Uniform Register of Mediators:

1. name, personal identification number (personal number of a foreign national), citizenship, education, profession, additional specialization in the field of mediation, the organization which has trained the mediator, foreign language skills, address and telephone for contacts and number of the mediator;

2. deletion and striking off the mediator;

3. the organization where the mediator was trained

4. changes in the circumstances under Article 8, paragraph 1, item 1, 3 and 4.

(3) The Uniform Register of Mediators is public.

(4) A person entered in the Uniform Register of Mediators shall declare in writing to the Minister of Justice any changes in the circumstances, subject to entering in the Register, within 14 days after they occur.

(5) When a requirement of Article 8, paragraph 1, item 1, 3 and 4 is no longer met, the Minister of Justice issues an order for deletion of the mediator in the Uniform Register of Mediators. The order may be appealed before the Supreme Administrative Court following the procedure of the Administrative Procedure Code.
(6) The procedure for entering in, striking off and deletion from the Uniform Register of Mediators is determined by the ordinance as per Article 8, paragraph 4.

(7) The information under paragraph 2, item 1 concerning the personal identification number (personal number of a foreign national) shall be submitted under the terms and conditions provided for by the Personal Data Protection Act.

Fees

Article 8b. (New, SG No. 86/2006) The Ministry of Justice shall charge a fee for entering in the Uniform Register of Mediators and for approval of organizations which train mediators, to an amount set with a tariff, adopted by the Council of Ministers.

Rules of Mediator Conduct

Article 9. (1) (Supplemented, SG No. 86/2006) A mediator shall act in good faith in compliance with the law, good morals, and the procedural and ethical rules of mediator conduct. These rules shall be determined in the ordinance under Article 8, paragraph 4

(2) A mediator shall accept to conduct the procedure solely if able to guarantee his or her own independence, impartiality and neutrality.

Mediator’s Obligations and Liability

Article 10. (1) A mediator may not give legal advice.

(2) During the process, a mediator shall be obligated to comply with the opinion of each of the disputants.

(3) A mediator shall withdraw from the process upon occurrence of any circumstances as would cast doubt on the independence, impartiality and neutrality thereof.

(4) A mediator may not communicate to the other participants in the process any circumstances concerning solely one of the disputants without the consent of the said disputant.

(5) A mediator shall not be liable if the parties fail to reach a settlement.

(6) A mediator shall not be liable for non-performance of the agreement.

Chapter Four
MEDIATION PROCESS
Initiation of Process

Article 11. (1) A mediation process shall commence on the initiative of the disputants, with each of the said disputants having the right to propose resolution of the dispute through mediation.
(2) (New, SG No. 27/2011) The beginning of a mediation process shall be the date on which the parties have reached an explicit agreement to commence such a process, and when no explicit agreement is available the beginning of the mediation process shall be the date of the first meeting of all participants with the mediator.

(3) (Renumbered from Paragraph 2, SG No. 27/2011) A proposal for resolution of the dispute through mediation may furthermore be made by the court or another competent authority where the dispute has been referred for settlement.

(4) (Renumbered from Paragraph 3, SG No. 27/2011) The consent of the parties to resolution of a possible future dispute therebetween through mediation may furthermore be stipulated as a clause of a contract.

Effect of the mediation process beginning on the limitation period

Article 11a. (New, SG No. 27/2011) No limitation period shall run while the mediation process is ongoing.

Participants

Article 12. (1) A mediation process shall be implemented by one or more mediators selected by the parties.

(2) (Supplemented, SG No. 86/2006) The disputants shall participate in the process personally or through a representative. Authorization shall be made in writing.

(3) Lawyers, as well as other specialists, may likewise participate in a mediation process.

Mediator's Steps

Article 13. (1) Prior to conduct of the process, the mediator shall inform the parties of the essence of mediation and of the consequences thereof and shall require the written or oral consent of the said parties to participation.

(2) (Amended, SG No. 27/2011) The mediator shall be obligated to indicate all circumstances as may give rise to reasonable doubt in the parties as to the impartiality and neutrality of the mediator, including the cases when the mediator is a person:

1. who is a spouse or a relative in a direct line to an unlimited degree and collaterally up to and including the fourth degree, or to the third degree of affinity, of any of the parties or their representatives;

2. who lives in de facto marital cohabitation with any party to the dispute that is the subject of the mediation;

3. who has been a representative or an agent of any party to the dispute that is the subject of the mediation;

4. in respect of whom there are other circumstances that cause reasonable doubt as to the
mediator's impartiality.

(3) (New, SG No. 27/2011) A mediator shall sign a statement of impartiality for each process which has been assigned to him/her and shall present it to the parties to the dispute. The statement of impartiality shall contain, inter alia, a reference to the circumstances under Paragraph 2.

(4) (Renumbered from Paragraph 3, SG No. 27/2011) In the course of the process, the essence of the dispute shall be clarified, the mutually acceptable options of solutions shall be specified, and the possible framework of an agreement shall be outlined.

(5) (Renumbered from Paragraph 4, SG No. 27/2011) Upon performance of the said steps, the mediator may schedule separate meetings with each of the parties, with due respect for the equal rights thereof to participation in the process.

Grounds for Suspension of Process

Article 14. (1) Mediation shall be suspended:

1. by common agreement between the parties, or at the request of one of the parties;
2. upon the death of the mediator;
3. in the cases provided for in Article 10 (3) herein.

(2) (Supplemented, SG No. 86/2006) If mediation is conducted while a proceeding is pending, the parties shall forthwith inform the competent authority of the suspension of the mediation process.

Grounds for Termination of Process

Article 15. (1) A mediation process shall be terminated:

1. upon reaching a settlement;
2. by mutual agreement between the parties;
3. upon withdrawal of one of the parties;
4. upon the death of a disputant;
5. upon dissolution of a disputant if a legal person.
6. (new, SG No. 27/2011) upon expiration of 6 months from the beginning of the process.

(2) The agreement of the parties to the termination of the dispute must be expressed clearly and unequivocally.

(3) Upon termination of a mediation process, a pending proceeding that has been
suspended shall be resumed in accordance with the provisions of the law.

**Chapter Five**

**AGREEMENT**

**Form and Content**

**Article 16.** (1) (Previous Article 16, supplemented, SG No. 27/2011) The form and content of the agreement shall be determined by the parties. The form may be oral, written, or written with a notarization of the parties' signatures. A written agreement shall state the place and date whereat the said agreement was reached, the names of the parties and the addresses thereof, the points of agreement, the name of the mediator, and the date under Article 11(2) and shall bear the signatures of the parties.

(2) (New, SG No. 27/2011) The parties may include a liability clause in the agreement governing any cases of defaulting on the obligations laid down therein.

**Effect of Agreement**

**Article 17.** (1) The agreement shall be binding solely on the disputants and may not be held adverse to any persons who did not participate in the process.

(2) (Amended, SG No. 86/2006) The agreement shall be binding on the parties solely in respect of the points of agreement therebetween.

(3) (New, SG No. 86/2006) Null shall be an agreement which contradicts or evades the law, as well as an agreement which is in conflict with the morals.

**Making an agreement enforceable**

**Article 18.** (New, SG No. 27/2011) (1) Any agreement concerning a legal dispute within the meaning of Article 1 of this Act reached in a mediation process shall have the effect of a court settlement and shall be subject to approval by regional courts in Bulgaria.

(2) The competent court shall approve the agreement, once acknowledged by the parties, if it does not contradict the law or the principles of morality. The court shall hear the opinion of the prosecutor, if the latter is involved as a party to the process.

**ADDITIONAL PROVISION**

(New, SG No. 27/2011)

§ 1. (New, SG No. 27/2011) Within the meaning of this Act, a "cross-border dispute" shall be:

1. One in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

   (a) the parties agree to use mediation after the dispute has arisen; or
(b) an invitation is made to the parties by a court to which the case has been referred to the effect that they are to use mediation for resolving the dispute.

2. One in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1.

For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

**TRANSITIONAL AND FINAL PROVISIONS**

§ 1a. (Renumbered from § 1, SG No. 27/2011) Within six months after the entry of this Act into force, the Minister of Justice shall adopt mediator training standards, Procedural and Ethical Rules of Mediator Conduct, and shall establish and maintain a Uniform Register of Mediators.

§ 2. The implementation of this Act shall be entrusted to the Minister of Justice.

This Act was passed by the 39th National Assembly on the second day of December in the year two thousand and four, and the Official Seal of the National Assembly has been affixed thereto.

TRANSITIONAL AND FINAL PROVISIONS to the Amendment and Supplement Act to the Mediation Act

(SG No. 86/2006)

§ 7. The persons who have been entered in the Uniform Register of Mediators have to ascertain with the due documents before the Ministry of Justice, within 6 months of the coming of this act into effect, that they meet the requirements of Article 8, paragraph 1, item 1, 3 and 4. The same term applies for filing of applications for entering in the Register of Mediators of persons who meet the requirements of Article 8, paragraph 1, item 1 - 4 and who have been trained as mediators in the country or abroad prior to the entering of this act in effect.

§ 8. The Minister of Justice shall issue the ordinance under Article 8, paragraph 4 within three months after the entering of this act in effect.

§ 9. The Council of Ministers shall adopt the tariff under Article 8b within three months after the entering of this act in effect.

§ 10. Paragraph 1 concerning Article 8, paragraph 2 shall enter into effect as of the date of accession of the Republic of Bulgaria to the European Union.

ADDITIONAL PROVISION to the Amendment and Supplement Act to the Mediation Act
Chapter One
GENERAL DISPOSITIONS

Article 1. This Act shall regulate legal aid in criminal, civil and administrative matters before courts of all instances.

Article 2. Legal aid under this Act shall be provided by lawyers and shall be financed by the State.

Article 3. The purpose of this Act is to guarantee persons equal access to justice by means of ensuring and granting effective legal aid.

Article 4. The resources for legal aid shall be provided by the executive budget.

Article 5. Legal aid shall be granted to natural persons on the grounds specified in this Act and in other laws.

Chapter Two
LEGAL AID AUTHORITIES

Article 6. (1) The Minister of Justice shall elaborate, coordinate and conduct the state policy in the sphere of legal aid.

(2) Legal aid shall be organized by the National Legal Aid Office (NLAO) and the Bar Councils.

(3) The National Legal Aid Office shall be an independent state body, a public-financed legal person and a second-level spending unit with the Minister of Justice, with a head office in Sofia.

(4) The National Legal Aid Office shall have a separate budget, which shall be prepared, implemented, balanced off and reported by the said Office. The revenue and expenditure sides of the NLAO budget shall be prepared according to the classification of revenues and expenditures of the state budget.
Article 7. (1) The National Legal Aid Office shall be assisted by an administration.

(2) The work organization of the NLAAO, the structure, composition and functions of the separate units of the administration thereof, shall be determined by Rules which shall be adopted by the Council of Ministers.

Article 8. The National Legal Aid Office shall perform the following functions:

1. provide general and methodological guidance of the activity concerning the grant of legal aid;
2. prepare a draft of a legal aid budget;
3. dispose of the resources on the legal aid budget;
4. organize the keeping of the National Legal Aid Register;
5. pay for the legal aid granted;
6. exercise control over the grant of legal aid;
7. prepare bills and other statutory instruments in the sphere of legal aid, which shall be laid before the Council of Ministers by the Chairperson of the NLAAO;
8. analyze the information required for proper planning and management of the legal aid system;
9. popularize the legal aid system;
10. adopt a decision on reimbursement of the costs incurred in the cases under Article 27 (3) herein;
11. endorse the standard forms under this Act;
12. pursue international legal cooperation in the sphere of legal aid.

Article 9. (1) The National Legal Aid Office shall be a body which considers and decides the matters within the competence thereof at meetings.

(2) The decisions of the NLAAO shall be adopted by a simple majority of the total number of members of the said Office.

Article 10. (1) the National Legal Aid Office shall be governed by a Chairperson.

(2) In the activity thereof, the Chairperson shall be assisted by a Deputy Chairperson.

Article 11. (1) The National Legal Aid Office shall consist of five members: a Chairperson, a Deputy Chairperson, and three members.

(2) The Chairperson and the Deputy Chairperson of the NLAAO shall be appointed and
removed from office by an order of the Prime Minister on the basis of a Council of Ministers decision. The motion to the Council of Ministers shall be made by the Minister of Justice.

(3) The remaining three members of the NLAO shall be elected by the Supreme Bar Council.

**Article 12.** The members of the NLAO shall be appointed or elected, as the case may be, for a term of office of three years. The said members may be re-appointed or re-elected for the same term of office.

**Article 13.** Eligibility for membership of the NLAO shall be limited to Bulgarian citizens who:

1. have graduated in Law from a higher educational establishment and possess a licensed competence to practise law;

2. have practised law for at least five years;

3. have not been sentenced to deprivation of liberty for premeditated offence at public law, regardless of whether they have been rehabilitated;

4. (amended, SG No 42/2009) does not hold an office or pursue activities referred to in Article 19 (6) of the Administration Act.

**Article 14.** (1) A member of the NLAO shall vacate office prior to the expiry of the term of office thereof:

1. upon resignation;

2. upon gross or systematic violation of this Act;

3. when sentenced by an effective sentence to deprivation of liberty for a premeditated offence at public law;

4. (new, SG No. 42/2009, amended, SG No. 97/2010, effective 10.12.2010) when conflict of interest has been ascertained by an effective act under the Conflict of Interest Prevention and Acertainment Act;

5. (renumbered from Item 4, SG No. 42/2009) when unable to discharge the duties thereof for a period longer than six months;

6. (renumbered from Item 5, SG No. 42/2009) upon interdiction;

7. (renumbered from Item 6, SG No. 42/2009) upon death.

(2) In the cases covered under Paragraph (1), the Prime Minister or the Chairperson of the Supreme Bar Council shall make a motion for a pre-term termination of the term of office.

(3) The Council of Ministers or the Supreme Bar Council shall pronounce on the
removal and, respectively, on the designation of a new member within one month.

(4) The new member of the NLAO shall serve the remainder of the term of office of the removed member.

**Article 15.** (1) The Chairperson and the Deputy Chairperson shall perform the activity thereof under an employment relationship and may not occupy another position under an employment or civil-service relationship.

(2) The remunerations of the Chairperson and of the Deputy Chairperson shall be fixed as follows:

1. of the Chairperson: three average monthly wages of the persons hired under an employment relationship and under a civil-service relationship in the public sector, conforming to data of the National Statistical Institute;

2. of the Deputy Chairperson: 90 per cent of the remuneration of the Chairperson, referred to in Item 1.

**Article 16.** (Supplemented, SG No. 99/2010, effective 1.01.2011, amended, SG No. 99/2011, effective 1.01.2012) The members of the NLAO shall receive a remuneration for attendance of a meeting in the amount of BGN 120.

**Article 17.** The Chairperson of the NLAO shall perform the following functions:

1. organize and direct the activity of the NLAO in accordance with this Act, the Rules referred to in Article 7 (2) herein and the decisions adopted by the NLAO;

2. be responsible for the exercise of the powers of the NLAO;

3. represent the NLAO in dealings with third parties;

4. appoint and dismiss the civil servants and conclude and terminate the contracts of employment with the employees under employment relationships of the NLAO administration;

5. lay before the Council of Ministers the instruments referred to in Item 7 of Article 8 herein;

6. submit an annual report on the activity of the NLAO to the Council of Ministers, the Supreme Bar Council and the Supreme Judicial Council;

7. conduct inspections on the implementation of this Act, whether personally or through persons authorized thereby;

8. issue orders within the powers vested therein.

**Article 18.** The Bar Councils shall organize the grant of legal aid within the respective geographical jurisdiction and, to this end:
1. shall prepare an opinion on the applications of the lawyers of the Bar Association for entry into the National Legal Aid Register;

2. shall compile and maintain a list of lawyers on duty;

3. according to Article 25 (4) and (5) herein, shall designate a lawyer of the Bar Association, entered in the National Legal Aid Register, for implementation of the legal aid, making sure that the professional experience and qualifications of the said lawyer are suitable for the type, the factual and legal complexity of the case, other appointments according to the procedure established by this Act, and the caseload of the said lawyer;

4. exercise control as to the grant of legal aid by lawyers of the Bar Association;

5. authenticate the timesheets of the lawyers who have granted legal aid, and prepare a motion for payment of a fee within the limits established by the ordinance referred to in Article 37 herein.

Article 19. The Bar Councils shall receive a remuneration from the NLAO budget for the activity performed concerning the administration of legal aid.

Article 20. (1) (Amended, SG No 32/2010, effective 28.05.2010) The National Legal Aid Office shall interact with the Supreme Bar Council, with the Bar Councils, with the judicial authorities and the Ministry of the Interior and the Ministry of Defence and with the Ministry of Justice in connection with the granting of legal aid.

(2) (Amended, SG No 32/2010, effective 28.05.2010) In the exercise of the powers thereof, the NLAO may require oral and written information related to the grant of legal aid from the lawyers, from the Bar Associations, from the judicial authorities and the Ministry of the Interior and the Ministry of Defence and from the social assistance authorities, which shall be obligated to provide any information required forthwith and at no charge.

(3) (Amended, SG No. 105/2005) In the exercise of the powers thereof under this Act, the authority referred to in Article 25 (1) herein may require information from the NLAO, the Bar Councils, the revenue authorities, the National Social Security Institute authorities and the social assistance authorities, the Labour Office Directorates and other State and municipal bodies, which shall be obligated to provide the information requested.

Chapter Three
TYPE AND SCOPE OF LEGAL AID

Article 21. Legal aid shall be of the following types:

1. pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings or to bringing a case before a court;

2. preparation of documents for bringing a case before a court;

3. representation in court by legal counsel;
4. (supplemented, SG No. 82/2011, effective 1.01.2012) representation upon detention under Article 70 (1) of the Ministry of Interior Act and under Article 16a of the Customs Act.

**Article 22.** (1) Legal aid under Items 1 and 2 of Article 21 herein shall be granted to the persons who satisfy the eligibility requirements for monthly social assistance benefits according to the procedure established by the Regulations for Application of the Social Assistance Act, and to persons placed in specialized institutions for provision of social services.

(2) Legal aid under Items 1 and 2 of Article 21 herein shall furthermore be granted to a foster family or to a family of friends and relatives wherewith a child is placed according to the procedure established by the Child Protection Act.

(3) The circumstances under Paragraphs (1) and (2) shall be certified by the order of the Director of the Social Assistance Directorate or by the judgment of court on placement of the child, as the case may be. In case the person has not exercised the entitlement thereof to a monthly social benefit according to the procedure established by the Regulations for Application of the Social Assistance Act, the said person shall submit to the NLAO a certificate issued by the Director of the Social Assistance Directorate to the effect that the said person satisfies the eligibility requirements for monthly social assistance benefits.

**Article 23.** (1) (Supplemented, SG No 32/2010, effective 28.05.2010) The legal aid system referred to in Item 3 of Article 21 herein shall cover the cases in which defence or representation by reserve defence counsel is mandatory as provided by virtue of statute.

(2) (Amended, SG No 32/2010, effective 28.05.2010) The legal aid system shall furthermore cover the cases in which an accused, a defendant, or a party to a criminal, civil or administrative case is unable to pay for the assistance of a lawyer, wishes to have such assistance, and the interests of justice require this.

(3) (Amended, SG No 32/2010, effective 28.05.2010) In criminal matters, the assessment that the accused or the defendant is unable to pay for the assistance of a lawyer shall be made by the authority who directs the procedural acts, on the basis of the property status of the person as established in the specific case.

(4) In civil and administrative matters, legal aid shall be granted in the cases where, on the basis of evidence presented by the relevant competent authorities, the court determines that the party is unable to pay for the assistance of a lawyer. To arrive at such determination, the court shall take into consideration:

1. the income accruing to the person or the family;
2. the property status, as certified by a declaration;
3. the family situation;
4. the health status;
5. the employment status;
6. the age and
7. other circumstances ascertained.

**Article 24.** Legal aid under Items 1, 2 and 3 of Article 21 herein shall not be granted:

1. where the granting of legal aid is not justified in terms of the benefit that such aid would confer on the applicant for legal aid;
2. where the claim is manifestly unfounded, unjustified, or inadmissible;

**Chapter Four**

**ACCESS TO LEGAL AID SYSTEM**

**Article 25.** (1) In the cases referred to in Items 3 and 4 of Article 21 herein, the decision to grant legal aid shall be made by the authority directing the procedural acts, at the request of the person concerned or by virtue of the law. A refusal to grant legal aid shall be reasoned.

(2) In the cases referred to in Items 1 and 2 of Article 21 herein, the decision to grant legal aid shall be made by the Chairperson of the NLAO within 14 days after submission of the order, the judgment of court or the certificate referred to in Article 22 (3) herein. A refusal shall be appealable according to the procedure established by the Administrative Procedure Code.

(3) The instrument on granting of legal aid shall be issued in a written form and shall state:

1. title of the instrument;
2. designation of the authority who issues the instrument;
3. factual and legal basis for issuance of the instrument;
4. the person whereto legal aid is granted;
5. the type of legal aid and, in the cases referred to in Item 3 of Article 21 herein, the case in the matter of which the said aid is granted;
6. the means by which an appeal against the instrument can be lodged;
7. date of issuance, position and signature of the person who issued the instrument.

(4) The instrument on granting of legal aid shall be transmitted forthwith to the relevant Bar Council for designation of a lawyer entered in the National Legal Aid Register.

(5) If practicable, the Bar Council shall designate a lawyer named by the person whereto
legal aid is granted.

Article 26. (1) The Bar Council shall notify the authority referred to in Article 25 (1) or (2) herein of the designated lawyer.

(2) The authority referred to in Article 25 (1) or (2) herein shall appoint the designated lawyer as mandatary, defence counsel or special procedural representative for courts of all instances, unless an objection to this has been raised.

(3) The appointed lawyer may delegate the authority to another lawyer entered in the National Legal Aid Register.

(4) In exceptional cases, where qualified assistance of a lawyer in a particular case cannot be provided, the Bar Council may designate a lawyer from another geographical jurisdiction with the consent of the said lawyer.

(5) The appointed mandatary, defence counsel or special procedural representative may be replaced at the request of the authority referred to in Article 25 (1) or (2) herein according to the procedure of the appointment thereof.

Article 27. (1) The person whereto legal aid has been granted shall be obligated to notify forthwith the authority referred to in Article 25 (1) or (2) herein of any intervening change in the circumstances which render the said person eligible for the granting of the aid.

(2) The authority who made the decision to grant legal aid may terminate the said aid as from the time of occurrence of the change. A transcript of the instrument shall be transmitted forthwith to the NLAO.

(3) (Amended, SG No. 105/2005) In case the person fails to notify promptly the change in circumstances referred to in Paragraph (1), on the basis of a decision under Item 10 of Article 8 herein the said person shall reimburse the NLAO for any costs incurred as from the time of the said change. The receivable shall be collected according to the procedure established by the Tax and Social Insurance Procedure Code.

Chapter Five
LAWYERS ON DUTY

Article 28. (1) (Amended, SG No 32/2010, effective 28.05.2010) In urgent cases on cases of coercive procedural measures and questioning before a judge in the pre-trial proceedings, the Secretary of the Bar Council shall designate a lawyer on duty, unless the accused has not retained his or her own defence counsel.

(2) (Supplemented, SG No. 82/2011, effective 1.01.2012) A lawyer on duty shall furthermore be designated according to the procedure established by Paragraph (1) for a detainee in the cases under Article 70 (1) of the Ministry of Interior Act and under Article 16a of the Customs Act, where the said detainee is unable to retain a lawyer of his or her own.

Article 29. (1) A lawyer on duty shall be designated from amongst the lawyers entered
in the National Legal Aid Register who have granted consent to be included in the list of lawyers on duty.

(2) The consent referred to in Paragraph (1) may not be effective for a period shorter than one month and shall express the readiness of the lawyer to be designated a lawyer on duty at any time of the day or night.

(3) The Bar Council shall maintain a list of lawyers on duty.

Article 30. (1) A request to designate a lawyer on duty in the cases referred to in Article 28 (1) herein shall be made by the authority directing the procedural acts to the Bar Council in writing or by telephone not later than three hours before the time appointed for the relevant proceeding.

(2) Immediately after the detention, the authority referred to in Article 25 (1) herein shall explain to the detainee the right to assistance of a lawyer on duty and shall notify the Bar Council of the need to appoint a defence counsel. The lawyer selected from the list shall proceed forthwith with fulfilment of the obligations thereof concerning the legal aid.

(3) The obligations referred to in Paragraph (2) shall be fulfilled by means of serving the detainee, upon signed acknowledgment of service, with a copy of a form stating the right thereof to assistance of a retained lawyer or a lawyer on duty as from the time of detention.

(4) The lawyer on duty shall continue to provide the legal aid in all phases of the trial.

Chapter Six
NATIONAL LEGAL AID REGISTER

Article 31. The National Legal Aid Office shall keep a National Legal Aid Register for the lawyers designated to provide legal aid by geographical jurisdiction of the relevant district courts.

Article 32. (1) The Register shall be open to public inspection. The Register shall be compiled on a paper-based and an electronic data medium and shall be posted on the Internet.

(2) The National Legal Aid Office shall provide the Bar Councils with information on the lawyers entered in the Register referred to in Article 31 herein.

Article 33. (1) Any lawyer wishing to be entered into the National Legal Aid Register shall submit an application to the NLAO care of the relevant Bar Council.

(2) The application referred to in Paragraph (1) shall be completed in a standard form endorsed by the NLAO.

(3) The Bar Council shall prepare an opinion on the application received and shall forward the said application to the NLAO.

(4) The lawyer shall be entered into the National Legal Aid Register by decision of the NLAO.
(5) The National Legal Aid Office shall issue a reasoned refusal to enter a lawyer into the Register or shall strike a lawyer entered therein in the cases of:

1. imposition of a disciplinary sanction;

2. bringing a charge of an offence at public law;

3. ascertained violation under this Act or poor quality of the legal aid provided, as ascertained by the Bar Council or the NLAO.

(6) Striking shall be imposed by the NLAO for a period of one year or, when repeated, for a period of three years.

(7) Any refusal of entry by the NLAO, as well as any striking of a lawyer from the National Legal Aid Register, shall be appealable according to the procedure established by the Administrative Procedure Code.

(8) Striking shall be announced on the Internet site of the NLAO.

**Article 34.** (1) The National Legal Aid Register shall be updated for the next succeeding calendar year not later than at the end of September of the last preceding calendar year.

(2) In exceptional cases, the National Legal Aid Register may also be modified during the course of the year according to the procedure established for entry.

**Article 35.** (1) The National Legal Aid Office may conduct inspections as to the legal aid provided under Article 21 herein. The said Office may require information from the competent authority directing the proceeding to certify the scope and type of the legal aid provided.

(2) The mandator, the client or the authorities referred to in Article 25 (1) herein may refer breaches committed by lawyers providing legal aid to the NLAO for consideration.

(3) The findings of the inspections may be grounds for striking of the lawyer from the National Legal Aid Register.

**Article 36.** (1) The Bar Council shall compile and keep, on a paper-based an on an electronic data medium, a list of the lawyers appointed to provide legal aid, and this list shall be periodically transmitted to the NLAO. The Bar Council shall notify the NLAO of each change in the appointment.

(2) The list shall be compiled in a standard form endorsed by the NLAO and shall be posted on the Internet site of the NLAO.

**Chapter Seven**

**PAYMENT FOR LEGAL AID**

**Article 37.** (1) Payment for legal aid shall depend on the type and amount of work
performed and shall be determined by an ordinance of the Council of Ministers on a motion by the NLAO.

(2) Without prejudice to other sanctions, the lawyer shall not be paid a fee for any legal aid provided in bad faith or incompetently in a particular case.

**Article 38.** (1) The type and amount of the work done shall be certified by a timesheet of the lawyer, completed in a standard form endorsed by the NLAO.

(2) The Bar Council shall verify and authenticate the timesheet of the lawyer who has provided legal aid and shall propose an amount of the fee depending on the type, amount and quality of the legal aid provided within the limits established by the ordinance referred to in Article 37 herein.

(3) The appointed lawyer shall furthermore be reimbursed for the essential expenses for the defence, incurred for visit to the places for deprivation of liberty or detention facilities in another nucleated settlement.

**Article 39.** Payment for the legal aid provided shall be effected by the NLAO by means of bank transfer on the basis of the timesheet referred to in Article 38 herein.

**Article 40.** The lawyer who provides legal aid shall not have the right to receive any fee and resources covering expenses from the mandator or from the client thereof.

**Chapter Eight**

**SPECIFICS OF GRANTING LEGAL AID IN CROSS-BORDER DISPUTES**

(Effective as from the date of entry into force of the Treaty concerning the Accession of the Republic of Bulgaria to the European Union)

**Article 41.** (1) The provisions of this Chapter shall apply to the granting of legal aid in cross-border disputes in civil and commercial matters before courts of all instances. The said provisions shall not apply to criminal and administrative matters.

(2) "Cross-border dispute", within the meaning given by Paragraph (1), shall be a dispute where the party applying for legal aid is a citizen of a Member State of the European Union or a person residing lawfully in a Member State of the European Union, and where the dispute is settled by a competent authority in another Member State of the European Union.

(3) The provisions of this Act shall apply to the granting of legal aid in cross-border disputes, save insofar as otherwise specifically provided for in this Chapter.

**Article 42.** (1) The citizens of the European Union or the persons residing lawfully in a Member State of the European Union shall be granted legal aid if the property status of the said persons does not exceed the social threshold established in Article 22 (1) herein.
(2) Where the property status of the persons referred to in Paragraph (1) exceeds the social threshold established in Article 22 (1) herein but the said persons are unable to pay for the costs of the case, the NLAO shall determine whether the applicant can pay the said costs. The said determination shall take into account the circumstances covered under Article 23 (4) herein, as well as the differential between the minimum cost of living required in the Member State and in Bulgaria.

**Article 43.** (1) The Ministry of Justice shall be the authority of the Republic of Bulgaria which shall be competent to receive applications for legal aid in cross-border disputes from the competent authorities of Member States of the European Union.

(2) The Ministry of Justice shall be the authority of the Republic of Bulgaria which shall be competent to transmit applications for legal aid in cross-border disputes to the competent authorities of Member States of the European Union.

**Article 44.** (1) The applicant shall have the right to submit an application for legal aid either to the competent authority of the Member State of the European Union in which the said applicant is domiciled or habitually resident, or directly to the Ministry of Justice of the Republic of Bulgaria, should the case is to be tried by a court in the Republic of Bulgaria or should the judgment of court must be enforced in the Republic of Bulgaria.

(2) The legal aid application and the documents proving that the person is responsive to the eligibility requirements for the granting of legal aid, as submitted to the Ministry of Justice, shall be translated into the Bulgarian language or into another official language of the institutions of the European Community, which the Republic of Bulgaria has specified as acceptable to the European Commission. Legalization of the said documents shall not be required.

(3) Upon receipt of an application for legal aid from a competent authority of another Member State of the European Union, the Ministry of Justice of the Republic of Bulgaria shall verify whether the application is accompanied by all the supporting documents required and whether a translation of the documents has been provided. If the documents are responsive to these requirements, the application shall be forthwith transmitted to the NLAO for adoption of a decision.

(4) In case the application is not responsive to the requirements of this Article, the said application shall be returned to the competent transmitting authority of the foreign Member State of the European Union for curing of the non-conformities as detected.

(5) The National Legal Aid Office shall transmit the decision thereof on the application for legal aid to the Ministry of Justice, which shall forward the said decision to the competent authority of the other Member State of the European Union for service on the applicant.

(6) Any refusal by the NLAO to grant legal aid shall be reasoned and shall be appealable according to the procedure established by the Administrative Procedure Code.

**Article 45.** (1) (Amended, SG No. 9/2011) Should the case be tried by the court of another Member State of the European Union, or should the judgment of court is to be enforced in another Member State of the European Union, any applicant who is a Bulgarian
citizen residing within the territory of the Republic of Bulgaria, a foreign citizen or a stateless person who has been permitted continuous, long-term or permanent residence in the Republic of Bulgaria, or a person who has been recognized a refugee status or who has been afforded a right of asylum within the territory of the Republic of Bulgaria, may submit the application thereof together with the documents proving that the said applicant is responsive to the eligibility requirements for granting of legal aid, directly to the competent authority of the respective Member State of the European Union, or care of the Ministry of Justice of the Republic of Bulgaria.

(2) The documents referred to in Paragraph (1) shall be translated into the official language or into one of the official languages of the other Member State of the European Union, or into another official language of the institutions of the European Community, which the said Member State has specified as acceptable to the European Commission.

(3) The Ministry of Justice of the Republic of Bulgaria shall have the right to refuse to transmit the application in case the said application is not responsive to the requirements of this Chapter. In such case, the Ministry of Justice of the Republic of Bulgaria shall notify the applicant of the reasons for the refusal.

(4) The Ministry of Justice of the Republic of Bulgaria shall be obligated to inform the applicant of the documents required for acceptance of the application for legal aid in the other Member State of the European Union and shall arrange a translation of the application and of the documents proving that the person is responsive to the eligibility requirements for the granting of legal aid.

(5) The Ministry of Justice of the Republic of Bulgaria shall be obligated to transmit the application together with the documents accompanying the said application to the competent authority of the other Member State of the European Union within 15 days after the day of translation of the application and of the documents.

(6) Should the competent authority of the other Member State of the European Union reject the application for legal aid, the applicant shall repay the costs of translation of the application and of the documents borne by the Ministry of Justice of the Republic of Bulgaria.

**Article 46.** The applications referred to in Articles 44 and 45 herein shall be submitted in standard forms established by the European Commission.

**Article 47.** The Ministry of Justice of the Republic of Bulgaria shall provide the European Commission with the following information:

1. the names and addresses of the competent receiving and transmitting authority;

2. the means by which applications are received;

3. the languages that may be used for the completion of the applications.

**Article 48.** The applicant who has received legal aid in another Member State of the European Union, where the case was tried, shall have the right to legal aid under this Act in case the Republic of Bulgaria is asked to recognize or admit enforcement of a judgment of
court rendered in the matter of the relevant case.

Article 49. (1) The legal aid granted to the persons referred to in Article 42 herein shall furthermore cover the following costs related to the cross-border nature of the dispute:

1. relating to interpretation;
2. relating to translation of documents required by the court or by another competent authority;
3. travel costs, where the physical presence of witnesses in the court hearing is mandatorily required.

(2) The legal aid granted to the persons referred to in Article 45 (1) herein shall cover the following costs:

1. relating to legal aid under Item 1 of Article 21 herein, which has been granted in the Republic of Bulgaria until the time when the application for legal aid was received in another Member State of the European Union where the case is tried or where the judgment of court must be enforced;
2. relating to the translation of the application for legal aid and of the documents proving that the person is responsive to the eligibility requirements for the granting of legal aid.

SUPPLEMENTARY PROVISIONS

§ 1. "Systematic violation," within the meaning given by this Act, shall be the commission of three or more violations.

§ 2. Legal aid in civil matters shall furthermore include legal aid in a subsequent enforcement proceeding, which has commenced within one year after the entry into effect of the judgment of court, unless there is a change in the circumstances that existed during the consideration of the application for legal aid.

TRANSITIONAL AND FINAL PROVISIONS

§ 3. Any pending cases in which an assigned counsel or a special procedural representative has been appointed, shall be tried under the hitherto effective terms and procedure.

§ 4. The Council of Ministers shall provide the property and the financial resources necessary for commencement of the work of the NLAO.


"(6) If the claim of a recipient of legal aid is granted, the due fees and applicable costs shall be awarded in favour of the National Legal Aid Office commensurate to the portion of the action granted. In the cases of a judgment adverse to the recipient of legal aid, the said recipient shall owe costs commensurate to the portion of the action rejected."

§ 6. The Bar Act (promulgated in the State Gazette No. 55 of 2004; amended in No. 43 of 2005) shall be amended as follows:

1. Article 44 shall be amended to read as follows:

"Article 44. (1) A lawyer, who has been entered in the National Legal Aid Register, shall be obligated to provide legal aid according to the procedure established by the Legal Aid Act, where the said lawyer has been designated for this.

(2) The lawyer shall be obligated to conduct the case assigned thereto, in the matter of which he or she provides legal aid according to the procedure established by the Legal Aid Act, exercising the same care as if he were retained by the client."

2. In Article 89, Item 15 shall be amended to read as follows:

"15. participate in the arrangement of legal aid according to the procedure established by the Legal Aid Act;".

3. In Item 6 of Article 132, the words "assigned defence or special procedural representation" shall be replaced by "legal aid".


"5. for the costs of legal aid under the Legal Aid Act, incurred after the lapse of the grounds for the granting of such aid."

§ 8. This Act shall enter into force on the 1st day of January 2006, with the exception of Chapter Eight, which shall enter into force as from the date of entry into force of the Treaty concerning the Accession of the Republic of Bulgaria to the European Union.

§ 9. The implementation of this Act shall be entrusted to the National Legal Aid Office.

The Act was passed by the 40th National Assembly on the 21st day of September 2005 and the Official Seal of the National Assembly has been affixed thereto.

TRANSITIONAL AND FINAL PROVISIONS
of the Administrative Procedure Code

(SG, No. 30/2006, effective 12.07.2006)

National section

CYPRUS

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?


List of the most basic Articles:

Section 2, "child" means a person who has not attained the age of 18 years, but does not include a married person who has not attained the said age.

Section 3 and Section 4 deal with the surname of the child.

Section 5(1)(a) provides that the parental responsibility of the minor child shall be the duty and the right of the parents who shall exercise it jointly.

Section 6(1) provides that every decision of the parents regarding the exercise of parental responsibility must aim at the interest of the child.

Section 6(1)(2)(b) provides that the decision of the Court must also respect the equality between the parents and not discriminate on the basis of sex, language, religion, beliefs, nationality, ethnic or social origin or property.

Section 6(3) provides that depending on the child’s maturity and the degree to which it may understand, its opinion shall be taken into consideration by the Court together with other criteria, before any decision concerning parental responsibility is taken.

Sections 14 and 15 provide respectively that in case of divorce or separation, the Court may allocate the exercise of the parental responsibility between the parties or assign it to a third party. The Court in its decision, shall take into consideration the bond of the child with its parents and siblings, as well as any agreements of the parents concerning the care and the administration of the property of the child. Lastly, it provides that the interest of the child shall always be the primary (paramount) consideration.

Section 17 deals with the right of personal communication of the parent with whom the child does not reside and Section 17(A) deals with a similar right of the ascendants. The interest of the child is again the primary consideration.

Section 18 deals with the consequences of bad exercise, the removal of parental responsibility and the assignment of it to the other parent or to a guardian. The Court has the power in case of bad exercise of parental responsibility to order any appropriate measure.

Section 26 deals with the leave of Court for the administration of the child’s property.

Sections 28-32 deal with various matters concerning guardianship.

Sections 33-40 deal with the maintenance of children.

Procedure

In 1998 all jurisdiction of the Family Courts of Religious Groups, including cases of parental responsibility and child abduction, was transferred by Law No. 26(I)/1998, to the jurisdiction of the Family Courts, except from divorce petitions and petitions
for the use of matrimonial home. The procedure before a Family Court begins with the filing of an application. The application embodies the remedies sought, the legal basis and the facts of the application, without being supported by an affidavit. Defence must be filed within 15 days of the service of the application, which may include a counter-action. If there is a counter-action, then there may be a defence to it. The hearing of the case is the same as in all common law countries. The applicant brings first all his or her witnesses and then the defendant his or her own. Each witness is examined and may be cross-examined and re-examined. Under a relatively new provision, Section 25, of the Evidence Law, Cap. 9 as amended by Law 32(I)/2004, which applies to all civil cases, the deposition of a witness may be conducted in whole or in part by a written declaration adopted orally on oath during examination in chief. An appeal against the decision of the Court must be filed within 42 days from the day following the delivery of judgment. For the procedure applied by the Family Courts there is a specific regulation, the Family Courts Procedural Regulation of 1990 (PR 2/1990) as amended. For child abduction cases, however, there is a more speedy procedure. See Question A.2.

There are no reform proposals pending.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbist)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

This is the procedure which has been enacted to meet the needs of the immediate return of a child under the Hague Convention of 1980. This procedure is regulated by Regulation 7A of the Family Courts Procedural Regulation of 1990 (PR 2/1990), which was effected by an addition made to the basic Procedural Regulation 2/1990 on the 2nd of May 2002 by the Procedural (Amendment) Regulation 23/2002.

According to para. (2) of the said Regulation 7A, the time for filing an objection to the application is 7 days from the day of service. According to para. (4) of the Regulation 7A, the hearing of the application is limited to the facts mentioned in affidavits supporting the pleadings, including supplementary affidavits if allowed by the Court for good reason (para. 3). Though they can offer no oral evidence, the parties have the right to cross-examine the deponents of the other side (para. (4)). Para. (5) foresees the possibility of an appeal which must be filed within 14 days from the day of the pronouncement of the decision.

Regulation 7A was made after a suggestion made by the author of the Cyprus national Sections, as a Liaison Judge of Cyprus in Child Abduction Cases. Before Regulation 7A, the procedure followed for child abduction cases was similar to any other civil case, thus permitting oral evidence and with extended periods of filing defence (15 days) and an appeal (42 days).

It is interesting to note, that by new Section 245A of the Cyprus Criminal Code, Cap. 154, as amended by Law 70(I)/2008, an abduction of a child by one of its parent outside the Republic of Cyprus is considered an offence.
3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

The Family Court.

4. Which national legislation lays down the provisional, including protective measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of the Regulation Brussels IIbis)?

The Parents and Children Relations Law 1990 (Law 216/1990) as amended, especially Section 18 as well as the general legal provisions empowering the Court to make provisional orders, such as Section 32 of the Courts of Justice Law of 1960 (Law no 14/1960), as amended, and Section 9 of the Civil Procedure Law, Cap. 6, as amended.

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

The relevant enforcement procedure is the Contempt of Court Procedure, which is a quasi criminal procedure. This procedure is, by its nature, quasi criminal, since the penalty incurred may be a prison sentence or a fine or sequestration of assets and the burden of proof required is the same as in criminal cases, beyond reasonable doubt. The relevant substantive law dealing with the matter is Section 42 of the Courts of Justice Law of 1960 (Law 14/1960), as amended. As to the procedure, see rules 48.3 & 4 and 42A of the Civil Procedure Rules.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

(a) Through an interview with the Family Judge who deals with the case.

Section 6(1) of the The Parents and Children Relations Law 1990 (Law 216/1990), as amended, reads:

“(3) Depending on its maturity and the degree to which a child may understand, its opinion shall be requested and taken into consideration together with other criteria before any decision concerning parental responsibility is taken, if such decision relates to its interests.”

(b) Through the Welfare Officer. The issue of relevant information about the view of the child is included in the Report prepared by the Welfare Officer which is deposited at the Court. See Regulations 5 & 6 of the Guardianship of Infants and Prodigals Rules (Cap 102), as amended by Procedural Regulation 1/1972.

(c) Through the Commissioner for the Protection of Children’s Rights. See the Commissioner for the Protection of Children’s Rights Law, (Law 74(I)/2007).

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?
8. Are there any other national legal instruments/procedures put in place for the application of Regulation Brussels IIbis?


By Cyprus’ entry into the European Union, all the EC Regulations become part of the Cyprus domestic legislation having superior force to any other domestic law. In Cyprus, EC Regulations are directly applicable instruments, needing no implementing legislation.

In 2006, by Article 2 of the Fifth Amendment of the Constitution Law of 2006 (Law 127(I)/2006), a new Article was added in the Cyprus Constitution giving supremacy of the European Union Law over the Constitution of the Republic of Cyprus. This new Article 1A provides as follows:

“No provision of the Constitution shall be deemed to annul laws enacted, acts done or measures taken by the Republic which become necessary by reason of its obligations as a member state of the European Union, nor does it prevent Regulations, Directives or other acts or binding measures of a legislative character, adopted by the European Union or the European Communities or by their institutions or competent bodies thereof on the basis of the Treaties establishing the European Communities or the Treaty on European Union, from having legal effect in the Republic.”

Besides Article 6 of the same Law (i.e. Law 127(I)/2006) reads:

“6. Article 179 of the Constitution is hereby amended as follows:

(a) By deletion in paragraph 1 thereof of the word “This” and the substitution therefore of the sentence “Subject to the provisions of Article 1A, this”; and

(b) by addition in paragraph 2 thereof, immediately after the words “this Constitution” (sixth line), of the sentence “or any obligation imposed on the Republic as a result of its participation as a member state of the European Union.”

The original text of Article 179 of the Constitution was as follows:

“1. This Constitution shall be the supreme law of the Republic.

2. No law or decision of the House of Representatives or any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution.”

Note. The Fifth Amendment of the Constitution Law of 2006 is available on internet in English (see www.olc.gov.cy).

Apart from the above national general provisions, there are no specific provisions put in place for the application of Regulation Brussels IIbis. However, the general provisions are quite satisfactory as they cover every EC Regulation.

The relevant Cyprus domestic law (i.e. Law 216/1990 see below) and regulations are quite consistent with Regulation Brussels IIbis.
B. Horizontal issues

1. **How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The Directive has not yet been transposed into domestic law. However, there is a bill pending in Parliament aiming at transposing the European Directive 2008/52 into the Cyprus domestic law, including not only cross-border civil and commercial disputes, but also internal or domestic civil and commercial disputes. It is hoped that the bill will very soon be passed into law.

There is also an older bill on mediation in family matters still pending in Parliament.

2. **How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

The Legal Aid Law of 2002 (Law 165(I)/2002), as amended by Laws 22(I)/2005, 77(I)/2005, 43(I)/2006, 132(I)/2009, 172(I)/2011, 8(I)/2012, 9(I)/2012, 10(I)/2012, and the Legal Aid Procedural Regulation (No. 1) of 2003 are compatible with the Directive, as they cover any legal service in relation to any civil and criminal procedure, specifically including legal aid in family cases (Section 6 of Law 165(I)/2002). The basic Law (i.e. 165(I)/2002) was amended by Law 22(I)/2005 to insert provisions to transpose the EC Directive into Law. So the basic Law is modified to include in Section 2 a definition of what is “Directive No 2003/8/EC”, and to add the following new Sections: Section 6A defining what is legal aid in cross-border disputes, Section 7A dealing with the prerequisites of granting legal aid in a cross-border dispute, Section 7B dealing with the competent Authority in Cyprus to transmit legal aid applications as well as with the procedure of such transmission, and lastly Section 13(2)(e) dealing with the form for the transmission of legal aid applications, which the Supreme Court of Cyprus, by regulation, must enact. Under Section 7B the Cyprus competent Authority for the transmission of legal aid applications is the Ministry of Justice and Public Order.

3. **Is your country a contracting party to any bilateral or international instruments on family law?**

(Note: “RL” means Cyprus Ratifying Law by which any bilateral or international instrument becomes by virtue of Article 169.3 of the Cyprus Constitution part of the domestic law, having superior force over any other domestic law except the Constitution).

Article 163.3 of the Constitution provides that “Subject to the provisions of ..... (3) treaties, conventions and agreements concluded in accordance with the foregoing provisions of this Article shall have, as from their publication in the official Gazette of the Republic, superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto.”

I. MULTILATERAL INSTRUMENTS

A. INTERNATIONAL INSTRUMENTS

Hague Conventions

UN Conventions
UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1964) (RL 16(III)/2002).

B. REGIONAL INSTRUMENTS
European Conventions

European Council Regulations
Since Cyprus is a member of European Community all the EC Regulations also apply in Cyprus. See e.g.:


Directives of the European Parliament and of the Council of the European Union
Since Cyprus is a member of European Community all such directives also apply in Cyprus. See e.g.


C. SIGNED BY CYPRUS BUT NOT YET RATIFIED
European Agreement on the Transmission of Applications for Legal Aid (1977).

II. BILATERAL INSTRUMENTS
Cyprus has entered into bilateral conventions for legal co-operation or assistance in regard to civil matters, including, of course, family matters, with the following countries: (The table which follows is in chronological order based on the year of ratification)

Czechoslovakia (RL 68/1982).
Hungary (RL 7/1983).
Greece (RL 55/1984).
Bulgaria (RL 18/1984).
Georgia (RL 172/1986).
Belarus (RL 172/1986).
Montenegro (RL 179/1986).
4. Are there any databases or online tools providing information on family law matters available in your country?

Yes, but only in Greek. This is www.cylaw.com available without subscription and www.leginetcy.com available only on subscription, where you can search for the Cyprus case law and legislation.

For statistical information on marriages and divorces, there is an available database which is www.mof.gov.cy search for “demographic report of 2009” (also available in English).

European Judicial Network in Civil and Commercial Matters:
- Information on divorce: http://ec.europa.eu/civiljustice/divorce/divorce_cyp_en.htm
- Information on maintenance obligations: http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_cyp_en.htm
- Information on parental responsibility http://ec.europa.eu/civiljustice/parental_resp/parental_resp_cyp_en.htm

European Judicial Atlas in Civil and Commercial Matters:

5. Please provide information on accessing and applying foreign family law in your country.

In Cyprus, foreign law is considered and proved as a matter of fact by an expert witness in that law. See, inter alia, Royal Bank of Scotland v. Geodrill Co. Ltd and other, (1993) 1 Cyprus Law Reports (CLR) pp. 753 et seq. However, when the Family Courts apply the Hague Convention on Civil Aspects of International Child Abduction (1980) ratified in Cyprus by Law 11(III)/1994, they are bound to follow the provisions of Article 14 which provide that the judicial or administrative authorities of the requested State may take notice directly of the foreign law without recourse to the specific procedures for the proof of that law. Cyprus participates in the judicial network established under the Hague Convention 1980 by having since the 19th of May 2000 an International Hague Network Judge, Dr. G. A. Serghides, with the duty, inter alia, of exchanging information on domestic law with Liaison Judges of other countries.
II. NATIONAL JURISPRUDENCE

**Regulation Brussels IIbis in matters of parental responsibility**


(Both cases concern Article 8.1 of the Council Regulation 2201/2003 (EC), dealing with jurisdiction).


A number of unreported judgements of first instance Family Courts, mainly on the jurisdiction of the competent Court and the enforceability of foreign judgments.
III. NATIONAL BIBLIOGRAPHY

**Regulation Brussels IIbis: Parental responsibility matters**


**Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)**


**Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)**


**Preliminary ruling system on family matters**

None.

**Family Mediation**


National section

CZECH REPUBLIC

Zuzana Fišerová
Director General, Czech Ministry of Justice
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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

8. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

Parental responsibility

The term “parental responsibility” is defined in the Family Act. This term represents a summary of the rights and responsibilities:

- when caring for a child who is a minor, especially including the care for the child’s health and its physical, emotional, intellectual and moral development,
- when representing a child who is a minor,
- when administering the child’s assets.

When exercising the rights and responsibilities within the framework of parental responsibility, parents are especially obliged to protect the interests of the child, to guide the child’s behavior and to carry out the supervision of the child corresponding to the child’s level of development. They have the right to use reasonable discipline in such a way so that the child’s dignity is not affected and so that there is no threat to the child’s health or its physical, emotional, intellectual or moral development. Parents are obliged to provide a child, who is capable of reaching its own opinion and assessing the scope of any measures concerning it, with all the necessary information and the opportunity to freely express an opinion as to all the decisions concerning the essential matters involving the child. The parents represent the child in all legal acts for which the child is legally a minor.

A child’s biological parents are generally the holders of the parental responsibility concerning said child. If the child is adopted, this responsibility is then transferred to the adoptive parents. It is of no consequence whether or not the couple is married or whether the child was born into a marriage or outside of wedlock. Parental responsibility arises with the birth of the child. If this involves a relationship, which arises as a result of adoption, the parental responsibility commences when the court’s decision on the adoption of the child comes into effect.

If the legal prerequisites are met, the court may decide on the suspension of the performance of the parental responsibility, the limitation of the performance of the parental responsibility or the divestment of the parental responsibility. The court may suspend the performance of the parental responsibility, if a significant impediment prevents a parent from carrying out his or her parental responsibilities and if it is in the interests of the child to do so.

If the child’s parents have died, been divested of their parental responsibility, have had the performance of their parental responsibilities suspended or are not in full possession of the capacity to carry out legal acts, the court will appoint a guardian for the child who will bring the child up, represent it and administer its assets in the place of the child’s parents.

Child abduction

There has been a constant increase in the number of mixed-culture relationships and marriage in society. Multicultural relationships tend to get even more complicated when they disintegrate. Consequently, parental child abduction has become a rather important issue in the Czech Republic.
Many of those who have moved to the country of their partner may feel rather lonely when their relationship ends. Insufficient language knowledge often limits their ability to deal with the authorities and courts. They also do not know the law and it is rather difficult for them to estimate how to act in a different cultural setting. To be in a lack of friends or a feeling that foreign authorities do not defend their rights properly, it is common that one feels excluded, without support and being discriminated. Aside of common differences, a relationship may be disrupted by pathological problems such as alcohol or drug abuse by one of the partners, domestic violence, etc.

It is necessary to keep in mind that every child has two parents, both of which have equal right to raise him/her. On the other hand, children are not their parents' property. They have right to keep contact with both parents, to be raised by both of them, and to learn from them about their culture, language and traditions of their countries of origin.

The main mission of the Czech Office for International Legal Protection of Children is to help parents to settle their cross-border dispute in the best interest of their children.

I. current sources of law

a) substantive law: Act No. 94/1963 Coll., on the Family (mainly §§ 31 – 40)

\[ \text{PARENTAL RESPONSIBILITY} \]

\[ \text{§ 30} \]

left out

\[ \text{§ 31} \]

1. The parental responsibility is an aggregate of rights and duties concerning
   a. care of a minor including in particular care of his or her health, physical, emotional, intellectual and moral growth; and
   b. representation of the minor; and
   c. management of his or her property.

2. In exercising the rights and duties mentioned in paragraph 1, the parents must rigorously protect the child's interests, manage his or her behaviour and exercise surveillance over him or her in accordance with the level of his or her development. They may use adequate upbringing measures so that the child's dignity is not violated and his or her health, emotional, intellectual and moral development are not endangered.

3. If the child is able to have his or her own opinion and to consider consequences of measures concerning him or her, the child has the right to obtain necessary information and express his or her opinion about all decisions of the parents concerning essential affairs of his or her person and to be heard in every proceedings in that such affairs are decided on.

4. A child living in common household with parents must help them according to his or her abilities and possibilities. He or she must contribute to coverage of common needs of the family if it has his or her own income or a property that can be used for common needs of the family.

\[ \text{§ 32} \]

1. The parents have a decisive function in the child’s upbringing.
2. The parents should be an example to their child through their personal life and behaviour.

§ 33

Also the spouse who is not parent of the child takes part in the child’s upbringing provided that he or she lives with the child in a common household.

§ 34

1. The parental responsibility shall be borne by both parents.

2. If one of the parents does not live, is not known has not a full capacity to legal acts, the parental responsibility shall be exercised by the other parent. The same rule shall apply if one of the parents was deprived of his or her parental responsibility or if exercise of his or her parental responsibility was suspended.

3. The court may grant the parental responsibility concerning care of the child even to his or her minor parent who has achieved sixteen years if he or she has the necessary makings of exercise of rights and duties following from the parental responsibility.

§ 35

The child must honour and respect his or her parents.

§ 36

The parents represent the child in legal acts to that he or she is not fully capable.

§ 37

1. None of the parents can represent the child as for legal acts in matters in those conflict of interests between the parents and the child or conflict of more children of the same parents could occur.

2. If the child can be represented by none of the parents, the court shall appoint a curator who shall represent the child in proceedings or in a certain legal act. The post of curator should be usually exercised by an authority exercising socio-legal protection of children (the „authority of socio-legal protection of children”).

§ 37a

1. The parents must manage their child’s assets with care of a proper manager.

2. The proceeds from the child’s assets must be used above all for his or her maintenance and then adequately for family’s needs. The property substance may be affected only if a gross disproportion between the liable persons and condition of the minor arises without fault of the liable persons.

3. As soon as the child becomes major, the parents shall give over the property they managed before. They must give the child a statement of the management of property if the child asks for it within one year after the end of the management. The child’s rights from liability for damages and unjustified enrichment shall remain unaffected.

§ 37b

1. In grounded cases that could lead to jeopardize of the property interests of the child, the court shall appoint a curator for a more intense protection of the child’s property. The post of curator may be exercised only by an individual who is fully capable to legal acts, whose way of life guarantees a proper exercise of this post and who agrees to the appointment as a curator.

2. Unless an individual can be appointed as the curator, the court shall usually appoint an authority of socio-legal protection of children as the curator.
3. The court shall determine the extent of the property that is to be managed by the
curator with the care of a proper manager. At the same time, the court shall
determine the ways in which the individual party can or must not be disposed of.
The court shall particularly determine the way of exercise of ownership and other
real rights, intellectual property rights, rights to securities and rights following
from obligations.

4. In the course of management of the property, the curator must not do acts that
are connected with inadequate risk.

5. The curator shall be subject to control of the court. According to circumstances of
the case, the court shall link validity of a legal act to its consent and shall decide
on a duty to provide regular reports about management of the child’s property.

6. Within two months after the end of his or her function, the curator must provide
the court with a final statement about the management of the child’s property.

7. The curator is entitled to a compensation of necessary expenses connected with
administration of the property and to an adequate remuneration paid from the
proceeds of the child’s property. The amount of the remuneration shall be
determined by the court.

8. The curator shall be liable for breach of duties mentioned in paragraphs 3 and 4
according to general provisions on compensation of damages.

§ 38

1. Children shall have the common surname of their parents or the surname of one
of them that was agreed on at the moment of entrance into the marriage.

2. As for a child whose surname was not determined in this way and whose parents
have different surnames, the parents shall agree on the child’s surname and let
the register office about such agreement.

3. If the parents fail to agree on the name or surname of the child or if none of the
parents is known, the name or surname shall be determined by the court.

§ 39

1. If the parents enter into marriage after birth of their child, the child shall have
the surname determined for their other children.

2. If the marriage is entered into by a child whose father is not known, the parents
may consent to declare before the register office that the surname determined for
their other children shall be born also by this child.

§ 40

The child’s surname according to previous provisions cannot be changed as soon as
the child becomes major.

b) procedural law: Act No. 99/1963 Coll., Civil procedure code

c) conflict of laws rules, international jurisdiction, recognition and enforcement,
child abduction:

jurisdiction and the recognition and enforcement of judgments in matrimonial
matters and the matters of parental responsibility, repealing Regulation (EC) No
1347/2000 (“Brussels IIbis Regulation”)
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
- European Convention on the Exercise of Children's Rights
- Convention on Contact concerning Children
- Act No. 97/1963 Coll., on International private and procedural law
- bilateral international agreements

II. future sources of law

On the 3rd of February 2012 a new Czech Civil Code was adopted (Act No. 89/2012 Coll.). This new piece of legislation will enter into force on the 1st of January 2014 and will replace the current Civil Code as well as the Act on Family. There will be no major substantive changes in comparison with the current state.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

As from 1st of October 2008 the Civil procedure code includes special provisions in §§ 193a – 193e on “return proceedings” under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and Regulation Brussels IIbis. All return proceedings are concentrated to one District court (Municipal Court in Brno) in the district of which the Office for the International Legal Protection of Children has its registered office (§ 88 q).

Czech national law foresees the possibility of an appeal against a decision entailing the return of the child.

Proceedings for returning a minor in matters of the international kidnapping of children

§ 193a

(1) The participants in the proceedings for a petition for returning a minor in matters of the international kidnapping of children under an international contract included in the law or under a directly applicable regulation of European Communities (hereinafter referred to as "proceedings for child returning") shall include the following

a) the one the right of whom to care of a child exercised under the law of the country where the child had its usual residence immediately before relocation or detention has been violated (plaintiff),

b) the one violating the right of whom to care of a child exercised under the law of the country where the child had its usual residence immediately before relocation or detention (defendant),

c) child.
If the participant includes a minor parent of a child, such parent shall have the right to litigation in these proceedings. Provisions of § 23 can only apply if the parent is under 16.

Section 193b

(1) In the proceedings for child returning, the court shall decide on the given matter by judgment.

(2) Other matters shall be decided by the court by resolution.

(3) In the proceedings for child returning, the proceedings cannot be suspended for reasons mentioned in part three of this Act, except for the reason mentioned in § 109 Subsection 1 d), and waive missing the term. An action for retrial and nullity plea cannot be filed either.

Section 193c

(1) Even without a petition, the court shall take appropriate measures to satisfy the conditions for child returning, in particular, the court shall take measures to the following

a) court supervision of the child’s movement in the country territory,

b) preventing the child from leaving the country territory without the consent of the court,

c) preventing disruption of personal ties between the child and the plaintiff.

(2) Upon the petition by the plaintiff, the court shall also decide on the temporary regulation of the plaintiff’s contact with the child if the plaintiff demonstrates his right to the care of the child.

(3) On the taking of appropriate measures, the court shall decide without undue delay, usually without hearing the participants.

§ 193d

(1) Within 3 days after proceedings have been initiated, the court shall order the defendant by resolution to express his written opinion in the matter within 7 days following the resolution delivery and if he does not consent to the child returning petition, the defendant shall

a) describe in the opinion the relevant facts upon which his defence is based,

b) attach to the opinion the documentary evidence he refers to,

c) identify evidence to support his claims and state whether he waives his right to take part in trying the matter.

(2) Resolution pursuant to § 1 must be delivered to the defendant personally; delivery in replacement shall be excluded. The resolution must not be delivered to the defendant before the action.

(3) If the defendant fails to express his opinion upon the call of the court pursuant to § 1 without any serious reason therefor, and fails to provide the court with the serious reason preventing it from notifying the court within the set term, it shall be regarded that the defendant waives his right to take part in trying the matter and has no objection against the child returning petition applied against it by the action; the defendant must be notified thereof.

§ 193e

(1) A hearing need not be ordered in the proceedings for child returning,

a) if it is believed that the defendant has no objection against the child returning petition (193d),

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b) if the matter may only be decided based on the documentary evidence submitted by the participants and the participants have waived their right to take part in trying the matter, or they consent to deciding the matter without a hearing being ordered, or if it is believed that the participants have waived their right to take part in trying the matter, or that they agree with deciding the matter without a hearing being ordered (§ 101 (4)).

(2) If reasons worthy of special consideration are not given, the court shall usually issue a decision in the given matter within 6 weeks after the proceedings have been initiated; if the court issues a decision after the term has expired, the statement of reasons shall include the facts for which the term could not be met.

(3) In the decision, the court shall be authorised to condition or conditionally defer child returning by meeting reasonable guarantees by the plaintiff or issuing a decision and/or taking other measures by the authorities of the country to which the child is to be returned.

(4) In the judgment, the court shall notify the participants of the possibility to enforce a decision by taking a child away.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

There are rules on jurisdiction on parental responsibility in several bilateral international agreements. The Act No. 97/1963 Coll., on International private and procedural law, has its own rules on jurisdiction in the § 39. Those rules are mainly based on the nationality.

§ 39

(1) As for upbringing and maintenance of minors or other matters concerning the minors who are Czech citizens, the jurisdiction of Czech courts shall be given even if they live abroad. The jurisdiction of Czech courts shall be also given as for proceedings on maintenance against a Czech citizen sued by a minor foreigner living abroad as well as for proceedings in that a Czech citizen sues a minor foreigner and asks the court to quash or change the decision of a Czech court.

(2) Care over a minor Czech citizen living abroad and missing any parental care may be also taken over by a Czech consulate authority to the extent of jurisdiction of courts if such jurisdiction is recognised by the state where the minor lives. Remedial measures against the decisions of consulates shall be decided upon by the Ministry of Foreign Affairs.

(3) As for matters regarding minor foreigners living in the Czech Republic, the Czech court shall take only measures necessary to the protection of their persons and property and shall notify the relevant authority of their domestic state. Unless the relevant authority of the domestic state regulates the minor’s matters within an adequate period, the Czech court shall do so.

(4) When cancelling the matrimony of parents of a minor foreigner living in the Czech Republic, the court shall regulate rights and duties of the parents vis-à-vis the minor for the period after the divorce if the foreigner stays in inland and if the authorities of its domestic state take no other measures.

Czech Civil Procedural Code regulates territorial jurisdiction of the concrete court. When a matter falling within the powers of courts of the Czech Republic but it is
not possible to determine the court territorially/locally competent, the Supreme Court shall determine which court shall try and decide on the matter (§ 11).

4. **Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?**

Czech courts may decide on provisional, including protective, measures under the §§ 74 – 77a of the Civil Procedural Code. In principle, an interim measure may be ordered by the presiding judge before proceedings are initiated, if necessary, to provisionally modify the relation of the participants, or if feared the enforcement of the judicial decision could be jeopardised.

An interim measure may for example impose on a participant the obligations to pay alimony to the necessary extent, to resign a child to the other parent or into the care of the one specified by the court, not to dispose some items or rights, to perform something, refrain from something, or permit something, etc.

When an interim measure is ordered, the presiding judge shall impose the plaintiff to file a proceedings initiation proposal at the court in a time specified by the court; this shall not apply if proceedings for the matter may be initiated without any proposal. The judge may also provide that the interim measure only lasts for a specified time.

If a minor child has found himself/herself without any care or if his/her life or favourable development is put at a serious risk or affected, the presiding judge shall order with the interim measure that the child is to be placed for a necessary time in a suitable environment as specified in the resolution. A suitable environment shall include an educational environment with a person or a facility capable of providing the minor child with due care with respect to his/her physical and mental state and intellectual faculties, and enabling the implementation of other measures stipulated by the interim measure (§ 76a).

5. **Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.**

Non-custodial parents have only limited influence over their children’s upbringing. In such cases the exercise of their parental responsibility is guaranteed by granting them access rights to their children. Contact between the child and non-custodial parent may be maintained directly by visiting the child or being visited by the child; or indirectly by telephone communication or any other form of electronic communication. The rights of access also include the right of the non-custodial parent to receive information about the child from the custodial parent.

A person (a parent but also a grandparent or other person) may exercise access rights based on provision of law, court order or valid agreement.

Should a parent fail to comply with a court order or court approved agreement regulating access rights, it is possible to enforce such order or agreement. Consequently, the child may have to be taken from one parent to another with the assistance of a court employee, social worker, bailiff or even a police officer. Given the traumatizing effect such experience may have on a child, the authorities
involved shall always act as an intermediary and encourage the parents to settle their dispute amicably.

Custodial parents living in the Czech Republic may face sanctions in case they prevent the non-custodial parent from contact with the child. Besides the extreme (and therefore limited) measures mentioned above, a court may impose a fine on a parent who does not comply with the court order or an agreement. Parties to a dispute may also be compelled by the court to participate in out-of-court conciliation or family mediation, and family therapy. Moreover, based on the § 27 subparagraph 2 of the Family Code (Act No. 94/1963 Coll.), unjustified and repeated denial of access rights qualifies as a change of circumstances which authorizes the court to render a new decision related to the upbringing of the child.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

The hearing of the child is regulated in the Civil procedure code, especially in the § 100 (4). A minor able to express his/her opinion is also involved in the proceedings. The court shall proceed in a way that the opinion of the child on the matter is known. The court shall learn the opinion of the minor by hearing thereof. In exceptional cases, the court may also learn the minor’s opinion through his/her representative, expert opinion, or appropriate body of social-legal protection of children. The court shall be authorised to hear the minor with no other persons present if the court may expect that the presence of such a person could influence the minor by preventing him/her from expressing his/her real opinion. The opinion of the minor shall be considered by the court while taking into account his/her age and intellectual faculties.

Czech legislation does not prescribe a precise age limit above which the hearing of the child would be obligatory.

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

The Central Authority designated to facilitate the application of Regulation Brussels IIbis is the Office for International Legal Protection of Children (hereinafter referred to as the „Office“). It was established by the Social and Legal Protection of Children Act (Act No. 359/1999 Coll., § 3). The Office is an administrative body with state-wide authority subordinated to the Ministry of Labour and Social Affairs. It is managed by a Director.

The Office has been designated to act as a “Central Authority“ and discharges the duties that are imposed on such authorities by various international conventions and EU regulations. In particular, it provides assistance in the matters of international recovery of child support and other forms of family maintenance, inter-country adoption, international child abduction and rights of access. The Office also acts as a guardian ad litem in court proceedings which involve minors and have cross-border implications.

In the area of maintenance recovery, the Office discharges its duties mainly pursuant to the Convention on the Recovery Abroad of Maintenance (New York, 20 June 1956), the Convention on the Recognition and Enforcement of Decisions


The international adoptions procedure is regulated by the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (The Hague 29 May 1993).

Being a state authority, the Office is also bound by the Convention on the Rights of the Child (New York 20. 11. 1989), and must therefore regard the best interests of the child as the most important consideration in any action it takes.

8. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels IIbis?

The Ministry of Justice has prepared a leaflet “International families in crisis”. The aim of this brochure is to help parents living in an international couple and considering (unlawful) removal or detention of their child. The leaflet, available in Czech and English, serves a source of inspiration for a similar leaflet prepared by the European Judicial Network in Civil and Commercial Matters (EJN).

The Ministry of Justice and the Czech Judicial Academy prepared or participated in several events, conferences or seminars dealing with the problem of international child abductions (latest example: International conference co-organized in Prague 10th and 11th May 2012 by the Judicial Academy, Ministry of Justice and the EJTN).

The Ministry of Justice, the Office for International Legal Protection of Children and judges communicate on a regular basis in concrete cases. They also exchange their experience at least twice a year when the Czech Internal Judicial Network in Civil and Commercial Matters (national follow-up to the EJN) meets.

B. Horizontal issues

6. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

The Directive has been transposed into the Czech national legislation with one year delay which was caused by several amendments during the legislative procedure. The Act No. 202/2012 Coll., on Mediation, was finally adopted on the 2nd May 2012 and will enter into force on the 1st September 2012.
7. **How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

The Directive was transposed into the Act No. 629/2004, on access to legal aid in cross-border disputes in the EU. The Act (or the Directive) is being regularly invoked in family cross-border cases (maintenance obligations, divorce, parental responsibility, etc.) by Czech and foreign applicants for legal aid.

The new Regulation on maintenance sets up new rules on legal aid for maintenance claims. Unfortunately, we still do not have sufficient experience to be able to draw a clear conclusion about the compatibility of both instruments.

There are other international instruments on free legal aid that might be invoked in cross-border cases (especially) where a non-EU member state is concerned:

- European Agreement on the Transmission of Applications for Legal Aid
- Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid
- bilateral agreements

8. **Is your country a contracting party to any bilateral or international instruments on Family Law?**

1) **Multilateral international conventions:**

Hague conference on private international law:

- Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children
- Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
- Convention of 13 January 2000 on the International Protection of Adults (deposition of ratification instruments by Czech Republic expected in April 2012)
- Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations

Council of Europe:

- European Convention on the Adoption of Children
- European Convention on the Legal Status of Children born out of Wedlock
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
- European Convention on the Exercise of Children’s Rights
- Convention on Contact concerning Children
- European Agreement on the Transmission of Applications for Legal Aid
- Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid

Other
- Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956

II) Czech Republic has bilateral international agreements including judicial cooperation in civil matters with the following states:

Afghanistan, Albania, Algeria, Australia, Bahamas, Belgium, Belarus, Bosnia and Herzegovina, Bulgaria, Montenegro, China, Fiji, France, Gambia, Georgia, Croatia, Italy, Yemen, Republic of South Africa, Canada, Kenya, PDR of Korea, Kosovo, Cuba, Cyprus, Kyrgyzstan, Lesotho, Hungary, FYROM, Moldova, Mongolia, Nauru, Germany (declaration of reciprocity – recognition of judgements), New Zealand, Poland, Portugal, Austria, Romania, Russian federation, Greece, Slovakia, Slovenia, USA (declaration of reciprocity – recognition of judgements on maintenance obligations for minor children), Serbia, Syria, Spain, Switzerland, Tunisia, Turkey, Ukraine, Uzbekistan, United Kingdom, Vietnam.

It has to be noted that some of the agreements have broad scope including jurisdiction and conflict of laws rules, some includes simple rules on recognition and enforcement of judgements and the rest is limited to the judicial cooperation stricto sensu – service of documents, taking of evidence, and validity of authentic acts. Some of the agreements have not been applicable for years although they remain in force.

9. Are there any databases or online tools providing information on Family Law matters available in your country?

European Judicial Network in Civil and Commercial Matters

- Information on divorce:
  http://ec.europa.eu/civiljustice/divorce/divorce_cze_en.htm
- Information on maintenance obligations:
  http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_cze_en.htm
- Information on parental responsibility:
  http://ec.europa.eu/civiljustice/parental_resp/parental_resp_cze_en.htm
European Judicial Atlas in Civil and Commercial Matters
- Parental responsibility
- Maintenance obligations

Office for International Legal Protection of Children

Ministry of Labour and Social Affairs

Ministry of Justice

Ministry of Foreign Affairs

10. Please provide information on accessing and applying foreign Family Law in your country.

The Czech law respects the principle “Iura novit curia” even when foreign law is applicable. It means that the parties are not obliged to submit the content of the respective foreign law to the court; it is the task of judicial authorities. The § 53 of Act No. 97/1963 Coll., on International private and procedural law, stipulates that in order to find out the content of foreign law, the court shall take all necessary measures. If the content of the foreign law is not known to the court by other means, it may also ask the Ministry of Justice for information for this purpose. Should doubts occur in the course of hearing court may ask the Ministry of Justice for a statement.

The Ministry of Justice (being the last resort for judicial authorities in finding the content of foreign applicable law) disposes of several sources of information. In addition to an extensive collection of foreign acts and several compilations there is a possibility to explore diplomatic and consular channels or to seek information on the basis of international instruments of the Council of Europe (European Convention on Information on Foreign Law and Additional Protocol to the European Convention on Information on Foreign Law). Competent authorities of the contracting parties to the above mentioned instruments are entitled to ask the Ministry of Justice of the Czech Republic for the information on Czech law.

Nevertheless, the most efficient and more and more broadly used tool is the European judicial network in civil and commercial matters (“EJN”). The EJN is a network of contact points and other members of all member states of the EU who...
communicate among themselves in order to overcome obstacles in cross-border civil cases (including missing information on foreign applicable law). The Czech Republic has appointed 4 contact points; all of them being employees of the Ministry of Justice. Every Czech civil judge has direct access to Czech contact points and is invited to ask them for cooperation.

The EJN provides also for useful general information on applicable law and judicial procedures in all member states of the European Union. Some basic information can be found on the official website: http://ec.europa.eu/civiljustice/index_en.htm
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

a) Parental responsibility

- **Jurisdiction, application of the Article 12 (3) of the Regulation Brussels IIbis**: Decision No. 35Co 2/2007 of the Regional Court in Ústí nad Labem (as appellate court) reforming Decision No. 30P 149/2000 of the District court in Jablonec nad Nisou

- **Preliminary measures (to resign a child to the other parent)**: Decision No. 35Co 878/2006 of the Regional Court in Ústí nad Labem (as appellate court) reforming Decision No. 30NCc 998/2005 of the District court in Jablonec nad Nisou

- **Jurisdiction (application of Article 8 of Regulation Brussels IIbis); habitual residence of the child; guardian ad litem**: Decision No. 73Co 218/2008 of the Regional Court in Ústí nad Labem (as appellate court) approving Decision No. 11Nc 55/2006 of the District court in Děčín

b) Child abduction

- **Return proceedings, Hague Convention on the Civil Aspects of International Child Abduction (Czech Republic – Australia)**: Decision No. 20 Co 365/2012 of the Regional Court in Brno (as appellate court) approving Decision No. 40 Nc 2516/2011 of the Municipal court in Brno


- **Return proceedings, Brussels IIbis Regulation, Hague Convention on the Civil Aspects of International Child Abduction (Czech Republic – Greece)**: Decision No. 20 Co 413/2010 of the Regional Court in Brno (as appellate court) reforming Decision No. 40 Nc 2511/2009 of the Municipal court in Brno
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Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)

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National section

ESTONIA

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

The rights and obligations of parents

According to national law the mutual rights and obligations of parents and children arise from the filiation of children which is ascertained pursuant to procedure provided by law. Generally parents have equal rights and obligations with respect to their children. The main part of parental rights and duties consists of the right of custody, which has to be registered in the Population Register.

The parents who are married to each other have joint custody over their child. If the parents of a child are not married to each other at the time of birth of the child, they shall have joint right of custody unless they have expressed their wish to leave the right of custody only to one of the parents upon submitting the declarations of intention concerning the acknowledgement of paternity. Otherwise, only the mother shall have the right of custody.

The parent's right of custody includes the right to care for the person of the child (custody over person) and for the property of the child (custody over property) and decide on matters related to the child. A parent who has the right of custody is the legal representative of a child. Parents who have joint custody have the joint right of representation.

If parents who have the joint right of custody live permanently apart or do not wish to exercise the right of joint custody any further for any other reason, each parent has the right to request from a court in proceedings on petition that the right of custody of the child be partially or fully transferred to him or her. If the right of custody belongs to only one parent, the other parent may request from a court that the right of custody of the child be partially or fully transferred to him or her.

If neither of the parents of a minor child has the right of representation or if it is not possible to ascertain the origin of a child, a guardian shall be appointed to the child. A guardian has both, the right of custody over the person and property of the child.

Notwithstanding the right of custody of the child, the child has the right to maintain personal contact with both parents and both parents have the obligation and right to maintain personal contact with their child (right of access).

Substantive provisions are included in the Family Law Act (FLA) as follows:

- parental rights and obligations, including right of custody – FLA § 113–146,
- guardianship over minor – FLA §§ 171–201.

Procedural provisions concerning registration of the right of custody or guardianship are included in the Vital Statistics Registration Act, esp. VSRA §§ 22.

29. Procedural provisions concerning court proceedings in disputes over parental responsibility and cases of guardianship are partly included in FLA. General procedural rules of the Code of Civil Procedure (CCP)\(^8\) also apply, but there have been enacted special procedural rules for some family law cases (Family matters on petition, general rules - CCP §§ 550–553), included determination of parent's rights to child and regulation of access to child (CCP §§558–563)\(^1\) as well as appointment of guardian for minor (CCP §§ 554–557).

Reform proposals

The Ministry of Justice has made a proposal for amendments concerning joint right of representation and in procedural matters concerning determination of the right to access by court. The proposals have not reached the Parliament yet.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

In Estonian national law there has not been foreseen any special expeditious procedure for child abduction cases. Nevertheless, Estonian courts are aware of the need to solve these cases immediately and try to proceed these cases in foreseen time limits.

As there is no special procedure stipulated in national law, the general procedural rules apply. Therefore, there is a possibility to appeal against the decision of the court of first instance and also appeal in cassation proceedings against the decision of the court of second instance.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

According to § 70 (2) of the Code of Civil Procedure (CCP)\(^9\) a matter falls under the jurisdiction of an Estonian court if an Estonian court can adjudicate the matter according to competence and pursuant to the provisions concerning jurisdiction or based on an agreement on jurisdiction, unless otherwise provided by law or an

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international agreement. According to CCP § 70 (4) the rules of CCP will apply only if the question of jurisdiction has not been regulated in Regulation of Brussels IIbis.

According to CCP § 116 and 110 Estonian court is competent to adjudicate a parental responsibility matter if the child is a citizen of the Republic of Estonia, or his or her residence is in Estonia or if the child needs the protection of an Estonian court due to another reason, including the case where the property of the child is located in Estonia. A parental responsibility case needs not be adjudicated in an Estonian court if an Estonian court or a court of a foreign state are equally competent to solve the case and the parental responsibility case is already decided in a foreign state or a foreign court is conducting proceedings, provided that the decision of the foreign court can be presumed to be recognised in Estonia and it is in the interests of the child.

4. **Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?**

According to § 110 (1) of the Code of Civil Procedure (CCP)⁹⁰ Estonian courts are competent to adjudicate a parental responsibility matter if the child needs the protection of an Estonian court. According to CCP § 551 the court may apply, based on a request or at the initiative of the court itself, measures for securing the action as measure of provisional legal protection. In order to protect the child’s best interests the court may for the time of the proceeding with preliminary ruling regulate the rights of parents to a common child or communication of a parent with a child or surrender of a child to the other parent or other matters which need to be settled expeditiously due to the circumstances (CCP § 378 (3)).

5. **Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.**

Access rights and the return of the child have to be enforced only if there is a respective court decision. According to § 1 of the Code of Enforcement Procedure (CEP)¹¹ court judgements and rulings which have entered into force or are subject to immediate enforcement in civil matters shall be enforced according to the rules of CEP.

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Enforcement of the right to access is regulated in the Code of Civil Procedure (CCP)\(^\pm\) and CEP, enforcement of the return of the child - only in CEP.

According to CEP § 179 (1) in a matter concerning the return of a child and the right to communicate with a child, a bailiff shall perform an enforcement action in the presence of a representative of the local government of the residence of the child or, as an exception, of the obligated person, and the representative shall have specific expertise in communication with children. If an obligated person impedes compulsory enforcement, the bailiff may impose a penalty payment on a debtor. If necessary, a bailiff may raise a question regarding temporary placement of a child in a children's social welfare institution in front of a representative of the local government of the residence of the child or, as an exception, of the obligated person. A bailiff may use force in respect of a child or a person obligated to return the child or allow communication with the child only on the basis of a court decision. A court shall allow the use of force for enforcement of a decision only if application of other measures is or will be unsuccessful or if prompt enforcement of the decision is necessary and the use of force is justified by the need to ensure the child's well-being which cannot be achieved in any other way.

Concerning the right to access there has to be conducted the conciliation procedure at the court in case of violation of the ruling regulating the access to the child before the enforcement by the bailiff (CCP § 563).

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

According to § 123 (1) of the Family Law Act (FLA)\(^\mp\) upon hearing any matter concerning a child, a court shall make a decision primarily in the interests of the child, taking into account all the circumstances and the legitimate interest of the relevant persons. For that reason, according to § 552 of the Code of Civil Procedure (CCP)\(^\pm\), the court personally has to hear the child of at least ten years of age. The court may also hear the child under this age. If necessary, a child shall be heard in the presence of an expert or other persons. Upon hearing a child, he or she shall be informed of the object and potential outcome of the proceedings unless this can be

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presumed to result in harmful consequences to the development or upbringing of the child. A child shall be given an opportunity to present his or her position. The hearing of a child shall be denied only with good reason. If a child is not heard due to the reason that the delay would clearly damage the child’s interests, the child must be heard retroactively at the earliest opportunity.

According to FLA § 137–138 in custody cases a petition of a parent shall be dismissed if a child who has attained at least 14 years of age objects to the transfer of custody rights. In other cases the views of the child have to be considered among other circumstances.

7. **Which is the Central Authority designated to facilitate the application of Regulation Brussels Iibis (Chapter IV of the Regulation)?**

   The Central Authority is the Ministry of Justice.

   For more information see: [http://www.just.ee](http://www.just.ee) or contact [central.authority@just.ee](mailto:central.authority@just.ee)

8. **Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels Iibis?**

   There are no further instruments or procedures enacted in Estonian law in order to apply the Regulation of Brussels Iibis (it has to be implemented directly).

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**B. Horizontal issues**

1. **How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

   In national law there have been enacted rules which enable to solve disputes at arbitral tribunals (agreement of arbitral tribunal, formation and competence of arbitral tribunal, procedure etc. (Code of Civil Procedure (CCP)\(^1\) §§ 712–758)).

   There has also been enacted the Conciliation Act (CA)\(^2\) which governs conciliation proceedings in civil matters, including the legal consequences of conciliation proceedings conducted in accordance with the procedure prescribed in this Act. For the purposes of this Act, conciliation proceedings means a voluntary process in the course of which an impartial third party facilitates communication between parties to conciliation proceedings with the purpose of assisting them in finding a solution.

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to their dispute. A conciliator may, on the basis of the facts of conciliation and the progress of conciliation proceedings, propose to the parties his or her own solutions to the dispute.

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

Grant by State of Procedural Assistance for Bearing Procedural Expenses, including legal aid for persons who have habitual residence in another European member state is regulated in the Code of Civil Procedure (CCP)17 §§ 180–193.

There has also been enacted the State Legal Aid Act18. Under this Act, state legal aid is granted to natural or legal persons in connection with proceedings in an Estonian court or administrative body or otherwise in the protection of their rights, if deciding thereon is within the competence of an Estonian court.

3. Is your country a contracting party to any bilateral or international instruments on family law?

Estonia is a contracting party to bilateral agreements with the following states:

- Lithuania and Latvia (1993)19,
- Russian Federation (1993)20,
- Ukraine (1995)21,
- Poland (1999)22.

Estonia is a contracting party to the following international instruments on family law:

United Nations:
- Convention on the Recovery Abroad of Maintenance (UN 1956),
- Convention on the Rights of the Child (UN 1989),

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19 Available in Estonian: https://www.riigiteataja.ee/akt/13099214
20 Available in Estonian: https://www.riigiteataja.ee/akt/13141764
21 Available in Estonian: https://www.riigiteataja.ee/akt/13119066
22 Available in Estonian: https://www.riigiteataja.ee/akt/79090
Hague Conference on Private International Law:

- Convention on the Recognition of Divorces and Legal Separations (Hague Conference 1970),
- Convention on the Civil Aspects of International Child Abduction (Hague Conference 1980),
- Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Conference 1993),
- Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (Hague Conference 1996),

Council of Europe:


4. **Are there any databases or online tools providing information on family law matters available in your country?**

Judgements and rulings of courts:
- Judgements and rulings of courts of first and second instance in family law cases (as far as the cases are published and the publication is not against the right to privacy of parties): [http://www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/t_siviilKohtumenetlus.html](http://www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/t_siviilKohtumenetlus.html)
- Judgements and rulings of the Supreme Court of Estonia: [http://www.riigikohus.ee](http://www.riigikohus.ee)

National legislation: [http://www.riigiteataja.ee](http://www.riigiteataja.ee)


Ministry of Justice: [http://www.just.ee](http://www.just.ee)

European Judicial Atlas in Civil and Commercial Matters:
5. Please provide information on accessing and applying foreign family law in your country.

According to § 438 of the Code of Civil Procedure (CCP) the court shall upon making a judgement decide which legislation applies in the matter. According to CCP § 234 proof of law in force outside of the Republic of Estonia, international law or customary law must be given only in so far as the court is not acquainted with such law. The court may also use other sources of information and perform other acts to ascertain the law. Upon ascertaining foreign law, the court shall be guided by the Private International Law Act.

According to IPLA § 4 the content of foreign law to be applied shall be ascertained by the court conducting the procedure. For such purpose, the court conducting the procedure has the right to request the assistance of the parties. The parties have the right to submit documents to the court for ascertainment of the content of foreign law. The court is not required to act pursuant to the documents submitted by the parties. Courts have the right to request assistance from the Ministry of Justice or the Ministry of Foreign Affairs of the Republic of Estonia and to use experts. If the content of foreign law cannot be ascertained within a reasonable period of time despite all efforts, Estonian law applies.

II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

Jurisdiction, habitual residence of the child:


In this judgement the Supreme Court of Estonia explained how to determine the habitual residence of a child in order to decide whether Estonian court has jurisdiction or not according to Brussels IIbis Article 8 (1) or Article 10.

- 20.03.2009 judgement of the district court in Tartu (as appellate court) in civil matter no 2-05-15619,
- 15.01.2010 judgement of the district court in Tallinn (as appellate court) in civil matter no 2-09-23855,
- 22.04.2010 judgement of the district court in Tallinn (as appellate court) in civil matter no 2-10-15066,
- 17.08.2010 judgement of the district court in Tallinn (as appellate court) in civil matter no 2-10-25779,
- 26.04.2012 judgement of the district court in Tartu (as appellate court) in civil matter no 2-12-426.

In these judgements the court of appeal decided whether Estonian court has or has not jurisdiction to determine parental rights and duties under the circumstances brought before the court. Unfortunately all these judgements have not been published.

Child abduction:


In this judgement the Supreme Court explained the notion of child abduction and made clear difference between child abduction and parental responsibility cases. The Supreme Court also emphasised the relevance of the return of the child and noted that the child may not be returned to the habitual residence only in very exceptional circumstances (Article 13 (1) b).

- 22.02.2007 judgement of Supreme Court of Estonia in civil matter no 3-2-1-142-06, available: [http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-142-06](http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-142-06)

In this case the Supreme Court explained the notion of child abduction and the legal consequences of child abduction (jurisdiction). The court also explained in which circumstances the child may not be returned if the child is against to the return (Article 13 (2)).


In this case the Supreme Court explained the jurisdiction in case of child abduction (Brussels IIbis Article 10.)
III. NATIONAL BIBLIOGRAPHY

**Regulation Brussels IIbis: Parental responsibility matters**


**Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)**


**Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)**


**Preliminary ruling system on family matters**

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**Family Mediation**

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The duty of the national court “is to make the foreign order happen and there is only such discretion as fulfilment of that duty requires” (per Holman J in Re S (Brussels II: Recognition of the Best Interests of the Child (n. 2) [2003] EWHC 2974)

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Is there any proposal to reform?

Parental responsibility is regulated by ss. 2 et seq. of the Children Act 1989 (CA 89). The term indicates “all the rights, duties, powers and responsibilities and authority” that an adult (often the parent) has towards a child: essentially it confers a legal status to the commitment by an adult to a child. See, in particular, s. 3 CA 89:

s. 3 Meaning of “parental responsibility”.

(1) In this Act “parental responsibility” means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

(2) It also includes the rights, powers and duties which a guardian of the child’s estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property.

(3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover.

(4) The fact that a person has, or does not have, parental responsibility for a child shall not affect—

(a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); or

(b) any rights which, in the event of the child’s death, he (or any other person) may have in relation to the child’s property.

(5) A person who—

(a) does not have parental responsibility for a particular child; but

(b) has care of the child,

may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child’s welfare.

The CA 89 does not contain a definition of parental responsibility, which was left to the interpretation of the Court (for the background of the concept see the case of Gillick v West Norfolk & Wisbech Area Health Authority [1986] AC).

People other than birth parents can acquire parental responsibility; the CA 89 establishes the procedure to follow.

As far as parents are concerned, married parents have both automatic parental responsibility but unmarried mothers only have automatic parental responsibility whilst unmarried fathers need to acquire it. The Adoption and Children Act 2002 (ACA 2002) has extended automatic parental responsibility to those unmarried fathers who sign the birth certificate. There are plans aiming to ensure that both parents sign the birth certificate but these have proved to be controversial and impractical.

24 Author’s emphasis.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

For the expeditious procedure, see case Vigreux v Michel [2006] 2 FLR 1180 (at p. 16 of this report).

In England and Wales, the procedure for appeal against a decision (Article 33 of the Brussels II Regulation) was clarified in the case of Re S (Foreign Contact Order) [2009] EWCA Civ 993, [2010] 1 FLR 982 as follows:

- an appeal under Article 33 lies in the Family Division of the High Court. No permission to appeal is required;
- a second appeal under Article 34 lies to the Court of Appeal and requires permission;
- there is no entitlement to appeal to the Supreme Court from the court of appeal.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

The Family Division of the High Court.

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

The best interests of the child (or welfare of the child) is regulated in English Law by s. 1 of the Children Act 1989 and it is paramount in cases involving the upbringing of the child. There is no definition of the concept in the Children Act 1989. In England and Wales, a definition of “welfare of the child” has been provided by case law. In particular, see Walker v Walker and Harrison, [1981] NZ Recent Law 257:

“Welfare’ is an all-encompassing word. It includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and the due person pride are maintained.

However, while material considerations have their place, they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child’s own character, personality and talents.” (per Hardy Boys J) 25

25 Note that this is a New Zealand case and it was decided prior to the entry into force of the Children Act 1989. It is, however, one of the leading authorities in this area.
Other relevant and more recent decisions include *An NHS Trust v MB* [2006] EWHC 507 where it was held that the welfare of the child encompasses:

“every kind of consideration capable of impacting on the decision. These include, non-exhaustively, medical, emotional, sensory (pleasure, pain and suffering) and instinctive (the human instinct to survive) considerations”

and *C (a Child) Re* [2012] *EW Mish (CC)* Case n RM 11 P02263.

Furthermore, s. 1 CA 89 provides a check list which the Court must consider:

**s. 1 Welfare of the child.**

(1) When a court determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child’s property or the application of any income arising from it,

the child’s welfare shall be the court’s paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

(...)

There are several provisions in the CA 1989 aiming to guarantee the best interest of the children. These are contained, in particular, in Part II (Orders with Respect to Children in Family Proceedings) in particular ss. 8 to 14 (see [http://www.legislation.gov.uk/ukpga/1989/41/part/II](http://www.legislation.gov.uk/ukpga/1989/41/part/II))

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.
In England and Wales, the Child Abduction and Custody Act 1985 and Part VI of the Family Proceedings Rules 1991 give effect to the Hague and European Conventions in English law; the Legal Aid Act 1988 and the Civil Legal Aid (General) Regulations 1989 provide financial support for litigants; the Family Law Act 1986 contains provisions for making orders for the protection of children and the Child Abduction Act 1984 makes it a criminal offence for a person connected with a child to take or send the child out of the United Kingdom without the appropriate consent. A parent can also be charged with the common law offence of kidnapping (see e.g. R v D [1984] AC 778).

Although, according to Lord Justice Thorpe, Head of International Family Justice for England and Wales, 2011 has seen a sharp increase in the number of new child abduction cases reported to his office (see: http://www.judiciary.gov.uk/publications-and-reports/reports/family/international-family-justice-report-2011-2012) there have been only a very small number of prosecutions and convictions for statutory child abduction offences in England and Wales over the last ten years.26

6. **Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?**

Under English Law it is mandatory for a Court to give regard to the “ascertainable wishing and feelings” of the child concerned. The relevant legislation is s. 1 of the Children Act 1989, in particular s. 1(3)(a) (see question 3 in this section of the report) which establishes that “the age, the understanding and the maturity of a child” must be taken into account (see also case Gillick v West Norfolk & Wisbech Area Health Authority [1986] AC).

7. **Which is the Central Authority designated to facilitate the application of Regulation Brussels Iibis (Chapter IV of the Regulation)?**

In England and Wales the Central Authority designated to facilitate the application of Regulation Brussels Iibis is the Lord Chancellor who delegates the duties of the Central Authority to the International Child Abduction and Contact Unit (ICACU). The ICACU is based within the office of the Official Solicitor and Public Trustee.

81 Chancery Lane
London
WC2A 1DD
(http://www.justice.gov.uk/protecting-the-vulnerable/official-solicitor/international-child-abduction-and-contact-unit)

8. **Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels Iibis?**

European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulation 2005, SI 2005/265,

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This instrument replaces and amends the domestic “traditional” jurisdictional rules which were included in the Domiciles and Matrimonial Proceedings Act 1973 (DMP Act 73).

B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?


Both of these pieces of legislation apply only to the mediation of cross-border disputes, not purely domestic ones. The Government, however, is now considering extending the national legislation to govern domestic mediations.

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

Directive No 2003/8/EC is transposed into England and Wales with the following measures:


3. Is your country a contracting party to any bilateral or international instruments on family law?
England and Wales are a contracting party to several international agreements in family law. Amongst the most important see:


This Convention seeks to protect children from the harmful effects of parental abduction across international boundaries or the loss of contact with the so-called “left-behind” parent. It establishes a procedure for bringing about the prompt return of a child wrongfully removed to or retained in another country which is a party to the Convention, or for securing access rights. Within the European Union, the Convention is supplemented by Council Regulation (EC) No 2201/2003 (commonly referred to as Brussels II A or Brussels IIbis).

11. The 1980 European Custody Convention


4. Are there any databases or online tools providing information on family law matters available in your country?

- Family Law Newswatch (http://www.familylaw.co.uk/) is a (free) source of useful information and weekly updates in family law (case law, legislation and policy initiatives/debates) at both domestic, international and EU level.

- Council of Europe: www.coe.int

- European Judicial Network: http://ec.europa.eu/civiljustice
  - Information on divorce: http://ec.europa.eu/civiljustice/divorce/divorce_eng_en.htm
  - Information on maintenance obligations: http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_eng_en.htm
  - Information on parental responsibility: http://ec.europa.eu/civiljustice/parental_resp/parental_resp_eng_en.htm

- European Judicial Atlas in Civil and Commercial Matters

- International Court of Justice – The Hague: www.icj-cij.org


- International Child Abduction Database: www.incadat.com
5. Please provide information on accessing and applying foreign family law your country.

Foreign law is not automatically enforceable in England. There is, however, the Office of the Head of International Family Justice for England and Wales that is a centre of expertise and a help desk for general enquiries in the field of international family law for the judiciary and practitioners in this jurisdiction and overseas. It supports cross border judicial collaboration and enhances the expertise necessary for handling the large number of cases relating to aspects of private international law. (http://www.judiciary.gov.uk/publications-and-reports/reports/family/international-family-justice-report-2011-2012)

There are however some instances, where foreign law has been taken into consideration in the context of domestic family law:

1. Being England a multicultural society, there have been instances where the domestic court, in deciding a case has taken into account the different backgrounds of the parties involved (see R. v Derriviere [1969] 53 CAR 637 and A v T (Ancillary Relief: Cultural Factors) [2004] 1 FLR 977).

However, in R. v Derriviere the Court of Appeal held that “[o]nce in this country, this country's law must apply ...”.

2. In some cases foreign case law / legislation will have persuasive value. The most remarkable example in English Family Law is the concept of the best interest of the child that has been developed by case law, in particular the New Zealander case of Walker v Walker and Harrison, [1981] NZ Recent Law 257 (see question 4 in this section).
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

- **Vigreux v Michel** [2006] 2 FLR 1180.

In this case the interaction of Article 11 and the Hague Convention was considered by the Court of Appeal. The father had abducted the child from France to England and McFarlane J had declined to order a return on the basis of the child's objections. The mother, who had been granted custody by the French court, appealed.

Thorpe LJ was extremely critical of the eight month delay between the start of the English proceedings and the appeal. Although such delay is not uncommon in Hague cases, he treated it as a serious breach of Article 11(3). He stressed (with the prior approval of the President) that Article 11(3) must be taken literally. Six weeks is the maximum, even though, as he acknowledged, this will often mean taking previously fixed cases out of the list. However, experience since *Vigreux v Michel* suggests that the six week timetable is still not always complied with.


In this case, the father was seeking the return of his child who had taken to France by the mother.

The case highlights issues related to the interaction of BIIR, the Hague Convention and current domestic law. In this case Singer J concluded that even though he declined to order the return the child, he had the power to make contact and residence orders. He ends his judgment with comments about procedure in cases where an article 13 Hague non-return order has been made. Return denied.


This case concerns the application to enforce an Italian order requiring the mother to return the child to Italy, so that the child could be placed in foster care, at a time when no application for such removal had been made by the relevant municipality and the mother was the sole carer. The case turned on procedural issues but was remitted to the High Court for a determination of the actual enforcement issue.

- **J v J** [2011] EWHC 1246 3255 (QB) (Family Division, Mostyn J).

The mother took two children, then aged 5 and 1 to Austria and the father remained in England. He initiated proceedings under the Hague convention. An order was made 14 months previously in relation to parental responsibility on the basis that the mother would remain the primary care giver, and there was an expectation that it would be implemented in Austria. The father took no steps to bring the order to the Austrian court's attention but reinstated Hague proceedings. The Austrian court refused the application to order the child's return.

The father abducted the 5 year old child to England. The siblings remained apart for 3 months with only Skype contact. The only solution was to order a return of the 5 year old to Austria for a welfare determination to be carried out.
The Court held that it was in the best interests of the child to be reunited with its mother and sibling as soon as possible and a decision was made on welfare principles regarding residence and contact. Permission to appeal granted.

- **Re LsdC (BIIR) [2012] EWHC 983 (Fam) (Family Division, Macur J).**

This case arises from the breakdown of the relationship between a Portuguese father and English mother. The father applied for recognition, registration and enforcement of Portuguese order and stay of English proceedings in relation to the 1 year old child. An order confirmed parents’ agreement for shared parental responsibility and care of the child on a 2-monthly rotational basis in England and Portugal until the child’s third birthday. The father’s application was dismissed, Portuguese judgment stayed, prohibiting child’s removal except for contact. The mother had been unhappy in Portugal and desperate to leave but her ability to express her feelings when the agreement was reached had been compromised. It would therefore be contrary to public policy to recognise the order. The Portuguese court still had jurisdiction but as per Art 13 it was in the best interests of the child for the English court to conduct proceedings.

- **VC v GC [2012] EWHC 1246 (Fam) (Family Division, Eleanor King J).**

In this case the parents lived in France with the child until she was 5 years old. They later agreed the mother and child would move to England as the maternal grandmother had cancer and so that the child could attend an English school. Following the breakdown of the marriage, the mother and child remained in England and the father in France. He issued divorce proceedings in France. The mother sought an adjournment of the French proceedings and was granted a residence order. The father contested the jurisdiction of the English court pursuant to BIIR. The French court transferred residence to the father and the mother unsuccessfully appealed to the French High Court. In the English proceedings the father eventually conceded that the child was habitually resident in England but he claimed the mother had accepted the jurisdiction of the French courts by engaging in proceedings there.

The English court held that the mother had not unequivocally accepted the French court’s jurisdiction by appealing the transfer of residence order, in any event it was in the child’s best interests to remain with her mother from whom she had never been apart.

- **JRC v EB [2012] EWHC 1863 (Fam) (Family Division, Mostyn J).**

This case addresses the relationship between Brussels II and the Hague Convention
### III. NATIONAL BIBLIOGRAPHY

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**M. Wells-Greco**, “The Importance of Being; Brussels II Revised” (2011), International Family Law, pp. 207-210 (general on Brussels II revised)


#### Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)


#### Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)


#### Preliminary ruling system on family matters


#### Family Mediation


See also more generally

R. George, Ideas and Debates in Family Law, Hart, 2012 (in particular, chapter 3 International Family Law)


National section

FINLAND

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

9. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

The substantive and procedural provisions relating to rights of custody and rights of access are to be found in the


The rules on local jurisdiction in these cases are to be found in Chapter 10 section 13 of the Procedural Code.

Provisions relating to guardianship are to be found in the Guardianship Services Act. The concept of guardianship means protection of adults and minors, mainly in their financial affairs.


A translation of the Guardianship Services Act into English (not updated) can be found on this page: http://www.finlex.fi/fi/laki/kaannokset/1999/en19990442.pdf

There are no reform proposals at the moment.

10. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

Finland has concentrated all the child abduction cases to only one court, i.e. the Helsinki Court of Appeal. There are specific procedural rules concerning return proceedings and appeal. The time limit of six weeks is also incorporated into the legislation and a decision is normally made within this time limit. A return decision can be appealed, but it is enforceable at once. The time limit for an appeal against a return decision is 14 days.

- In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

National provisions concerning international jurisdiction in child custody and rights of access cases are to be found in Sections 19-20 of the Child Custody and Right of Access Act. The main ground for jurisdiction is the habitual residence of the child. The other ground is discretionary and is based on the idea that it may sometimes be justified to exercise jurisdiction even though the child is not at the moment habitually resident in Finland. Such a situation may occur, if the child was habitually
resident in Finland only a short time before the proceedings were instituted or otherwise is very closely connected to Finland. Under certain circumstances a Finnish court may also consider an application on parental responsibility in connection to divorce proceedings provided that the spouses have accepted the jurisdiction of the court and it is in the best interest of the child.

In situations where financial affairs of a child are at stake the international jurisdiction of Finnish courts may also be based on sections 95a – 95e of the Guardianship Services Act. The main grounds for jurisdiction are the habitual residence or presence of the child in Finland or the fact that the case relates to property locating in Finland or to representation of the child. The Act contains also a kind of forum necessitatis. This means that the Finnish authorities may consider a case if proceedings cannot be reasonably brought or would be impossible in a third state and it is necessary to hear the case in Finland. In addition, there are some complementary jurisdiction provisions in order to provide jurisdiction for urgent situations and cases where location or identity of the child is unknown. The case must have a sufficient connection with Finland.

- **Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child's best interests (Article 20 of Regulation Brussels IIb)?**

Provisions on provisional measures concerning child custody and rights of access cases are to be found in section 21 of the Child custody and Rights of Access Act. The jurisdiction rule on urgent measures concerning guardianship is to be found in section 95c of the Guardianship Services Act.

- **Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.**

A separate enforcement order is needed in order to enforce an access order or an agreement relating to access. The proceedings in these cases include a mediation phase. If needed, the court may order coercive measures to enforce the decision e.g. conditional fines or fetching of the child.

An order on the return of a child is enforceable at once, even if it is not yet final. A return order is delivered by the court to the competent enforcement authority which is exhorted to enforce the decision urgently by fetching the child.

- **Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?**

Normally, the court requests the local social welfare authorities to ascertain the child's views. The child may be heard in person before the court if there is substantial reason that makes this necessary in view of the resolution in the case. He may only be heard in court if he consents to the same and if it is evident that the hearing cannot cause harm to the child. In return proceedings the child is heard if the child is presumed to have attained such a degree of maturity that it is appropriate to take the child's opinion into account. The court assesses the maturity
of the child on the basis of the child's age, a report of the social welfare authorities and other evidence presented to the court.

- **Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?**

  The Central Authority is the Ministry of Justice

8. **Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

   Yes. There is an Act on implementation of the Regulation Brussels IIbis which contains additional provisions needed for the application of the Regulation e.g. determination of the competent authorities at national level and nomination of the central authority.


B. **Horizontal issues**

1. **How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**


2. **How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

3. Is your country a contracting party to any bilateral or international instruments on family law?

Finland is a party to quite many Conventions or other international instruments on family law. The following list contains most of them, but it is not exhaustive:

- The UN Convention of 1980 of the rights of the child
- The European Convention of 1996 on the exercise of children's rights
- The European Convention of 2008 on the adoption of children
- The Nordic Convention of 1931 comprising international private law provisions on marriage, adoption and guardianship.
- The Nordic Convention of 1962 on recovery of maintenance
- The New York Convention of 1956 on international recovery of maintenance
- Convention fait à la Haye 1958 concernant la reconnaissance et l’exécution des décisions en matière d’obligations alimentaires envers des enfants
- The Hague Convention of 1970 on recognition of divorces and legal separations
- The Hague Convention of 1973 on the recognition and enforcement of decisions relating to maintenance obligations
- The Hague Convention of 1980 on the civil aspects of international child abduction
- The European Convention of 1980 on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children
- The Hague Convention of 1993 on protection of children and co-operation in respect of intercountry adoption
- The Hague Convention of 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children
- The Hague Convention of 2000 on the international protection of adults
- Agreement of 2007 between the Government of Finland and the Government of the United States of America for the enforcement of maintenance (support) obligations.

4. Are there any databases or online tools providing information on family law matters available in your country?

Finlex (www.finlex.fi) is a public data bank that contains Finnish legislation, secondary legislation, case-law, government bills and international treaties. The use of the database is free of charge.

In addition, there are commercial databases that contain judicial information e.g. Suomen Laki (www.suomenlaki.com) and Edilex (www.edilex.fi).
The European Judicial Network in Civil and Commercial Matters provides accessible information on Finnish family law on its website:
- Information on divorce: http://ec.europa.eu/civiljustice/divorce/divorce_fin_en.htm
- Information on maintenance obligations: http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_fin_en.htm
- Information on parental responsibility http://ec.europa.eu/civiljustice/parental_resp/parental_resp_fin_en.htm

The European Judicial Atlas in Civil and Commercial Matters informs on

5. Please provide information on accessing and applying foreign family law in your country.

In family matters the court is responsible for obtaining information on the contents of foreign law. However, since there are not always efficient ways for the court to find out the content of the foreign law the parties often present evidence on the same. If no information can be obtained, Finnish law shall apply.

Judicial authorities may submit requests on information on foreign law through applicable international conventions. Finland is party to the European Convention on Information on Foreign Law. The European Judicial Network in civil and commercial matters provides also a useful tool in obtaining information from other Member States of the European Union.

A precedent of the Supreme Court of Finland concerning application of a foreign law in a case relating to spousal maintenance is KKO:2011:97.
II. NATIONAL JURISPRUDENCE

**Regulation Brussels IIbis in matters of parental responsibility**

The Supreme Administrative Court; KHO 30.6.2009/1681 2009:68
(Scope of the Brussel IIbis Regulation in relation to a decision concerning taking into care and placement of children outside the family home, habitual residence of a child and competence to decide on protective measures; including preliminary ruling in case C-523/07 of the European Court of Justice)

The Supreme Administrative Court; KHO 30.1.2008/123 KHO:2008:4
(Scope of the Brussel IIbis Regulation in relation to a decision concerning taking into care and placement of children outside the family home, recognition of a decision on taking into care; including preliminary ruling in case C-435/06 of the ECJ)

The Supreme Court; KKO 2008:80, 30.7.2008, DNo S 2007/590
(Recognition of a decision on rights of access, relation between the Regulation Brussels IIbis and the Nordic Convention of 1931)

Vaasan hovioikeus 4.2.2010 No 127, Dno S 10/10 (Jurisdiction of a Finnish court in a child custody case. The question of whether the child was habitually resident in Finland.)

Helsingin hovioikeus 18.6.2008 No 1846, Dno S 08/1003 (Jurisdiction of a Finnish court in a custody case. The question was, whether the preconditions for exercising jurisdiction under Article 12 of Brussels IIbis were at hand in the given case.)

Helsingin hovioikeus 13.5.2009 No 1210, Dno S 09/357 (Recognition of a decision concerning child custody. The appellant mother claimed that the Italian court order was not enforceable, because - among other things – the children were not heard in the proceedings. Helsingin hovioikeus considered that this ground of refusal was not applicable in the case because the children were given an opportunity to be heard and it was due to the mother that the planned hearing did not take place.)

Helsingin hovioikeus 27.5.2009 No 1326, Dno S 08/1168 (Jurisdiction of a Finnish court in a child custody case. The crucial question was, whether the child was habitually resident in Finland at the time of the institution of the proceedings.)

Helsingin hovioikeus 8.6.2011 No 1760, Dno S 11/406 (Jurisdiction of a Finnish court in a child custody case, habitual residence of the child)

Tampereen käräjäoikeus 3.4.2009 No 09/6997, Dno H 08/16555 (Jurisdiction of a Finnish court in a child custody case, habitual residence of the child)

[Note: The list is not exhaustive.]
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**Family Mediation**

Court mediation:

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Beatrice Weiss-Gout
Isabelle Rein-Lescastereyres
Partners in the family law firm BWG Associés, Paris
Laurie Dimitrov
Associate in the family law firm BWG Associés, Paris
Professor Marie-Laure Niboyet
Counsel in the family law firm BWG Associés, Paris
Dr Alexandre Boiche
Dr Charlotte Butrille-Cardew, LL.M
Veronique Chauveau
Partners in the family law firm CBBC, Paris
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

Current source of law is set out in the CIVIL CODE, Title XI Articles 371 to 387.

By principle both parents share joint legal custody, provided that their parentage is established within the child’s first year.

Separation of the parents has no influence on the rules of devolution of the exercise of parental authority.

Parental authority includes the right to decide where the children live, which means that the resident parent does not get to decide on his/her own.

Another important principle is that siblings shall not be separated unless it is in their best interest.

The child has a right to maintain personal relationship with his ascendants but also with relevant third parties.

Conflicts on parental responsibility are ruled upon by the family judge. The competent family judge is the one of the habitual residence of the parent with whom the minor children live.

Under exceptional circumstances the family judge may deprive one parent from his/her rights of parental responsibility.

When ruling on residence and rights of access the judge may take in consideration the practice previously followed by the parents or the agreements they entered into earlier, feelings expressed by a minor child in the way provided for in Article 388-1, the capacity of each parent to assume his or her duties and to respect the rights of the other, the result of court-ordered appraisals possibly carried out, taking into account in particular the age of the child and information collected in possible social enquiries and counter-enquiries provided for in Article 373-2-12.

A different judge, the Juvenile judge is involved when there is a danger for the child who needs to be protected. Measures go from educative assistance to removing the children from their family.

Proposals of reform: there is no proposal of reform standing, save if the aim of the marriage of persons of the same sex is accepted; the modification of the rights to adopt that will most probably be conferred to these new couples.

The relevant Articles which are not up to date on the official website on French law (Legifrance) please find in the Annex.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

The most expeditious procedures are set out in the Code of Civil Procedure:

Article 788: Assignation à jour fixe “In case of emergency, the President of the court may authorise the plaintiff, on his request, to serve the defendant for a fixed date.”
He (the President) designates if necessary, the Chamber of the Court with which the case will be vested. The request should explain the motivation of emergency, should contain the briefs of the plaintiff and indicate the evidence. A copy of the request and evidence should be handed to the President first to be transferred to the bundle of the Court.

**Article 485: référendé** "The request is born by way of petition for a hearing set in this effect at the habitual and time for emergency procedures."

In a normal situation, the delay between service onto the defendant and the hearing should be at the least of 15 days if the defendant lives in France.

But the President granting leave to serve in emergency may, pursuant to Article 646 of the Civil Code of Procedure, shorten this delay.

The delay should take into account the ECHR (in order for a trial to be fair, the defendant should have the time to organise his/her defence).

As most of the cases in France are introduced by the Public Prosecutor, he is in charge of service onto the defendant and mostly the delay between service and hearing is around 15 days. The reason of the length of procedures for return in France lies in:
- The delay needed to instruct the Public Prosecution
- The delay to enforce the order.

The right to appeal is open against a decision for return. The Appellate Court should, pursuant to the Brussels IIbis Regulation affix the case in a short time.

Note that whenever an appeal is possible, the first order is enforceable, whereas most Public Prosecutors will not give a hand to forced execution if the Appellate Court has not ruled.

The six weeks delay is very seldom met.

3. **In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?**

If one of the parents is French, and no European Regulation nor any international convention applies, Article 14 or 15 of the French Civil Code may ground French jurisdiction.

For practical purposes, unless another court offers closer links with the matter (for instance if one of the parents lives there), the matter will be heard by the family judge of the court of Paris. Some foreign jurisdiction may not recognise decisions grounded solely on the nationality of one of the parents. Apart from the family judge, the “Juge des enfants” (Juvenile judge) is in charge of children in danger.

If pursuant to Article 14 of Brussels IIbis Regulation, no court of a Member State has jurisdiction, but if the child is present in France, the rules are set out in the Code of Civil Procedure:

**Article 42:** “Court with territorial jurisdiction is, if no other rule applies, the one where the defendant remains.... if the defendant has no known residence or domicile, the plaintiff may petition to the court of the place where he lives, or the one of his choice if he resides outside of France.”
This rule is general and in case of litigation involving children Article 1070 of the Code of Civil Procedure will apply:

"The family judge with jurisdiction on a territorial basis is:

- The judge of the court where is situated the residence of the family or
- if parents live separately, the judge of the place where is the residence of the parent with whom habitually reside the minor children in case of joint exercise of parental authority or of the place of residence where the parent with parental authority resides or
- in any other case, the judge of the place where resides the parent who did not petition (…)"

But in France apart from the family judge, the "Juge des enfants" (Juvenile judge) is in charge of children in danger.

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

Starting emergency proceedings before the family judge is always an option.

Furthermore, pursuant to Article 375 of the French Civil Code: "If the health or the morality of a non emancipated minor is in jeopardy, or if the conditions of his education or his physical, affective, intellectual and social development are seriously endangered, orders for educative assistance may be taken by justice at the request of both parents or one of them, of the person or body with whom the child is vested, his tutor, the minor himself or the Public Prosecutor.

In the cases where the Public Prosecutor has been advised by the President of the General Council, he ensures that the situation of the minor enters the field of application of Article L 226-4 of the Code of social action and family. The judge may even act by himself if necessary.

Orders may be taken in the same time for many children whose parents exercise parental authority.

The order decides about the length of the measure, but the measure cannot, when it is educative exercised by a body or an institution, last more that 2 years. It may be renewed by a especially motivated order."

"Nevertheless, when the parents show severe, grave and chronic relational and educational difficulties, evaluated as such in our actual state of knowledge, affecting in a durable manner their competence within the exercise of parental authority, an order for foster care by a service or an institution may be ordered for a longer time, in order to allow the child to benefit of an affective and geographical continuity in his place of life as long as it is adapted to his immediate and foreseeable needs. A report on the child's situation shall be addressed to the judge every year."

The Juvenile judge has jurisdiction if the child is physically present in his jurisdiction.

The Juvenile judge cannot rule on the exercise of parental authority but may take any order needed to protect the child’s best interest. He may rule on residence, access right, may decide to put the child in foster care. The Public Prosecutor is present.
5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

Parents and practitioners are experiencing problems in enforcing orders in both cases. In French law, the order is enforceable if it contains a special phrase called "formule exécutoire" pursuant to the Decree n°47-1047 dated 12 June 1957 which reads as follows:

« As a consequence, the French Republic mandates and orders to any bailiff on this required to enforce this order; to the General Prosecutors, to the Prosecutors of the Republic to the Tribunaux de Grande Instance to give a hand to the Commandant and Officers of the Public Forces when they are required. In faith of which, the present order has been signed by the President and the Clerk ".

Alas in practice, the civil enforcement of such orders shows almost impossible, whereas it is easier to recover alimonies by way of lien on assets or direct recovery from employers.

The solution often lies in a criminal claim:

**Refusal of complying to an order of access:**
Article 227-5 of the French Criminal Code: "The fact to wrongfully refuse to represent a minor child to the person who has the right to claim for him is punished of 1 year of jail and 15'000 Euros of fine".
The claim may be done:
- Either by reporting to the local police or "Gendarmerie"
- Or by writing a certified letter to the Public Prosecutor.
It would be honest to say that the speed of the answer will totally depend of the burden of work of the local police or Gendarmerie. Some members of the force will endeavour to obtain amicable remittance of the child, call the reluctant parent, go to their residence and try to obtain a positive result, whereas some others will just register the claim and pass it to the prosecution services.

**Refusal to comply with a return order:**
In most cases in France, the Public Prosecutor is the plaintiff in the case. Therefore, when the order is definitive, he will endeavour to obtain that the child be returned. The French Central authority is in close relation with the Prosecution services. Whereas the practice is somewhat different from a service to another, the difficulty arises when the abducting parent either opposes to return the child or hides.
If the order for return only states that the "child should be returned to the jurisdiction" and is not more precise, this could lead to difficulties, but when judges are more specific in their orders about the details of return, including a possibility of financial sanctions if not enforced in a fixed delay, this eases the enforcement.
If the order states for example that, if the abducting parent has not returned the child to the country of habitual residence within 8 days of the service of order, then the left-behind parent has the right to come and claim for the child, this eases the application of Article 227-5 of the criminal code.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?
Pursuant to:

- **French Civil Code : Articles 388 to 388-3**
- French Code of Civil Procedure: **Articles 338-1 à 338-12**
- **Law n° 91-647 dated 11 July 1991 related to Legal Aid** (Article 9-1)

A minor child may be heard at his/her request or at the judge's request in any procedure that may concern him. This hearing aims to express his feelings, but it is a "**voice and not a choice**".

In due respect of the New York convention on children's rights, Article 388-1 has been added to our Civil Code: a minor child may be heard at his/her request or if the judge wishes so. The parents or the persons vested with parental authorities have the duty to inform the child of his/her right.

The child may be assisted or represented by a lawyer, paid by legal aid, generally appointed by the president of the Law Society at the request of the judge.

A child with sufficient discernment may be heard by a court, but there is NO MINIMUM AGE to be heard. The criteria taken into account are: maturity, degree of understanding, ability to understand the situations, capacity to express a mature advice and others. There is a great disparity in the position of family judges (who, contrary to what happens for example in Germany, are not trained in children psychology). Some judges will hear children as young as 6 or 7, whereas some others will only accept it from 10 or 12, but if they do not hear the child themselves, they may in any case appoint a child professional such as a psychologist or a welfare officer to do so.

The child may write directly to the judge in charge of the case at any moment of the procedure, or the parties may write to the Court (In this later case, the judge has no DUTY to hear the child). If the judge believes that the child is not mature enough he may refuse to hear the child, same if he believes that the hearing is contrary to the child's best interest.

The judge will write to the child and inform him/her if the child did not ask for it, that he/she may be assisted by a lawyer or any person of the child's choice. The parents are informed of the hearing. The judge will then either hear the child himself/herself or appoint a person for this. As said, the child benefits (not means tested) from legal aid.

The Appellate Court of Poitiers has confirmed the suppression of the access rights of the father on a child aged 15 and ½, who clearly expressed the wish not to have any relationship with his father, due to the lack of interest of the latest and who never wrote to the child for many years, including for her birthday (**Appellate Court of Poitiers, Civ Chamber 4, 13 January 2010, confirmation of first order, case N° 08/01422, published by jurisdata 2010-°12997**)

The Appellate Court of Toulouse, chamber 1, section 2, on the 8th of April 2008, case n° 07/02344, published by Jurisdata 2008-268196, ruled that Article 388-1 of Civil Code requires a sufficient discernment from a child to hear him. Therefore the Court refused to hear a child aged 8 who, during the welfare inquiry, when his father was evoked, only presented a smile that seemed a form to avoid any more
personal expression of his feelings. The Court therefore retained that the child had neither the sufficient maturity nor the necessary discernment to express his feelings.

The French Cour de Cassation (Supreme Court) has ruled on 28th of September 2011 (case N°10-23.502.879 unpublished) that the Appellate Court had no duty to check if the child had been informed as the mother HAD the duty to inform the child that he had a right to be heard. (Civ. 1st Chamber, Cour de Cassation).

The child's lawyer has a duty to help the child to express his/her feelings, bring him/her moral and psychological help and explain that his/her possible choice may not be followed as his/her hearing is one element amongst other factors and has no duty to accept the advice of the wishes of the child. The judge will precise in his/her order that he/she took into account the feelings expressed by the child, under penalty of nullity of his/her order, but the child is never a party to the procedure in the Family Court.

Children of sufficient maturity may consult www.ado.justice.gouv.fr

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

BECCI
Bureau d'entraide civile et commerciale internationale
Ministère de la justice, 1 place Vendôme PARIS 75001 France
or http://www.diplomatie.gouv.fr/fr/
Email: entraide-civile-internationale@justice.gouv.fr
Fax: 33 1 44 77 61 22
Tel: 33 1 44 77 61 05

8. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

Provisions of the French Code of Civil Procedure (Articles to 509-1 to 509-7) set forth specific rules with respect to:

- Recognition and enforcement in other Member States of judgements rendered by French courts under Brussels IIbis in matrimonial matters and in matters of parental responsibility (Article 39 of Brussels IIbis):
  
  Petitions for purposes of certification of enforceable French decisions in view of their recognition or enforcement on a foreign territory must be presented to the chief Registrar of the court which rendered the decision or approved the agreement (Article 509-1 §1 of the French Code of Civil Procedure).

- Recognition and enforcement in France of same judgments rendered by other Member States:
Petitions must be presented to the President of the Tribunal de Grande Instance, or to his/her delegate. No compulsory recourse to a lawyer (Article 509-2 § 2 of the French Code of Civil Procedure).

- Recognition and enforcement in other Member States of judgements rendered by French courts under Brussels IIbis on rights of access or return of a child illicitly moved or retained (Article 41 or Article 42 of Brussels IIbis)

The French court having rendered a decision on rights of access or return of a child illicitly moved or retained is the one issuing the certificate granting binding effect to the decision in the other Member States. These proceedings are exempted from the obligation to be represented by a lawyer (Article 509-1 § 2).

B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?


The ordinance provides for a very large definition of mediation: any structured process, regardless of its name, by which one or several parties try to reach an agreement in view of the amicable resolution of their dispute, with the help of a third party, the mediator, chosen by them or designated, with their consent, by the judge having jurisdiction over their dispute.

The ordinance describes the necessary qualities of the mediator: competence and fairness. The mediator has an obligation of diligence. The French law regulates the access to the profession, which requires to pass the state diploma of family mediator (Articles R451-66 to R461-72 of the French Code of Social and Family Action).

Mediation is confidential, unless otherwise provided for in the contract. However, there are some exceptions (imperious reasons of public policy, reasons related to the protection of the child’s superior interest or to a person’s physical or psychological integrity, and when the disclosure is necessary in order to enforce the agreement reached during the mediation). As regards judiciary mediation, the judge who has ordered the mediation must be informed of the success or failure of the process, but not of the reasons why the mediation failed.

The agreement reached during the process of the contractual mediation can be approved by the judge, and will therefore be enforceable.

Pre-existing rules regarding family mediation and allowing the judge to summon their parties to attain one information session remained applicable (Articles 255 and 373-2-10 of the French Civil Code).

The 13th December 2011 (2011-1862) Statute makes family mediation concerning measures related to children an obligation (Article 15 of this Statute applies in replacement of Article 373-2-13 of the Civil Code until 31 December 2014 for experimental purposes). Exceptions exist if the parties ask jointly a judicial approval
of their agreement, if there is a legitimate reason not to have recourse to mediation, or if there is a risk of a breach of their right to access to a judge during a reasonable delay.

According to the June 17th 2008 Statute, prescription is suspended as of the day the parties decided to have recourse to mediation.

The 22nd December 2010 (2010-1609) Statute has created the “convention de procedure participative” (Articles 2062 to 2068 of the French Civil Code and Articles 1542 to 1554 of the French Code of Civil Procedure). This contract can be concluded for divorce and legal separation matters, even though the parties are not free to dispose of their rights in these matters (Articles 2064 and 2067 of the French Code of Civil Procedure). During the process, the parties cannot bring suit before the court, unless they can bring evidence of an emergency or if one of the parties has breached the contract. Their agreement still needs to be submitted to the judge.

Last, many French lawyers are now trained in collaborative law but collaborative law is not part of the French Code of Civil Procedure yet.

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?


French law n°91-647 of 10 July 1991 already provided that people with limited financial resources could be elected for legal aid.

The main purpose of the transposition of Directive n°2003/8/EC was to adapt national rules to fully comply with European Union law:

- Legal aid is deemed subsidiary to other mechanisms supporting legal costs such as insurance contracts or other schemes of legal protection.
- Nationals of a third country who reside regularly in a Member State are eligible to legal aid.
- In civil and commercial cases, a person whose financial resources exceed the threshold for legal aid can still be eligible to legal aid in France provided that he/she proves that he/she cannot meet legal costs given the differences in living standards between France and the State where he/she resides.
- Extension of the legal aid allowance to enforcement proceedings in France of a court decision rendered in another Member State.
- Legal aid may cover the costs that result from the cross-border nature of a procedure (for instance, costs of translation, travel fees, etc.).
- A litigant can have access to a lawyer even before he/she is elected to legal aid. French law deals with this commitment through dispositions related to “access to law”, under which, for instance, free consultations with lawyers are offered to the public, regardless of their financial resources, in courts, city halls, etc.
3. Is your country a contracting party to any bilateral or international instruments on family law?

France is a party to several multilateral or bilateral conventions:

**Hague Conventions**

- Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants; and

- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

It shall be noted that the former has been replaced by the latter in most instances. The 1961 Convention remains however applicable between France and Turkey since Turkey has not yet ratified the Convention of 1996.

Regarding rules of jurisdiction, it shall also be reminded that the provisions of Brussels IIbis prevail over those of the 1996 Hague Convention, except where the dispute concerns children residing in **a State which does not belong to the European Union and is a party to the 1996 Hague Convention**.


  The Maintenance Regulation only applies with respect to decisions rendered by European Member States. The 1973 Hague Convention remains applicable to recognition and enforcement of decisions rendered by non European Member States parties to this Convention.

- Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations, which has now been replaced in France by the :


- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

- Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

**New York Convention (ONU)**

- Convention of 20 November 1989 on the Rights of the Child

**Bilateral Conventions**

Among the very numerous bilateral conventions signed by France, as legal professionals in family law, we are mainly faced with the application of the following ones:

- Convention between France and Algeria concerning children born from separated Franco-Algerian couples dated 21 June 1988

- Convention between France and Morocco on personal and family law and judicial cooperation dated August 10th 1981
- Convention between France and Tunisia on judicial cooperation with respect to children’s rights of custody, rights of access and child support dated March 18th 1982

- Convention between France and Yugoslavia on applicable law and jurisdiction in family law matters dated May 18th 1971, which now applies between France and Serbia, Bosnia-Herzegovina and Slovenia.

Furthermore, numerous bilateral conventions between France and African countries organize judicial cooperation, recognition and enforcement of judicial decisions in civil law matters, such as for instance:

- Convention between France and Morocco on mutual judicial cooperation, enforcement of judgments and extradition dated 5 October 1957

- Convention between France and Tunisia on judicial cooperation in civil and commercial matters and on recognition and enforcement of judicial decisions (and additional protocol) dated June 28th 1972

4. Are there any databases or online tools providing information on family law matters available in your country?

The most famous and commonly used website on French law (legislation, case law, treaties) is www.legifrance.fr.

There are also different websites providing information on family law matters:

- General websites on family law
  
  www.service-public.gouv.fr
  www.impots.gouv.fr
  www.courdecassation.fr
  www.senat.fr
  www.assemblee-nationale.fr
  www.social-sante.gouv.fr
  http://lemondedudroit.fr/
  www.textes.justice.gouv.fr
  www.vos-droits.justice.gouv.fr
  http://vosdroits.service-public.fr/particuliers/N10.xhtml

- Divorce
  http://ec.europa.eu/civiljustice/index_fr.htm

- Access to origins
  www.cnaop.gouv.fr

- Adoption
  http://abandon-adoption.hautetfort.com/
  www.adoption.gouv.fr
The website of the European Judicial Network in civil and commercial matters is, of course, a source of useful information both in terms of European law and in terms of national laws of the EU Member States (http://ec.europa.eu/civiljustice).

Regarding international (international conventions notably) and foreign laws, www.hcch.net but also the website jafbase, set up by a French judge at the Cour de cassation, Cyril Roth (http://www.jafbase.fr) are of great use.

The website of the DBF (Délégation des Barreaux de France) (http://www.dbfbruxelles.eu) is also of interest, as well as:

www.incadat.com
http://ec.europa.eu/civiljustice/index_fr.htm
https://e-justice.europa.eu
www.diplomatie.gouv.fr
www.eur-lex.europa.eu/n-lex/index_fr.htm
http://ec.europa.eu/civiljustice/index_fr.htm

5. Please provide information on accessing and applying foreign family law in your country.
Under the current case law of the French Cour de cassation, it rests with the French judge, who acknowledges that a foreign law is applicable, to research, either on its own initiative or at the request of a party, with the assistance of the parties or personally if necessary, the content of the foreign law (Cour de cassation, Commercial Chamber, 28 June 2005, ltraco, n° 02-14686, http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007049938&fastReqId=400702208&fastPos=1 ; Cour de cassation, First Civil Chamber, 28 June 2005, Aubin, n° 00-15734, http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007052360&fastReqId=824513731&fastPos=1).

If the judge is faced with an impossibility to establish such content, he/she will apply French law on a subsidiary basis. This was notably the case in an instance where the judge was unable to establish the content of Byelorussian filiation law due to the insufficient information provided both by the Service of the European and International affairs of the Ministry of Justice to which the judge had made inquiries, and by the parties themselves. (Cour de cassation, First Civil Chamber, 21 November 2006, n°05-22002). http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007053352&fastReqId=454668932&fastPos=1

Therefore it remains essential that the party who invokes the application of a foreign law provides the judge with the means of properly applying it, for instance by way of an affidavit drafted by an expert foreign lawyer (“certificat de coutume”). No cross-examination of the expert who issued the affidavit is provided for under French law.

As for the judge, he/she may order the same measures of investigation as those available regarding the evidence of facts, such as ordering an expertise made by a foreign lawyer appointed by the judge (Articles 10 of the Code of Civil Procedure). The judge may also ask for the parties’ assistance, such as the production of a “certificat de coutume”, and may draw all the relevant conclusions from their abstention or refusal (Article 11 of the Code of Civil Procedure).

Judges may also use the systems of judicial cooperation implemented by the Council of Europe, such as those put into place pursuant to the London Convention on information on foreign law of 7 June 1968, or by the Hague Conference (cooperation between Central Authorities). Lastly, within the European Union, French judges may have recourse to the framework of the European Judicial Network in civil and commercial matters to directly question judges of other Member States (See Decision n°568/2009 CE of the Parliament and of the Council of 18 June 2009).
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

1. Civil Proceedings issues related or applied to children matter pursuant to the Regulation CE 2201/2003

1.1 The date of seizure for the purpose of lis pendens

The French case law gave in 2006 an autonomous definition of the date of seizure for the purpose of the European Regulation— at the time CE 1347/2001— by referring the formalities set out by French civil proceeding law (Cass, Civ. 1, 11th July 2006, n° 04-20.405, http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007055728&fastReqId=730489232&fastPos=1 and 05-19.231, http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007053888&fastReqId=1825586529&fastPos=1). Such definition was given in the context of Article 3 and for the purpose of a divorce proceeding but it also applies to children matters. A French court is seized— for the purpose of the above mentioned Regulation— by the lodging of a request for divorce (Requête en divorce). Pursuant to French divorce law, the divorce proceedings starts with the lodging of a standard request for divorce containing no allegation of fault and no indication as to which type of divorce is chosen. When lodging this request, the applicant can apply for interim measures in relation to his or her minor children (contact or residence etc.). For the purpose of Article 19 of the European Regulation 2201/2003, the French Court will be deemed first seized in the matter of parental responsibility by the lodging with the French Court of a request for divorce outlining demand in relation to minor children.

French case law has further indicated that each party has the burden (for the purpose of the European Regulation) to prove the date and the hour at which the national court has been seized of the matter (Cass, Civ. 1, 11th June 2008, n° 06-20.042, http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000019001679&fastReqId=1107001672&fastPos=1).

1.2 The autonomy of divorce and children proceedings

French case Law recognised, despite the unity of the divorce proceedings in France, the possibility to split such proceedings in order to satisfy the grounds for jurisdiction set out by the European Regulation 2201/2003.

The French Supreme Court thus recognised that the jurisdiction for parental responsibility matters do not automatically follow the one of divorce, if the children do no habitually reside in France and the conditions set out in Article 12 of the referred Regulation are not met at the time (Cass, Civ. 1, 3rd December 2008, n° 07-19.657, http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000019879276&fastReqId=1722914968&fastPos=1).

1.3 The ground for jurisdiction as set out in the Regulation are of Public Policy

French case law considered that the grounds for jurisdiction set out by Article 8 of the Regulation 2201/2003 are of public policy. As such, a defendant cannot be considered as having implicitly accepted the French jurisdiction in light of the circumstance that such defendant would not have alleged the lack of jurisdiction of

Frequently, French case law reminds the steps to be followed by the French national courts when ruling upon their jurisdiction in children matter. Such jurisdiction should first be tested by the French Courts against Articles 8 to 13 of the European Regulation2201/2003, then if no Member State has jurisdiction over the minor children pursuant to these Articles, French Courts should check their jurisdiction according to Article 1070 of the French Civil proceeding Code, before accepting jurisdiction based on the national privilege of the applicant (Cass, CIv,1, 12th January 2011, n°09-71.540, http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000023434313&fastReqId=1450603688&fastPos=1).

2. Case Law relating to the application of Article 8

Article 8 of the Brussels IIbis Regulations provides: “The courts of a Member State shall have jurisdiction on matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seized”. The notion of habitual residence is not defined by the Regulation1347/2001, nor its subsequent replacement 2201/2003.

The French Supreme Court in the “Moore” case gave a very extensive definition of the habitual residence within the context of Article 3 of the Regulation 1347/2001. Habitual residence is an autonomous concept of European law defined as “the permanent or habitual centre of interest of a person” (that is more specifically “the place where the person concerned had set up, with the intent to confer to it a stable character, the permanent centre of his interests” Cass, Civ. I, 14th December 2005, n°05-10951, http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007052204&fastReqId=1881527323&fastPos=1). French case law has used this definition, as given within the scope of Article 3, for the purpose of the habitual residence of Article 8 of the Regulation 2201/2003.

The Appellate Court of Douai 3rd March 2011 (n°10/05561), thus defined the habitual residence for the purpose of Article 8 as “the place where the person concerned had set up, with the intent to confer to it a stable character, the permanent centre of his interests” (see also CA Versailles, 25th March 2010 n°09/02695) notion of “precarious move and / or fictitious domicile”, CA Lyon, 18th April 2011, n° 10/00625 (http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000023937331&fastReqId=90509337&fastPos=15), the criteria of “school

3. Prorogation of jurisdiction – Article 12

Appellate Court of Paris, October 6, 2011, 10/19960 – the disagreement of the parents is a bar to the application of Article 12. Such disagreement can simply result from the existence of an application lodged by one of the parent to have the matter of parental responsibility heard in another State (CA Lyon, 17th January 2008, http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000018187809&fastReqId=782836739&fastPos=1).

Appellate Court of Chambéry, October 18, 2011, 10/01739 – the courts are appreciating in concreto the best interest of the child – and despite the joint agreement of the parents, a prorogation should not be permitted if the child is in Brazil that means not within the proximity of the French Court.

Appellate Court of Dijon, October 13, 2011, 10/00130

The French Court does not have jurisdiction in application of the Article 12 despite their joint agreement, because the parents had already accepted the jurisdiction of the English court to rule on parental responsibility matters.

Appellate Court of Nîmes, May 13.2009, 2009/017748 – the provision of Article 12 cannot be implicitly accepted by a parent. The prorogation of jurisdiction should result from an explicit agreement from the parents and a court decision.

4. Urgent measures Article 20

Cass, Civ.1, 8th July 2010 (http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000022457767&fastReqId=1912735403&fastPos=1), pursuant to Article 20, the urgent measures which are considered necessary to preserve the interests of the children are made pursuant to the national law of the judge making them. These urgent measures automatically cease as soon as and when the foreign court which has jurisdiction over the matter of parental responsibility has ruled on parental responsibility matters.
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**Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)**

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Preliminary ruling system on family matters

Family Mediation

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Annex

Relevant provisions of the French Civil Code on parental responsibility

Chapter 1st relates to the parental authority (French denomination of parental responsibility) onto the person of the child.

Article 371

A child, at any age, shall honour and respect his mother and father

Article 371-1

(law n°2002-305 dated 4 March 2002)

Parental responsibility is a set of rights and duties whose aim is the child's interest.

It is vested with the father and mother up to the coming of age or emancipation of the child in order to protect him in his security, health and morality, to ensure his education and allow his development, within the respect of his person.

Parents shall associate the child to any decision that concerns him, according to his age and maturity.

Article 371-2

(law n°2002-305 dated 4 March 2002)

Each of the parents contributes to the maintenance and education of the child in due proportion of his resources, of the one of the other parent, as well as the child's needs.

This obligation does not cease "de lege lata" (by operation of the law) upon the child's coming of age.

Article 371-3

The child may not, without authorization of father and mother, leave the family home and cannot be taken from it, save in case of necessity as set out by law.

Article 371-3

(law n°2002-305 dated 4 March 2002)

The child has the right to maintain personal relationship with his ascendants (law n°2007-293 dated 5 March 2007 art.8) "the sole child's best interest may be an obstacle to this right".

If such is the child's best interest, the family judge may affix the modalities of the relationship between the child and a third party, parent or not.

Article 371-5

(law n°96-1238 dated 30 December 1996)
The child shall not be separated from his siblings, save if this is not possible or if his best interest commands another solution. If this is needed, the judge shall rule on personal relationship between the siblings.

First section: about exercise of parental authority

Paragraph 1: General principles (law n°2002-305 dated 4 March 2002)

Article 372
(Act no 2002-305 of 4 March 2002)
The father and mother shall exercise in common parental authority.
Where, however, parentage is established with regard to one of them more than one year after the birth of a child whose parentage is already established with regard to the other, this one, alone remains vested with the exercise of parental authority. It shall be likewise where parentage is judicially declared with regard to the second parent of the child.

Parental authority may however be exercised in common in case of joint declaration of the father and mother before the clerk of the "Tribunal de grande instance" or upon judgment of the family’s judge.

Article 372-1 and Article 372-1-1 [repealed]

Article 372-2
Where one of the "parents" (Act no 93-22 of 8 Jan. 1993) performs alone a usual act of parental authority concerning the person of the child, he or she shall be considered to be acting with the consent of the other with regard to third parties in good faith.

Article 373
(Act no 2002-305 of 4 March 2002)
The father or mother who is unable to express his or her intention, by reason of a disability, absence or any other cause, shall be deprived of the exercise of parental authority.

Article 373-1
(Act no 2002-305 of 4 March 2002)
Where one of the father and mother dies or is deprived of the exercise of parental authority, the other shall exercise that authority alone.
Paragraph 2: Exercise of parental authority by separated parents

(law n°2002-305 dated 4 March 2002)

Article 373-2

Separation of the parents has no influence on the rules of devolution of the exercise of parental authority.

The father and the mother shall maintain personal relations with the child and respect the child’s bonds with the other parent.

Any change of residence of one of the parents, where it modifies the terms of exercise of parental authority, shall be the subject of a notice to the other parent, previously and in due time. In case of disagreement between them, the most diligent parent shall refer the matter to the family’s judge who shall rule according to what the welfare of the child requires. The judge shall apportion removal expenses and adapt accordingly the amount of the contribution to the support and education of the child.

Article 373-2-1

Where the welfare of the child so requires, the judge may commit exercise of parental authority to one of the parents.

The exercise of the right of access may be refused to the other parent only for serious reasons.

When, in conformity to the best interests of the child, the continuity and the effectiveness of the links between the child and his/her parent who did not have the exercise of the parental authority require it, the family’s judge can organize a right of access in a special meeting place.

When the interest of the child order it or when the child’s return to the other parent is dangerous for one of them, the judge organises the terms of this return in a way that it presents all the necessary guarantees. He can anticipate that it will happen in a meeting space that he designates, or with the assistance of a trustworthy person or of a qualified legal person’s representative.

Article 373-2-2

In case of a separation between the parents, or between the them and the child, a contribution to his support and education shall take the form of periodical payments to be paid, according to the circumstances, by one of the parents to the other, or to the person to whom the child is entrusted.

The terms and guaranties of those periodical payments shall be fixed by the approved agreement referred to in Article 373-2-7 or, failing which, by the judge.

Those payments may in whole or in part take the form of a direct taking charge of costs incurred on behalf of a child.

They may in whole or in part be done under the form of a right of use and dwelling.
Article 373-2-3

Where the consistence of the debtor's property permits it, periodical payments may be replaced, in whole or in part, under the terms and guarantees provided for by the approved agreement or by the judge, by the payment of a sum of money in the hands of an accredited body responsible for granting in counterpart to the child an index-linked annuity, a surrender of property in usufruct or an allocation of property yielding income.

Article 373-2-4

Attribution of additional means, in particular under the form of periodical payments, may, if there is occasion, be requested later on.

Article 373-2-5

A parent who has primarily the responsibility of an adult child who cannot meet his own needs may ask the other parent to pay a contribution to his support and education. The judge may decide or the parents agree that this contribution be paid in whole or in part into the hands of the child.

Paragraph 3 : On the intervention of the family judge

(law n°2002-305 dated 4 March 2002)

Article 373-2-6

A family's judge of the Tribunal de grande instance shall settle issues brought before him in the framework of this Chapter in watching in particular over the safeguarding of the welfare of minor children.

The judge may order measures that allow protecting continuity and effectiveness of the keeping of the child's bonds with each of his/her parents.

He may, in particular, order an entry on the passports of the parents to prohibit the child's departure from the territory without the authorization of the two parents. The prohibition against the removal of the child form the jurisdiction without the authorisation of the two parents is registered on the wanted person file by the French public prosecutor.

Article 373-2-7

Parents may seize the family's judge to have approved the agreement through which they organize the terms of exercise of parental authority and establish their contributions to the support and education of the child.

The judge shall approve the agreement unless he observes that it does not sufficiently protect the welfare of the child or that the consent of the parents was not freely given.
Article 373-2-8

The judge may also be seized by one of the parents or the Public’s prosecutor, who may himself be seized by a third person, relative or not, for the purpose of ruling upon the terms of exercise of parental authority and the contribution to the support and education of the child.

Article 373-2-9

In compliance with the two preceding Articles, the residence of a child may be fixed alternately at the domicile of each of the parents or at the domicile of one of them.

On request of one of the parents or in case of disagreement between them about the mode of residence of the child, the judge may order provisionally an alternate residence of which he shall determine the duration. On the expiry of it, the judge shall rule finally on the residence of the child alternately at the domicile of each of the parents or at the domicile of one of them.

When the interest of the child order it or when the child’s return to the other parent is dangerous for one of them, the judge organise the terms of this return in a way that it present all the necessary guarantees. He can anticipate that it will happen in a meeting space that he designates, or with the assistance of a trustworthy person or of a legal person's qualified representative.

Article 373-2-10

In case of disagreement, the judge shall endeavour to conciliate the parties.

For the purpose of making easier the search by the parents of a consensual exercise of parental authority, the judge may offer them a measure of mediation and, after gaining their agreement, designate a family mediator who will initiate it.

He may call upon them to meet a family mediator who will acquaint them with the subject and progress of such a measure.

Article 373-2-11

Where he rules on the terms of exercise of parental authority, the judge shall take into consideration in particular:

1° The practice previously followed by the parents or the agreements they entered into earlier;

2° Feelings expressed by a minor child in the way provided for in Article 388-1;

3° The capacity of each parent to assume his or her duties and to respect the rights of the other;

4° The result of court-ordered appraisals possibly carried out, taking into account in particular the age of the child;

5° Information collected in possible social enquiries and counter-enquiries provided for in Article 373-2-12.

Article 373-2-12
Before any decision fixing the terms of exercise of parental authority and of the right of access, or entrusting the children to a third person, the judge may assign the task of undertaking a social enquiry to any qualified person. This is for the purpose of collecting information on the situation of the family and on the conditions in which the children live and are educated.

Where one of the parents contests the conclusions of a social inquiry, a counter-inquiry may be ordered on his or her request.

A social inquiry may not be used in a trial of a cause for divorce.

Article 373-2-13

The provisions of an approved agreement as well as the judgments relating to the exercise of parental authority may be varied or completed at any time by the judge, on request of the parents or of a parent or of the Public’s prosecutor, who himself may be seized by a third person, relative or not.

Paragraph 4

Of the Intervention of Third Persons Articles 373-3 to 374-2 Art. 373-3

Article 373-3

(Act no 87-570 of 22 July 1987)

“Separation of the parents” (Act no 2002-305 of 4 March 2002) is not an obstacle to the devolution provided for by Article 373-1, even if the parent who remains able to exercise parental authority was deprived of the exercise of some attributes of that authority by the effects of a judgment delivered against him or her.

(Act no 2002-305 of 4 March 2002) The judge may, by way of exception and where the welfare of the child so requires, in particular when one of the parents is deprived of the exercise or parental authority, decide to entrust the child to a third person, chosen preferably within his relatives. He shall be seized and shall rule under Articles 373-2-8 and 373-2-11.

In exceptional circumstances, the family’s judge (Act no 93-22 of 8 Jan. 1993) who decides on the terms of exercise of parental authority after “a separation of the parents” (Act no 2002-305 of 4 March 2002) may decide, even if the parents are still alive, that in case of death of the parent who exercises parental authority, the child may not be placed in the custody of the survivor. He may, in that event, designate the person to whom the child shall temporarily be entrusted.

Article 373-4

(Act no 87-570 of 22 July 1987)
Where the child was entrusted to a third party, parental authority shall continue to be exercised by the father and mother; however, the person to whom the child was entrusted shall perform all the usual acts regarding his supervision and education.

The family’s judge (Act no 93-22 of 8 Jan. 1993), where he temporarily entrusts the child to a third person, may decide that the latter shall require the establishment of a guardianship.

Article 374-1
(Act no 93-22 of 8 Jan. 1993)
The court which decides on the establishing of a [...]. parentage may decide to entrust the child temporarily to a third person who will be in charge of requiring the organization of a guardianship.

Article 374-2
In all cases provided for in this Title, a guardianship may be established even where there is no property to be administered.
It shall be then organized in accordance with the provisions of Title X.

SECTION II
Of Educational Assistance Articles 375 to 375-9

Article 375
Where the health, security or morality of a not emancipated minor are endangered, or where the conditions of his education or his physical, emotional, intellectual or social development, are seriously endangered, measures of educational assistance may be judicially ordered on request of the father and mother jointly, or of one of them, or “of the person or body to whom the child was entrusted” (Act no 87-570 of 22 July 1987) or of the guardian, of the minor himself or of the Public prosecutor’s office.

In cases where the public prosecutor’s office has been advised by the President of the General Council, the prosecutor has to insure that the situation of the minor is one of those provided by the article L226-4 of French Family and Social Action Code. Exceptionally, the judge may be seized of his own motion.

The measures may be ordered at the same time with regard to several children dependent on a same parental authority.
(Act no 86-17 of 6 Jan. 1986) The decision shall fix the duration of the measure without exceeding two years, where it relates to an educational measure implemented by a service or body. A measure may be renewed by a judgment setting out the grounds on which it is based.

However, when the parents have serious, cruel and chronic relational and educational difficulties, evaluated like that within the current knowledge, which have a long lasting
impact on their abilities in the exercise of their parental responsibility, an accompanied measure exercised by a service or an institution can be ordered for a superior period, to allow the child to beneficiate of a relational, emotional and geographical continuity inside his/her environment since it is adapted to his actual and future needs.

A report concerning the situation of the child has to be conveyed to the juvenile judge.

Article 375-1
The juvenile judge shall have jurisdiction, subject to appeal, in all matters relating to educational assistance.

He shall always endeavour to secure the adhesion of the family to the measure contemplated.

Article 375-2
Each time is it possible; a minor must be kept in his present environment. In that case, the judge shall designate either a qualified person, or a service of observation, education or rehabilitation in the free community, with the mission of bringing aid and counsel to the family in order to overcome the material or moral difficulties which it is encountering.

That person or service shall be responsible for following the development of the child and making a periodical report of it to the judge.

When he leaves the minor to a service mentioned in the first paragraph, he can authorize this service to assure to him/her an exceptional or periodical accommodation under the condition that this service has a special authorization for it. Each time that he accommodates the minor pursuant to the authorization, the service informs without any period his/her parents or his/her legal representative, the juvenile judge and the representative of the general council. The judge is seized about all disagreement relative to this accommodation.

The judge may also make the keeping of the child in his circle conditional on specific obligations, such regularly attending a medical or educational institution, ordinary or specialized, under a boarding system, or of exercising a professional activity.

Article 375-3
If the child’s protection commands it, the judge may decide to entrust him:

1° “To the other parent” (Act no 2002-305 of 4 March 2002);
2° To another member of the family or to a trustworthy third person;
3° “To a departmental Children’s aid service”
4° To a service or an institution enable to receive minors during the day or in any other manner of taking charge of them.
5° To a medical or educational, ordinary or specialized, service or institution;

However, when a petition for divorce has been filed or a divorce order handed down between the father and mother, or when a petition to determine the custody and the right of access relating to a child is introduced or a decision rendered between the father and the mother, those measures may be taken only if a new circumstance likely
to endanger the minor is revealed after the decision “which rules on the terms of exercise of parental authority or entrusts the child to a third person” (Act no 87-570 of 22 July 1987). They may not be an obstacle to the power of the "family's judge" (Act no 93-22 of 8 Jan. 1993) to decide, pursuant Article 373-3" (Act no 2002-305 of 4 March 2002), to whom the child is to be entrusted. The same rules shall apply to judicial separation.

Article 375-4
(Act no 87-570 of 22 July 1987)
In the circumstances specified in 1°, 2°, 4° and 5° of the previous article, the judge may assign either to a qualified person, or to a service of observation, education or rehabilitation in the free community, the mission of bringing aid and counsel to the person or the service to whom the child was entrusted, as well as to the family, and of following the development of the child.

In all cases, the judge may join the handing over of the child with the same terms as under Article 375-2, paragraph 3. He may also decide that periodical report shall be made to him as to the situation of the child.

Article 375-5
Provisionally, but subject to appeal, the judge may, pending suit, either order the provisory handing over of the child to a rest or observation centre, or take one of the measures provided for in Articles 375-3 and 375-4.

In case of emergency, the Public prosecutor of the place where the child was found shall have the same power, with the responsibility of referring the matter within eight days to the competent judge who shall maintain, vary or revoke the measure.

If the situation of the child allows it, the prosecutor sets the nature and the frequency of the parent's right of correspondence and right of access, except if he wants to reserve it if the interest of the child compels it.

Article 375-6
Decisions taken in matters of educational assistance may, at any time, be varied or revoked by the judge who took them, either of his own motion, or on request of the father and mother jointly or of one of them, "of the person or service to whom the child was entrusted" (Act no 87-570 of 22 July 1987) or of the guardian, the child himself or the Public prosecutor's office.

Article 375-7
The father and mother whose child gave occasion for a measure of educational assistance keep their parental authority over him and exercise all the attributes of it that are not incompatible with the implementation of the measures. They may not emancipate the child without authorization of the juvenile judge, while the measure of educational assistance is being implemented.

Without prejudice to the article 373-4 and the specific provisions authorizing a third person to achieve a non common act without the agreement of the parental
responsibility sharer, the juvenile judge can exceptionally, in all cases where the child’s interest justifies it, authorize the person, the service or the institution to whom the child has been left, to do an parental authority’s act in case of abusive or unjustified refusal or in case of parental responsibility’s holder’s neglect, the petitioner has to prove the necessity of that measure.

The child’s host place has to be search out in the best interest of the child with an eye to facilitate the exercise of the right of access par the parent(s) and the maintenance of bonds with the siblings, in application of the article 371-5.

If it was necessary to place the child outside the parents' home, the latter keep a right of correspondence and a right of access. The judge shall fix the terms thereof and may even, if the welfare of the child so requires, decide that the exercise of these rights or of one of them shall be temporarily suspended. He can also decide that the parents'right of access can be exercised only with the presence of a third person designated by the institution or the service to which the child has been entrusted.

If the situation of the child allows it, the judge can fix the nature and frequency of the right of access and can decide that their exercise’s conditions will be determinate jointly between the parental responsibility’s holders and the person, the service or the institution to whom the children has been entrusted, in a document which is transferred to the judge. The judge is seized in case of disagreements.

The judge can decide the terms of the children's host in consideration with the child's interest. If the child’s interest requires it or in case of danger, the judge can decide to refuse to reveal the localisation of the host’s place.

When the articles 375-2, 375-3 or 375-5 enforces, the judge can also order the child’s prohibition to leave the territory. The decision sets the period of this prohibition which cannot exceed two years. This prohibition to leave the territory is registered on the wanted person’s files by the Public’s prosecutor.

Article 375-8

The expenses of support and education of the child who was the subject of a measure of educational assistance continue to devolve upon its father and mother as well as upon his ascendants from which maintenance may be claimed, except for the power of the judge to discharge them of it in whole or in part.

Article 375-9

(Act no 2002-303 of 4 March 2002).- The judgment which, under Article 375-3, paragraph 3, entrusts the minor to an institution which receives persons admitted due to mental diseases, shall be handed down after detailed medical advice from a physician not belonging to the institution, for a duration which may not exceed fifteen days.

The provision may be renewed, after medical assent given by a psychiatrist of the receiving institution, for a period of one month, renewable.
SECTION II
Legal aid for the management of family budget Articles 375-9-1 to 375-9-2

Article 375-9-1 (Act n°2007-293 of 5 March 2007, article 20-II)
Where the family benefits ( Act n°2008-1249 of 1st Dec. 2008, art.14 applied 1st June 2009) “or the income of Active solidarity to isolated individuals, provided under the article L.262-9 of the Social action and Families code, are not employed for needs relating to housing, health, education, and that, advising home economics and handling finances envisaged by the article L223-9 of the Social Action and Families code do not appear sufficient, juvenile judge may order ( Act n°2008-1249 of 1st Dec. 2008, art.14, applied 1st June 2009) “that they are in whole or in part, paid“ to a qualified legal or natural person called “delegate for family’s affair“.
This delegate takes all the decisions while at the same time endeavouring or gather accessions to beneficiaries from family allowances. (Act n°2008-1249 of 1st Dec. 2008, art 14 applied 1st of June 2009) “or the allowance referred to in the first sub-paragraph“ and to meet the needs of the maintenance, health, education; he makes an educative action that is aim at restoring conditions of an autonomous management of the benefits.
The list of the persons qualified to apply to a judge to order this aid measure is set by government ordinance.
The decision sets the duration of the measure. It shall not be more than two years. It may be renewed by reasoned decision.
These provisions contained in the current article are not applicable at the flat-rate-premium sets by the 8° of the article A.511-1 of the Social Security code.

The mayor or his representative in the council for the families’ rights and duties can apply to the juvenile’s judge, jointly with the debtor body of the family’s benefits, to point out, pursuant to article 375-9-1, difficulties of a family. If the mayor designated a coordinator pursuant to article A.121-6-2 of the Social and Families action code, he specifies it, after the agreement of the controlling authority of the professional, to the juvenile’s judge. This one may specify the coordinator to exercise the function of delegate of family’s affairs.
The exercise of the function of delegate to families’ affairs by the coordinator follow the rules lays down in the article A. 474-3 and the first and second sub-paragraph of the article A.474-5 of the Social Action and Family code and the article 375-9-1 of the current code.

SECTION III
Of Delegation of Parental Authority Articles 376 to 377-3
Article 376

No relinquishment or transfer relating to parental authority may be effective, unless under a judgment in the cases specified below.

Article 376-1

A family’s judge (Act no 93-22 of 8 Jan. 1993) may, where he is called to rule upon “the terms of exercise of parental authority or upon the education of a minor child or where he decides to entrust a child to a third person” (Act no 87-570 of 22 July 1987), take into consideration the covenants which the father and mother may have freely concluded between them on this subject, unless one of them adduces serious reasons which allow him or her to revoke his or her consent.

Article 377

(Act no 2002-305 of 4 March 2002)

The father and mother, jointly or separately, may, where circumstances require it, seize a judge for the purpose of having delegated all or part of the exercise of their parental authority to a third person, member of the family, trustworthy near relation, institution approved for receiving children or departmental Children's aid service.

In case of plain disinterest or where the parents are unable to exercise all or part of parental authority, the individual, the body or the departmental Children's aid service who received the child may also seize the judge for purpose of having delegated to them parental authority wholly or partially. In all cases referred to in this Article, both parents shall be called in the case. Where the child concerned is the subject of a measure of educational assistance, delegation may occur only after opinion of the juvenile judge.

Article 377-1

(Act no 2002-305 of 4 March 2002)

Delegation, total or partial, of parental authority results from the judgment handed down by the family’s judge.

However, a judgment of delegation may provide, for the needs of education of a child, that the father and mother, or one of them, shall share all or part of the exercise of parental authority with the third person, delegate. That division shall require consent of the parent or parents in so far as they exercise parental authority. The presumption in Article 372-2 shall apply with regard to transactions performed by the delegator or delegators and the delegatee.

The judge may be seized of the difficulties that a shared exercise of parental authority may produce by the parents, one of them, the delegate or the Public prosecutor. He shall rule in accordance with the provisions of Article 373-2-11.

Art. 377-2

In all cases, delegation may come to an end or be removed by a new judgment, where new circumstances are adduced.
In the case where the father and mother are granted the return of the child, the family's judge (Act no 93-22 of 8 Jan. 1993) shall place on them, unless they are necessitous, reimbursement of all or part of the expenses of child's support.

Art. 377-3
The right to consent to the adoption of a minor may never be delegated

SECTION IV
Of the Total or Partial Withdrawal of Parental Authority Articles 378 to 381

Article 378
By express provision of a criminal judgment, parental authority may be "totally withdrawn" (Act no 96-604 of 5 July 1996) from the father and mother who are sentenced either as perpetrators, co-perpetrators or accomplices of a serious or ordinary offence committed on the person of their child, or as co-perpetrators or accomplices of a serious or ordinary offence committed by their child.

That "withdrawal" (Act no 96-604 of 5 July 1996) may be applied to ascendants other than the father and mother as regards that part of parental authority which they may have over their descendants.

Article 378-1
The father and mother who apart from any criminal sentence, either by maltreatment, or by usual and excessive consumption of alcoholic beverages or drug addiction, or by a notorious misconduct or criminal activities or by lack of care or want of guidance, obviously endanger the security, health or morality of the child, "may be totally withdrawn parental authority" (Act no 96-604 of 5 July 1996).

The father and mother who, for more than two years, have intentionally abstained from exercising the rights and fulfilling the duties they retained under Article 375-7, may likewise "be totally withdrawn parental authority" (Act no 96-604 of 5 July 1996).

An action "for total withdrawal of parental authority" (Act no 96-604 of 5 July 1996) shall be brought before the Tribunal de grande instance, either by the Public prosecutor's office, or by a member of the family or by the child's guardian.

Article 379
(Act no 96-604 of 5 July 1996)
A total withdrawal of parental authority ordered under one of the two previous Articles affects by operation of law all the attributes, patrimonial as well as personal, connected with parental authority; in the absence of other determination, it extends to all minor children already born at the time of the judgment. It involves, for the child,
dispensation from maintenance obligation, in derogation from Articles 205 to 207, unless otherwise provided by the judgment of withdrawal.

Article 379-1
(Act no 96-604 of 5 July 1996)
Instead of a total withdrawal, the judgment may be confined to ordering a partial withdrawal of parental authority, limited to the attributes it specifies. It may also decide that a total or partial withdrawal of parental authority will be effective only with regard to certain children already born.

Article 380
When it orders "a total or partial withdrawal of parental authority or" (Act no 96-604 of 5 July 1996) of the right of custody, the court seized shall, where the other parent is dead or has lost the exercise of parental authority, either "designate a third person to whom the child will be temporarily entrusted" (Act no 87-570 of 22 July 1987) with the responsibility of requesting the organization of a guardianship, or entrust the child to the Children's aid service.

It may take the same measures where parental authority has devolved on one of the parents through the effect "of a total withdrawal of parental authority ordered" (Act no 96-604 of 5 July 1996) against the other.

Article 381
The father and the mother who have been the subject "of a total withdrawal of parental authority" (Act no 96-604 of 5 July 1996) or of a withdrawal of rights for one of the grounds provided for in Articles 378 and 378-1, may, by way of a petition, gain from the Tribunal de grande instance, by proving new circumstances, the restitution to them, in whole or in part, of the rights of which they were deprived.

An application for restitution may be filed only one year at the earliest after the judgment ordering "the total or partial withdrawal of parental authority" (Act no 96-604 of 5 July 1996) became irrevocable; in case of dismissal, it may be renewed only after a new period of one year. No application is admissible where, before the filing of the petition, the child has been placed for the purpose of adoption.

Where restitution is granted, the Government procurator's office shall, if there is occasion, apply for measures of educational assistance.

CHAPTER II
Of Parental Authority with regard to the Property of a Child Articles 382 to 387

Article 382
The father and mother have, subject to the distinctions that follow, the administration and enjoyment of the property of their child.

Article 383
(Act no 85-1372 of 23 Dec. 1985)

Statutory administration shall be exercised jointly by the father and mother where they exercise in common parental authority and, in the other cases, under judicial supervision, either by the father or by the mother, according to the provisions of the previous Chapter.

Statutory enjoyment is attached to statutory administration: it belongs either to the two parents jointly, or to the one of the father and mother who is responsible for the administration.

Article 384

The right of enjoyment comes to an end:

1° As soon as the child has completed "sixteen years" (Act no 74-631 of 5 July 1974), or even earlier when he contracts marriage;

2° through the causes which put an end to parental authority, or even, more particularly, through those which put an end to statutory administration;

3° through the causes which involve extinction of any usufruct.

Article 385

The charges of such enjoyment are:

1° those to which usufruct Aries are liable in general;

2° the feeding, supporting and educating the child, according to his wealth;

3° debts which burden a succession received by the child to the extent that they must be discharged out of the income.

Article 386

That enjoyment may not take place for the benefit of a surviving spouse who omits to make an inventory, authentic or under private signature, of property owed to a minor.

Article 387

Statutory enjoyment does not extend to property acquired by a child through his work, or to that which is donated or bequeathed to him under the express condition that the father and mother may not have enjoyment of them.
National section

GERMANY

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

**Substantive law:**

1) §§ 1626 to 1698b of the Bürgerliches Gesetzbuch (Civil Code = BGB) concerning parental responsibility, in particular:
   - §§ 1626 et seq BGB on parental custody of the parents (joint custody, scope of custody, exercise of custody);
   - §§ 1666 et seq. BGB concerning removal of parental custody in case of danger for the physical, mental or psychological well-being of the child, which the parents are unable or unwilling to avert;
   - § 1671 BGB (decision on custody after separation of the parents); §§ 1687 et seq (exercise of joint custody after separation of the parents)
   - §§1684 et seq BGB (contact rights).

2) Guardianship and curatorship: See §§ 1773 to 1895 and §§ 1909 to 1921 BGB

3) There are reforms ongoing concerning §§ 1626a BGB on joint custody for parents who are not married to each other.

**Procedural law:**

§§ 151 to 168a FamFG (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – Code of Family Procedure).

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

In accordance with § 38 of the International Family Law Procedure Act (Internationales Familienrechtsverfahrensgesetz – IntFamRVG) the court shall deal with proceedings for the return of a child with priority at all instances. Except in case of Article 12 paragraph 3 of the Hague Child Abduction Convention there shall be no stay of the proceedings. § 40(2) IntFamRVG provides that a decision on the return of the child may be appealed within two weeks after it has been issued; details are regulated in the FamFG (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – Code of Family Procedure) (in particular §§ 58 et seqq. FamFG).

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

Germany is a Contracting State to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996 Hague Convention). Where the child has his or her habitual residence in another
Contracting State of that Convention and outside the territorial scope of the Brussels I/II Regulation, jurisdiction is determined in accordance with the rules of that Convention (Article 61 Brussels I/II; Article 52 of the 1996 Hague Convention). This is not strictly speaking a case of application of Article 14 Brussels I/II, but is worth mentioning.

In addition, Germany is a Contracting State to the 1961 Hague Convention (Protection of minors).

If none of the above mentioned instruments applies, national law provides for jurisdiction of German courts if the child is a German national or in need of protection by German courts (see Section 99 Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – Code of Family Procedure).

4. **Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels I/II)?**

The possible content of such measures and their preconditions are, in principle, determined by substantive law (see answer to question A.1). The rules of procedure for provisional measures are contained in §§ 49 to 57 FamFG (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – Code of Family Procedure). They apply also in cases of Brussels I/II, the 1980 and 1996 Hague Conventions (see § 14 No. 2 IntFamRVG (International Family Law Procedure Act -Internationales Familienrechtsverfahrensgesetz), which refers to the rules of the FamFG).

5. **Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.**

Enforcement of decisions in cases of Brussels I/II, the 1980 or 1996 Hague Convention and the 1980 Luxembourg Convention is governed by § 44 IntFamRVG (International Family Law Procedure Act -Internationales Familienrechtsverfahrensgesetz) (special rule), combined with §§ 86 to 94 FamFG (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – Code of Family Procedure) (general rules). In other cases, only §§ 86 to 94 FamFG apply. The family court may order e.g. that, if the person concerned does not comply with a decision which is enforceable,

- that person has to pay a fine (“Ordnungsgeld” – up to 25 000 Euro);
- that person has to go to prison (“Ordnungshaft” – up to 6 months, rarely applied in practice);
- the officials may use force in order to implement the decision, but only in case that the decision orders the return of the child, not in case of contact decisions.

The best interests of the child have to be protected (e.g. application of force against the child is not permitted if this is justified taking into account the child best interests, and if no other, less invasive means are available). A number of procedural safeguards should ensure that enforcement measures are only taken if
the person concerned does not comply with the order although it had the opportunity to do so and is aware of the possible consequences of non-compliance.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

The court is obliged to hear the child in person
- if he or she is 14 years or older;
- if the child’s opinion/feelings/intentions (“Wille”) are relevant for the decision to be taken or if there is any other reason why it is relevant to hear the child’s view.

Exceptionally, the court may abstain from hearing the child if there are serious reasons not to do so; if the hearing is omitted just because of the urgency of the matter, the hearing has to be done as soon as possible.

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

Bundesamt für Justiz, 53094 Bonn (www.bundesjustizamt.de)

8. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?


B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

The Directive is implemented by the “Gesetz zur Förderung der Mediation und anderer Formen der außergerichtlichen Konfliktbeilegung“ (Law on promoting mediation and other forms of alternative dispute regulation). That law applies to domestic cases as well as to cross-border cases covered by the Directive. The law regulates the tasks and obligations of the mediator and provides for a series of procedural rules which shall ensure a proper conduct of mediation, providing i. a. that participants are informed about the process of mediation and that they participate on a voluntary basis. In addition, provisions are included into the Codes of procedure (e. g. ZPO (Zivilprozessordnung - Code of Civil Procedure) and FamFG (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – Code of Family Procedure)) which facilitate a proper
linkage between the court proceedings and alternative dispute resolution mechanisms (e. g. the court propose parties to achieve an amicable settlement through mediation or any other ADR mechanism - § 278a ZPO / § 36a FamFG). If parties agree to do so, the court proceedings are suspended.

2. **How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

The implementing legislation has been included in the Code of Civil Procedure (ZPO), in §§ 1076 to 1078 ZPO; insofar as § 1077 ZPO (outgoing requests) and § 1078 ZPO (incoming request) do not provide otherwise, the general rules on legal aid shall apply (see § 1076 ZPO, §§ 114 to 127a ZPO). In family proceedings, §§ 76 to 78 FamFG (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – Code of Family Procedure) are applicable; in substance, they mainly refer to the rules of the ZPO (see § 76(1) FamFG).

3. **Is your country a contracting party to any bilateral or international instruments on Family Law?**

Germany is party to a number of international Conventions in the area of Family Law; the following list is not exhaustive but names the practically most important ones:

- 1961 Hague Convention on the protection of minors
- 1980 Hague Convention on the civil aspects of international child abduction
- 1980 Luxembourg Convention on the recognition and enforcement of decisions concerning custody of children and on restoration of custody of children
- 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of Children
- 1968 European Convention on the adoption of children
- 1993 Hague Convention on intercountry adoption
- 2000 Hague Convention on the international protection of adults
- 1956 New York Convention on the recovery abroad of maintenance
- 1956 Hague Convention on the law applicable to maintenance obligations
- 1958 Hague Convention on the recognition and enforcement of decisions relating to maintenance obligations
- 1973 Hague Convention on the recognition and enforcement of decisions relating to maintenance obligations
- 1973 Hague Convention on the law applicable to maintenance obligations
In addition, Germany is bound (via the ratification of the EU) by the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is also applicable to maintenance claims. Germany is also applying the 2007 Hague Protocol on the law applicable to maintenance obligations (by virtue of the decision of the Council on the conclusion by the EU of that Protocol).

4. Are there any databases or online tools providing information on Family Law matters available in your country?

There are a number of databases for law in general, including Family Law, which can be used if purchased.

The full text of practically important laws, in particular the BGB (Bürgerliches Gesetzbuch, Civil Code), the ZPO (Zivilprozessordnung, Code of Civil Procedure) and the FamFG (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – Code of Family Procedure), and some translations thereof into English, can be found on the website:

www.gesetze-im-internet.de

Decisions of the Bundesgerichtshof (Supreme Court) can be accessed through the website of the Bundesgerichtshof:

www.bundesgerichtshof.de

The European Judicial Network in Civil and Commercial Matters provides accessible information on German Family Law on its website:

- Information on divorce:
  http://ec.europa.eu/civiljustice/divorce/divorce_ger_en.htm
- Information on maintenance obligations:
  http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ger_en.htm
- Information on parental responsibility
  http://ec.europa.eu/civiljustice/partial_resp/partial_resp_ger_en.htm

The European Judicial Atlas in Civil and Commercial Matters informs on

- Matrimonial matters and matters of parental responsibility
- Maintenance obligations

The Centre for German Legal Information (CGerLI) brings together English translations of court decisions, legislation, articles and other law-related documents:
5. Please provide information on accessing and applying foreign Family Law in your country.

The conflict-of-laws rules have to be applied by the German courts ex officio (following the principle “iura novit curia”); this is true for all relevant conflict-of-law rules (whether deriving from national law, EU law or international conventions to which Germany is a party). If the relevant conflict-of-laws rule refers to a foreign law, the judge has to find out the content of the foreign law. If he or she does not know the foreign law, the court has to find out about it using the normal means for the taking of evidence. The court can e. g. ask for an expert opinion (e. g. Universities, Max-Planck-Institutes), apply the London Convention on information on foreign law, or ask for the assistance of a German embassy or a foreign lawyer. It can also use any other means available, such as legal literature, legal databases, etc. In an appeal concerning questions of law, the higher instance has to control whether the conflict-of-laws rules have been applied correctly. It does not check whether a foreign law has been applied correctly (see §§ 545, 560 ZPO (Zivilprozessordnung - Code of Civil Procedure)).

Exceptions to the rule explained above are debated for cases of urgency (provisional and/or protective measures), where the discovery of an applicable foreign law would lead to delays that would jeopardise the aim of the requested urgent measure (generally, this is seen as a reason for the application of the lex fori).
II. NATIONAL JURISPRUDENCE

**Regulation Brussels IIbis in matters of parental responsibility**

- Bundesgerichtshof (BGH), decision of 28/04/2010, case XII ZB 81/09, BGHZ 185, p. 272
- BGH, decision of 28/04/2010, case XII ZB 170/11, FamRZ 2011, p. 959 and p. 1046
- BGH, decision of 09/02/2011, case XII ZB 182/08, BGHZ 188, p. 270
- OLG München, decision of 26/07/2011, case 33 UF 874/11, FamRZ 2011, p. 1887
- OLG Hamm, decision of 02/02/2011, case 8 UF 98/10, FamRZ 2012, 143
- OLG Düsseldorf, decision of 04/03/2008, case 1 UF 18/08, FamRZ 2008, p. 1775
- OLG Karlsruhe, decision of 03/02/2006, case 2 UF 236/05, ZKJ 2006, p. 421
- OLG München, decision of 30/06/2005, case 4 UF 233/05, IPRspr 2005, Nr. 198, p. 543
III. NATIONAL BIBLIOGRAPHY

The extensive literature available has been limited to a realistic minimum that will allow the reader to find many other and detailed references. The references are not always repeated in the other sections of this bibliography. The selection is restricted to just a selection of publications.

**Regulation Brussels IIbis: Parental responsibility matters**

- Staudinger/Pirrung (2009), Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, EGBGB/IPR Vorbem C-H zu Art 19 EGBGB (Internationales Kindschaftsrecht 2)
- Andrae, Zur Abgrenzung des räumlichen Anwendungsbereichs von EheVO, MSA, KSÜ und autonomem IZPR/IPR, IPRax 2006, p. 82
- Finger, Anerkennung und Vollstreckung ausländischer Sorge- und Umgangsrechtsentscheidungen; Kindesherausgabe; Kindesentführung – HKÜ, FuR 2007, p. 67
- Hau, Das Internationale Zivilverfahrensrecht im FamFG, FamRZ 2009, p. 21
- Helms, Zur Frage der Anerkennungsfähigkeit einstweiliger Maßnahmen nach der Brüssel IIa-Verordnung, FamRZ 2009, p. 1400
- Henrich, Anmerkung zu EuGH C-403/09, FamRZ 2010, p. 526
- Janzen/Gärtner, Anmerkung zu EuGH C-403/09, IPRax 2011, p. 156
- Mankowski, Der gewöhnliche Aufenthalt eines verbrachten Kindes unter der Brüssel IIa-VO, GPR 2011, p. 209
- Martiny, Kindesentführung, vorläufige Sorgerechtsregelung und einstweilige Maßnahmen nach der Brüssel IIa-VO, Anm. zu C-403/09, FPR 2010, p. 493
- A. Schulz, Anmerkung zu C-2011/10 – Zum Zusammenspiel zwischen der Brüssel IIa-VO und dem HKÜ, FamRZ 2010, p. 1307
- dies., Das Internationale Familienrechtsverfahrensgesetz, FamRZ 2011, p. 1273
- Wagner/Janzen, Die Anwendung des Haager Kinderschutzübereinkommens in Deutschland, FPR 2011, p. 110

**Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)**

- Staudinger/Pirrung (2009), Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, EGBGB/IPR Vorbem C-H zu Art 19 EGBGB (Internationales Kindschaftsrecht 2)
- Andrae, Zur Abgrenzung des räumlichen Anwendungsbereichs von EheVO, MSA, KSÜ und autonomem IZPR/IPR, IPRax 2006, p. 82
- Finger, Anerkennung und Vollstreckung ausländischer Sorge- und Umgangsrechtsentscheidungen; Kindesherausgabe; Kindesentführung – HKÜ, FuR 2007, p. 67
- Hau, Das Internationale Zivilverfahrensrecht im FamFG, FamRZ 2009, p. 21
Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)

- Karle/Gathmann/Klosinski, Zur Praxis der Kindesanhörung in Deutschland, ZKJ 2010, p. 432
- Prenzlow, Die kindgerechte Vermittlung der Aufgaben des Verfahrensbeistands, ZKJ 2011, p. 128
- Schweppe/Bussian, Die Kindesanhörung aus familienrichterlicher Sicht, ZKJ 2012, p. 13
- Stötzle/Prenzlow, Die Kindesanhörung im familiengerichtlichen Verfahren, ZKJ 2011, p. 200
- Thomas/Putzo/Hüßtege, ZPO/FamFG (2012), comments concerning § 158 FamFG (Verfahrensbeistand / attorney ad litem for the child) and § 159 FamFG (Anhörung des Kindes / hearing of the child)

Preliminary ruling system on family matters

- Family Mediation

National section

GREECE

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Assistant Professor Chryssafo Tsouka
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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

   Substantive legal provisions:  
   
   Articles 1505-1541 of the Civil Code.

   Procedural legal provisions:


   There are no current reform proposals for the substantive or procedural provisions.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?


   “The proceedings for adjudication of an application for return according to the Convention are the Provisional Measures proceedings, according to the Code of Civil Procedure, due to the expeditious character of such proceeding as requested by the Convention (Article 2). However, the decision of the Court is not a decision of Provisional Measures, but a decision of the ordinary procedure, which can be appealed and which must be grounded on full conviction and not probable“ (Court of Appeal of Thessaloniki, decision 722/2003, published in Armenopoulos 2004, p. 1157) – see also http://hagueconventions.law.uoa.gr

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

   Articles 3 (international jurisdiction with reference to Articles 22 et seq.), 22 (domicile of the defendant), 23 (residence of the defendant), 34 (counterclaim), 39 (last common residence of spouses for marital disputes), 41 (choice of basis of jurisdiction by claimant), and 622 (Greek courts have jurisdiction if one of the spouses or the child has Greek nationality) of the Code of Civil Procedure.

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

   Articles 682 et seq. (provisional measures proceedings) and 735 (temporary resolve of a situation) of the Code of Civil Procedure.
5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

Greece has ratified the Hague Convention 1980 on the Civil Aspects of International Child Abduction (Law 2102/1992). Besides the special rules of the Convention, regular national enforcement rules are found in Articles 904 et seq. and 950 of the Code of Civil Procedure (pursuant to an amendment by Law 2721/1999, enforcement is intermediate and not immediate). This means that the bailiff of the court cannot physically take the child from the one parent and give it to the other. The parent, against whom is the decision for return, will pay a monetary fine if he/she refuses to return the child.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

Article 681Γ paragraph 3 of the Code of Civil Procedure.

The opinion of the child (if mature) is considered one of the most important decisive factors, according to Greek court decisions [See, e.g., Supreme Court of Civil and Penal Law (Areios Pagos) decisions 1976/2008 (published in Elliniki Dikaiosyni 2010, p. 689), and 1910/2005 (published in NOMOS subscription legal database – http://lawdb.intrasoftnet.com), and Court of Appeal of Athens decisions 7352/2002 (published in Elliniki Dikaiosyni 2003, p. 205), and 1559/2000 (published in Elliniki Dikaiosyni 2000, p. 1378)]. The child is heard in private (out of the courtroom) by the judge.

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels Iibis (Chapter IV of the Regulation)?

Ministry of Justice (http://www.ministryofjustice.gr).

B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

Law 3898/2010 on mediation in civil and commercial matters.

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

Law 3226/2004 on legal aid to citizens of low income.
3. **Is your country a contracting party to any bilateral or international instruments on family law?**

**INTERNATIONAL COMMISSION ON CIVIL STATUS**

Convention No. 5, Convention extending the competence of authorities empowered to receive declarations acknowledging natural children (14 September 1961)

Convention No. 6, Convention on the establishment of maternal descent of natural children (12 September 1962)

Convention No. 7, Convention to facilitate the celebration of marriages abroad (10 September 1964)

Convention No. 11, Convention on the recognition of decisions relating to the matrimonial bond (8 September 1967)

Convention No. 12, Convention on legitimation by marriage (10 September 1970)

Convention No. 18, Convention on the voluntary acknowledgment of children born out of wedlock (5 September 1980)

Convention No. 20, Convention on the issue of a certificate of legal capacity to marry (5 September 1980)

**HCCH**


Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

**BILATERAL AGREEMENTS**

Agreement with Yugoslavia (continued with Serbia) of 18 June 1959 on Mutual Judicial Relations (ratified by Law 4009/1959)

Agreement with Yugoslavia (continued with Serbia) of 18 June 1959 on Mutual Recognition and Enforcement of Judgments (ratified by Legislative Decree 4007/1959)

Agreement with Yugoslavia (continued with Croatia) of 18 June 1959 on Mutual Judicial Relations (ratified by Legislative Decree 4009/1959)

Agreement with Yugoslavia (continued with Croatia) of 18 June 1959 on Mutual Recognition and Enforcement of Judgments (ratified by Legislative Decree 4007/1959)

Agreement with Austria of 6 December 1965 on Mutual Judicial Assistance in Civil and Commercial Law (ratified by Legislative Decree 137/1969)

Agreement with Romania of 19 October 1972 on Judicial Assistance in Civil and Criminal Matters (ratified by Legislative Decree 429/1974)

Agreement with Lebanon of 5 May 1975 on Judicial Assistance and Deportation (ratified by Law 1099/1980)


Agreement with Poland of 24 October 1979 on Judicial Assistance in Civil and Criminal Matters (ratified by Law 1184/1981)

Agreement with Czechoslovakia (continuing with the Czech Republic) of 22 October 1980 on Judicial Assistance in Civil and Criminal Matters (ratified by Law 1323/1983)


4. Are there any databases or online tools providing information on family law matters available in your country?

No

There are general online legal databases (with a subscription).

For example:
NOMOS legal database (http://lawdb.intrasoftnet.com)
ISOCRATES Athens Bar Associate legal database (http://www.dsanet.gr)

European Judicial Network in Civil and Commercial Matters:
- Information on divorce: http://ec.europa.eu/civiljustice/divorce/divorce_gre_en.htm
- Information on maintenance obligations: http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_gre_en.htm
- Information on parental responsibility http://ec.europa.eu/civiljustice/parental_resp/parental_resp_gre_en.htm

European Judicial Atlas in Civil and Commercial Matters informs on:
5. Please provide information on accessing and applying foreign family law in your country.

According to Civil Procedure, the maxim *jura novit curia* also applies with respect to foreign law, which is considered as a matter of law, and not a fact (Articles 337 and 559 number 1 of the Code of Civil Procedure). However, the judge may order the proof of the contents of foreign law.

In this respect, in practice the courts order that the parties furnish legal information as to the contents of foreign law from the Hellenic Institute of International Foreign Law, which is seated in Athens (see: [http://www.hiifl.gr](http://www.hiifl.gr)).
II. NATIONAL JURISPRUDENCE

Note: All the court cases mentioned below are published in NOMOS subscription legal database – http://lawdb.intrasoftnet.com

Regulation Brussels IIbis in matters of parental responsibility

1. Provisional measures for custody rights – Jurisdiction of the Greek courts: The general basis of jurisdiction (Article 8) is retained in cases of wrongful retention of the child, provided the child has not remained for a period of one year or more in the country of retention (Article 10) [One-Member Court of First Instance of Piraeus, decision no. 6827/2010].

2. Jurisdiction of the Greek courts in matters of parental responsibility when the child has been wrongfully removed (Articles 8 and 10). Application of the Regulation in time [Supreme Court (Areios Pagos) decision no. 873/2010].

3. Provisional measures for access rights - Jurisdiction of the Greek courts: The Greek courts have jurisdiction based on the habitual residence of the child in Greece (Article 8). Access rights are contained in the meaning of the more generic term “parental responsibility” [One-Member Court of First Instance of Thessaloniki, decision no. 14038/2005].

4. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child’s former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence (Article 9). The term “habitual residence” of a child is an autonomous term of EU law. Although the Regulation contains no definition, habitual residence in one country coincides with its loss in another country. The time factor is important; however in certain cases a new habitual residence may be created immediately depending on the facts of the case [One-Member Court of First Instance of Kavala, decision no. 24/2009].

5. Civil proceedings for return of an abducted child: The provision of Article 11(4) of the Regulation, pursuant to which “A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return” is a substantive legal provision [Supreme Court (Areios Pagos) decision no. 1857/2011].


7. Application before the Greek courts from an Austrian petitioner for return of a child pursuant to the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The Court mentions the Regulation, without reference to a specific provision [Court of Appeal of Athens, decision no. 8468/2007].
8. Enforcement of a French decision on parental responsibility: Detailed explanation of the procedure followed (Articles 21, 23, 28, 29, 31, 32, 33, 34, 68). The decision recognising the foreign decision is a court order, not a decision [Court of Appeal of Athens, decision no. 589/2008].
III. NATIONAL BIBLIOGRAPHY

**Regulation Brussels IIbis: Parental responsibility matters**

Haris Tagaras, *The contribution of the Community legal order to the unification of the international family law (an analysis of the Regulation 1347/2000)* (2001) [in Greek]


**Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)**


**Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)**

-

**Preliminary ruling system on family matters**

-

**Family Mediation**

-
CHAPTER XI

Relations between parents and children

Section 1505.—Surname of children. The parents are under an obligation to have determined the surname of their children by a joint irrevocable declaration made by them. The declaration is made before the marriage either in the presence of a notary or to the official before whom the marriage is celebrated. The official is under an obligation to ask for such declaration.

The surname so determined which is common to all children may be either the surname of one of the parents or a combination of their two surnames which however must in no case comprise more than two surnames.

Where the parents have omitted to make a declaration about the surname of their children in conformity with the conditions set out in the preceding paragraphs the children shall have for surname the surname of their father.

Section 1506.—Surname of child born outside a marriage of its parents. A child born outside a marriage of its parents shall assume the surname of its mother. The husband of the mother may give to the child by means of a notarial deed his surname instead of the surname hitherto attributed to the child or in addition thereto if the mother and the child express their agreement under the same formality (notarial deed).

In the case of a supervening marriage of the child’s parents shall be applicable regarding its surname and where the child is under age the provisions of the preceding section.

If an acknowledgment takes place whether voluntary or judicial a child which came of age or if it is under age its parents or one of them or the child’s tutor shall have the right within one year as from the completion of the acknowledgment to add by means of a declaration made to the registry of civil status the paternal surname to the surname of the child. If both parents proceed jointly with such declaration they may determine the new surname of the child in accordance with the second paragraph of the preceding section.

Section 1507.—Reciprocal obligation. Parents and children are under a reciprocal obligation of assistance affection and respect.

27 In cooperation with Associate Professor Eugenia Dakoronia and Constantine Taliadoros.
Section 1508.—Obligation to render services. For as long as a child is a member of its parents’ household and is being raised or taken care of by them it shall be under an obligation to provide to its parents in the management of the household or the carrying out of their profession services in analogy to its possibilities and the living conditions of itself and its family.

Section 1509.—Grants of parents to their children. The grant of property to the child by any of its parents either for the creation or maintaining of an economic or family self-sufficiency or for the starting or continuation of a profession shall constitute a donation only regarding the amount that exceeds the extent which the circumstances require. However the responsibility towards the child of the parent/s who proceeded with the grant in respect of actual or legal defects of the thing shall always be appreciated in accordance with the provisions governing the responsibility of a donor.

Section 1510.—Parental care. Care for a child under age is a duty and a right of the parents (parental care) and is exercised jointly. Parental care includes care of the child’s person the management of its property and the representation of the child in any matter legal transaction or Court action relating to its person or to its property.

In a case where parental care ceases by reason of death declaration of absence or forfeiture of one parent parental care shall belong exclusively to the other parent.

If one of the parents is in the impossibility of exercising parental care for factual reasons or because he lacks or enjoys a limited legal capacity to conclude transactions parental care shall be exercised by the other parent alone. However care of the person of the child shall also be exercised by a parent who is under age.

Section 1511.—Any decision made by the parents in the exercise of parental care must aim at the promotion of the child’s interest.

At the interest of the child must also aim a Court decision where according to the provisions of the law the Court decides in the matter of entrusting (to someone) parental care or of the way in which it shall be exercised. The decision of the Court must also respect the equality between the parents and not make any distinction based on gender race language religion political or any other orientation citizenship national or social origin or property.

With due regard to the maturity of the child its opinion must be sought and taken into consideration before any decision pertaining to
parental care to the extent that such decision concerns the child’s interests.

Section 1512.—In case of disagreement. Where the parents disagree in the exercise of the parental care and the interest of the child requires the taking of a decision the Court shall decide.

Section 1513.—Divorce or annulment of marriage. In the cases of divorce or annulment of the marriage and if both parents are alive the exercise of parental care shall be regulated by the Court. The exercise of parental care can be attributed to one of the parents or if they concur and at the same time determine the place of abode of the child to both parents jointly. The Court may decide differently more particularly to divide the exercise of parental care between the parents or to entrust parental care to a third party.

In making a decision the Court shall take into consideration the ties of the child with the parents and its brothers and sisters as well as any agreements entered into by the parents of the child with regard to care of its person and the management of its property.

The parent to whom was not entrusted the exercise of parental care shall have the right to demand from the other parent information on the person and the property of the child.

Section 1514.—Interruption of life in common. The provisions of the preceding section shall also apply in the cases of interruption of life in common of the spouses.

Section 1515.—Children outside a marriage of their parents. Parental care of a child under age born and existing outside a marriage of its parents belongs to its mother. In case of acknowledgment by its father the latter shall also partake in the parental care but can exercise it if the mother’s parental care has ceased or if the mother cannot exercise it on legal or factual grounds.

At the request of the father the Court may in other cases and particularly if the mother agrees entrust also to him the exercise of parental care or a part of it to the extent that the interest of the child so demands.

In a case of judicial acknowledgment where the father acted as defendant the latter shall not exercise parental care nor shall he replace the mother in the exercise thereof. The Court may if the child’s interest so demands decide differently at the request of the father where the mother’s parental care has ceased or if the mother cannot exercise it on legal or factual grounds or if the parents agree.

Section 1516.—Acts by one parent. Each parent may alone proceed
with the making of acts relating to the exercise of parental care: 1. where
the matter concerns usual acts of care of the person of the child or acts
of the current management of its property or acts presenting a character
of urgency 2. in the matter of receiving a declaration of will addressed
to the child.

In case of interruption of life in common of the parents of divorce
or annulment of their marriage as well as in the case of a child born
outside a marriage of its parents the claims for maintenance of the child
against the parent who has not the care of the child’s person can be
pursued by the parent who has the care of the child’s person and if no
one is entrusted with such care the person with whom the child resides.

Section 1517.—Conflict of interests. Where the interests of the child
are in conflict with the interests of its father or its mother who exercise
parental care as well as with the interests of their spouses or of their
relatives by blood or by alliance through marriage in direct line a special
custodian shall be appointed.

Section 1518.—Care of person. The care of the person of the child
comprises in particular the upbringing supervision education and in-
struction of the child as well as the determination of its place of abode.

In raising the child the parents must support it without distinction as
to gender in developing responsibly and with social awareness its per-
sonality. The taking of measures of compulsion shall only be allowed if
these are pedagogically necessary and do not cause injury to the child’s
dignity.

As regards the education and the professional training of the child
the parents shall take into consideration its capabilities and personal
inclinations. For this purpose they must cooperate with the school au-
thorities and if necessary request the concurrence of the competent State
departments or public bodies.

Section 1519.—Abrogated.

Section 1520.—Personal communication. The parent with whom
the child does not reside conserves the right of personal communication
with it.

The parents have not the right to prevent the communication of the
child with its distant ascendants except on serious grounds.

In the cases contemplated in the preceding paragraphs particulars
pertaining to the method of communication shall be specifically regulated
by the Court.
Section 1521.— Property of the child coming from a will or donation. The management of the parents shall not also extend to the patrimonial assets that accrue to the child from a testamentary disposition or from a donation providing that such assets shall not be placed under the parents' management. If the testator or the donor has not appointed the person charged with the management of the said assets the Court shall appoint a special custodian.

Where it is stated in the testamentary disposition or in the donation that the management must not be entrusted to one of the parents the management shall in case of doubt belong to the other parent who shall also represent alone the child in any relevant Court proceedings or legal transactions.

Section 1522.— The testator or the donor may determine the method whereby shall be managed the patrimonial assets which they left or gave to the child. A deviation may be allowed in the case of a donation provided the donor consents. If the donor is not alive or refuses his consent or his consent cannot be obtained as well as in the case of devolution by testamentary disposition a deviation shall only be allowed with the permission of the Court and to the extent that the child's interest so demands.

Section 1523.— Acts of management of the parents. Inventory. The parents are under an obligation to draw up an inventory of any patrimonial assets devolving on the child and subject to their parental management.

Section 1524.— Donations. The parents may not grant donations out of the child's property. Shall be excepted donations that are prescribed by a special moral duty or on grounds of decency.

Section 1525.— Profitable placing of cash. The parents shall be under an obligation to proceed without delay imputable to their fault with the productive investment or the profitable placing of cash belonging to the child under their administration if it is not necessary to keep the moneys in order to meet disbursements. The Court may order a different disposal of such cash.

Section 1526.— Management subject to formalities. The parents may not without Court permission accomplish in the name of the child acts that are also prohibited to the tutor of a minor.

Section 1527.— A succession devolving on a child under age shall always be deemed to have been accepted subject to inventory and the child under reserve of the provisions of section 1912 shall not forfeit such privilege. Third parties having a lawful interest may demand from
the parent who is in charge of the administration to draw up an inventory within four months at the latest.

Section 1528.—Relative nullity. Acts accomplished by the parents in violation of the provisions of sections 1524 to 1526 inclusive shall be null. The nullity may be relied upon by the father the mother and the latter’s general or particular successors in title.

Section 1529.—Application for the needs of the child. The parents shall make use of the income deriving from the child’s property under their administration for its maintenance education and training. They may also use such income to meet the needs of the family to the extent that this is considered reasonable. Any balance shall accrue to the child’s property.

The parents may also in cases of exceptional need and subject to the provisions of section 1526 make use of the capital of the child’s property.

Section 1530.—Disbursements of parents. The parents shall have the right to claim the disbursements they incurred in taking care of the person and for the administration of the property of the child if under the circumstances they had the right to consider such disbursements as necessary and where the disbursements are not those that must burden them.

Section 1531.—Responsibility of parents. The parents in exercising parental care shall have the obligation to exert the same degree of care as in their own affairs. If a prejudice that resulted is imputable to a violation of such obligation by both parents the parents shall be held responsible jointly and severally.

Section 1532.—Consequences of defective exercise. If the father or the mother violate the duties imposed on them by their function to take care of the person of the child or the administration of its property or if they exercise abusively such function or they are not in a position to cope with this task the Court may at the request of the other parent the closer relatives of the child the public prosecutor or even on its own initiative order any appropriate measure.

The Court may in particular take away from one parent the exercise of parental care wholly or partially and entrust such care to the other parent or if the circumstances described in the preceding paragraph obtain also in regard to the person of the other parent entrust the actual care of the child or even its custody wholly or in part to a third party or to appoint a tutor.

Section 1533.—The taking away of the whole of the care of the
child’s person from both parents and the entrusting thereof to a third party shall be ordered by the Court only where other steps have proved ineffective or if it is considered that such steps are not sufficient to avert a danger that may affect the bodily intellectual or spiritual health of the child.

The Court shall determine the extent of parental care entrusted to the third party and the conditions of exercise thereof.

The Court shall decide on the granting of the actual care or the custody to a third party in accordance with the second paragraph of the preceding section or the first paragraph of this section after a control of his moral standing living conditions and generally of his appropriateness based obligatorily on an attestation issued by the department of Social Service.

The granting can be made to an appropriate family preferably made up of relatives (entrusted family) and if this proves to be impossible to a proper establishment.

Section 1534.— In case of an urgent need of medical intervention with a view of averting a threat to the life or health of the child the public prosecutor sitting at the Court of first instance may on the refusal of the parents give himself immediately the required permission following a request by the medical doctor in charge of the treatment or by the director of the clinic where the child is under treatment or by any other competent health authority.

Section 1535.— Taking away at the request of the parents. The Court shall take away the exercise of the parental care or of part thereof from the two parents on a serious ground if the parents so request indicating at the same time the person who accepts to assume the exercise withdrawn. In its decision on the taking away the Court shall attribute the exercise withdrawn to the person indicated or to another person and shall also determine the method of exercise. Where such determination is absent shall be applicable by analogy the provisions governing tutelage.

Section 1536.— Change of circumstances. Where since the Court decision pertaining to parental care was issued circumstances have changed the Court shall be obligated at the request of one or both parents of the child’s closer relatives or of the public prosecutor to adapt its decision to the new circumstances by recalling or amending it in conformity with the child’s interest and in particular by restituting to the parents the exercise of the parental care that had been taken away from them.
Section 1537.—Forfeiting by parents. A parent shall forfeit parental care if he has been condemned by a final judgment to imprisonment of at least one month by reason of an offence he committed fraudulently and which relates to the life, the health and the morality of the child. The Court may in such a case and in its appreciation of the circumstances take away from the parent also the parental care of his other children at the request of the other parent of the closer relatives or of the prosecutor.

Section 1538.—Cessation of parental care. Parental care in its totality shall cease in regard to one parent where such parent has forfeited his function in accordance with the preceding section or has died or has been declared absent and in regard to both parents where the child came of age or has died or has been declared absent.

Section 1539.—Consequences of cessation. Where has ceased the parental care or the right of the parents to administer the property of their child or even the exercise only of such functions the parents shall be under obligation to render account regarding the capital of the child's property and to hand over such property. The same rule shall apply where parental care or the right to administer the child’s property has ceased or only the exercise thereof has ceased in regard to one parent alone.

Section 1540.—Where parental care or the exercise thereof has ceased wholly or in part the parents shall have the right to continue making acts pertaining to the care of the person or the administration of the property of the child until they are informed of the cessation. However third parties shall not have the right to rely on such right of the parents if they knew or ought to have known of the cessation.

Section 1541.—Where parental care has ceased by the demise or the absence of the child the parents shall be under an obligation to take care of matters that cannot be postponed until the heirs are able to take care themselves of such matters.
National section

Hungary

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

The current source of matrimonial responsibility matters is the Act No. IV 1952, namely the Family Act on marriage, family and guardianship (Family Act). Chapter VIII contains the regulations concerning parental responsibility and the main rules concerning state caring of children.
- §§ 70-92 are about parental rights and obligations both in case of parents living together and parents after the relationship’s breaking-up and right to access;
- §§ 93-110 are about guardianship.

Act No. XXXI 1997, namely the Act on child welfare and guardianship administration, contains regulations concerning the protection of children being cared of by the state, the rights of children and the obligations of parents and the state.

The Order of Government No. 149/1997 on public guardianship authority and proceeding in child welfare and guardianship cases (Order of Guardianship) contains detailed rules on children’s rights, parental rights and obligations, the role of the guardianship authority and the right to access.
- §§ 18-26 are about exercise of parental rights and obligations;
- §§ 27-33/B are about right to access, children’s rights, parental rights and obligations in contact cases. Those are both substantial and procedural rules. Procedure means only that of the guardianship authority.

The source of law for court proceeding in parental responsibility cases is Act No. III 1952, it is the Civil Procedure Act. Chapter XVII contains some special rules on the discharge of parental responsibilities, with regard of which the general rules are to be applied.

The codification of the new Civil Code is continuously on the agenda. In mid-July 2012 the Bill of the new Civil Code was submitted before the Parliament. The fourth book of the Civil Code is the ‘Family Law Book’ which will contain partly new regulation for parental responsibility issues. Although the new rules will be based on the current regulations, joint parental responsibility and shared parental responsibility will be promoted. Besides, the Bill does not use the phrase “placement of the child” but uses only the phrases of sole, joint or shared parental custody.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

The procedure on the return of a child is the enforcement proceeding (See answer to question 5). § 180/A was enacted into the Act on Judicial Enforcement with the aim to promote the successful return of the child in child abduction cases. The child has to be handed over to the applicant, but in the applicant’s absence the child may be handed over to the applicant’s representative or the guardianship authority. The guardianship authority takes measures to hand over the child to the applicant as soon as possible. Because of the possibility of appealing against the decision for the
return of the child the enforcement in advance is not ordered in the Hungarian judicial practice. Nevertheless, the deadlines are kept.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels Iibis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

The domestic jurisdiction rules are regulated in the Law Decree No. 13 1979, namely the Law Decree (or Code) on private international law. According to § 59(1) a Hungarian court or another Hungarian authority shall have jurisdiction in all cases concerning custody (placement of the child), contact between child and non-custodial parent and exercise of parental responsibility if the child’s domicile or residence is in Hungary. If one of these issues is settled in a proceeding which affects the personal status, a Hungarian court or another Hungarian authority shall have jurisdiction if it has jurisdiction in the case concerning personal status [§ 59(3)]. In cases concerning the relationship between the guardian and the child under guardianship the Hungarian court shall have jurisdiction if the child under guardianship is Hungarian citizen or the child’s domicile or residence is in Hungary (§ 59/A).

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels Iibis)?

§ 156(1)-(8) of Act No. III 1952 that is the Civil Procedure Act contains the possibility of provisional measures, their requirements and the proceeding itself. These are general rules of provisional measures and not special child-concerned regulations. (Nevertheless, their application is closely related to welfare and best interest of children.)

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

The enforcement of the placement or the handover of the child is regulated in the Act No. LIII of 1994, namely Act on Judicial Enforcement. The enforcement with regard to access rights is primarily not the task of the independent judicial bailiff but that of the guardianship authority and regulated in the Order of Government No. 149/1997 on public guardianship authority and proceeding in child welfare and guardianship cases (Order of Guardianship). Concerning the enforcement of the placement or handover of the child (which is to be applied in case of return of the child), the Judicial Enforcement Act has special enforcement rules for the case when a definite act or behaviour has to be enforced on the basis of the judgment (§§ 172-179). One kind of the behaviour to be enforced is the placement or handover of the child (§§ 180 and 180/A). § 180 was amended and the § 180/A was enacted in 2005 with the aim to protect the child’s best interest and provide the effective enforcement at the same time. The judge calls the obligor to perform the duty and for the case of default orders the child’s handover with the police’s assistance. The judicial bailiff is informed at the same time [§ 180(2)] as the enforcement order and the judgement to be enforced is delivered. The bailiff’s obligation is to send the copies of these documents to the guardianship authority with the aim that the guardianship authority should make efforts to promote the obligor’s voluntary performance.
These efforts include the on-site inspection, giving information to the obligor e.g. about how important should be to avoid the need of the police's assistance. In fifteen days the results of the efforts are told to the bailiff [§ 180(3)]. In fail of voluntary performance the bailiff designates a day for on-site proceeding and informs every authority (guardianship authority, police) and the applicant. The enforcement of the child’s handover shall happen in the residence of the obligor or if the child has another residence, in the child’s residence with the assistance of the police and the guardianship authority [§ 180(4)-(5)].

The child has to be handed over to the applicant, in the applicant’s absence to his/her representative or to the guardianship authority. The obligor’s duty is to inform this person about the health of the child or any other circumstances which may endanger the child’s life or body. Besides, the obligor has to handover the child’s personal documents, the child’s objects in daily use, clothes, tools which are needed in studies, medicals in case of illness [§ 180/A (1)-(3)]. If the bailiff initiates, the police can remove persons whose behaviour hinders the enforcement; if either the obligor or the child is not found, a warrant of caption, if needed an international warrant of caption is sent.

The Order of Guardianship regulates the enforcement of right to access (§§ 33-33/B). If the guardianship authority ascertains the lack of the applicant fault in the unsuccessful child-parent contact it orders the enforcement. The guardianship authority calls the obligor to make the exercise of right to access possible and warns to the legal consequences of malpractice [§ 33(4)]. In case of the obligor’s default the Order of Guardianship refers to the Act on Judicial Enforcement (namely §§ 172-180/B on the general rules of a behaviour’s enforcement and specially that of the child’s handover) and/or the guardianship authority has some special possibilities. It may initiate child welfare mediation and can request for the child welfare services’ assistance [§ 33(5)]. In case of continuous malpractice and hindrance of the child-parent contact the guardianship authority may initiate the change of the child’s residence (placement in the Hungarian terminology) or may make a denunciation because of the child’s endangering. [I should mention in brackets that the legal possibilities of initiating the change of the child’s residence, requesting for the police’s assistance or applying penal consequences are almost not used at all.]

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

According to the § 74 of the Family Act the court and the guardianship authority have to hear the child in proceedings concerning parental responsibilities, the child’s placement (custody) and change of the child’s placement (revision of custody decision) if it is justified (reasonable) directly or by an expert. One case for reasonability is the child’s demand. If the child is over 14, this child has to be heard. An exception is if the parents have agreed on the residence and custody of the child and the child-parent contact (in case of divorce upon mutual consent).

There are new Articles concerning the child’s hearing in the proceeding in Act No. III 1952 namely the Civil Procedure Act. These regulations are to be applied from 29 June 2012 and give ruling for the case when the court decides for the direct hearing. (Nevertheless, I should mention that according to the actual judicial practice, children are regularly heard indirectly, mostly by the assistance of psychologist experts.) The new §§ 65/A and 65/B give some technical rules (ordering proctor for
the child, issuing a summons, child’s hearing in the absence of the parties’ legal
advisors) and some rules on the atmosphere and methodology of the hearing for the
sake of the child’s best interest.

The Order of Government No. 149/1997 on public guardianship authority and
proceeding in child welfare and guardianship cases (Order of Guardianship) contains
rules on hearing (§ 11). According to these rules a child in issues affecting the child
has to be heard directly or by the way of the child welfare service. There are cases
when the child’s direct hearing cannot be avoided. These are the following: the child
who is mature enough and capable of forming his/her own view demands for the
hearing; in the child’s personal and property issues if the child is over 14 or under 14
but being capable of forming his/her own views (although there are some
exceptions); special regulation orders it. There are few technical regulations in the
child’s best interest. This Order of Guardianship gives a definition for the child who
is “capable of forming his/her own view.

As a summary, there are some issues concerning which a concrete age is given for
the obligatory hearing of the child (mostly 14, sometimes 12), but under 14/12 the
age and the maturity play a role.

7. **Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?**

There are two Central Authorities in Hungary. The Ministry of Administration and
Justice is that for child abduction cases. The Ministry of Human Resources is the
Central Authority for other parental issues.

8. **Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

No.

### B. Horizontal issues

1. **How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

The Act No. LV 2002 on mediation was adopted in 2002. The act was promulgated
on 17 December 2002 and entered into force in March 2003. The Act No. LXXV 2009
on the modification of several acts concerning judicial service amended some acts,
among them the Act on Mediation. § 146 explicitly mentions directives, among
them the Directive 2008/52/EC, with which the amendment aimed the
harmonisation.

2. **How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

The Act No. LXXX 2003 on legal aid was adopted in 2003. The act was promulgated
on 6 November 2003 and entered into force on 1 April 2004 (with some exceptions
as some rulers entered into force three month earlier or one month later).
3. **Is your country a contracting party to any bilateral or international instruments on family law?**

**International instruments:**
- UN Convention on the Recovery Abroad of Maintenance, New York 1956;
- Convention 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children of the Hague Conference on International Private Law;
- UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage;
- UN Convention on the Elimination of All Forms of Discrimination against Women, 1979;
- UN Convention on the Rights of the Child, 1989;
- Convention 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption;

**Bilateral instruments:**
Agreements on legal assistance in civil and family law cases (or at least in civil law cases) with the following countries:

4. **Are there any databases or online tools providing information on family law matters available in your country?**

**European Judicial Network**
- In divorce cases: [http://ec.europa.eu/civiljustice/divorce/divorce_hun_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_hun_en.htm)
- In parental responsibility issues: [http://ec.europa.eu/civiljustice/parental_resp/parental_resp_hun_en.htm](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_hun_en.htm)
- Information on alternative dispute resolution: [http://ec.europa.eu/civiljustice/adr/adr_hun_en.htm](http://ec.europa.eu/civiljustice/adr/adr_hun_en.htm)
- Information on jurisdiction of the courts:
Information on bringing a case to a court:
Information on interim and precautionary measures:
http://ec.europa.eu/civiljustice/interim_measures/interim_measures_hun_en.htm
Information on enforcement of judgments:
http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_hun_en.htm

European Judicial Atlas in Civil and Commercial Matters:
- Matrimonial matters and matters of parental responsibility
- Maintenance obligations

Hungarian Ministries, Institutions with English/German pages
Hungarian Government – Magyar Kormány
http://www.kormany.hu/en
Ministry of Public Administration and Justice – Közigazgatási és Igazságügyi Minisztérium
Head office: 1055 Budapest, Kossuth Lajos tér 2-4.
Postal address: 1357 Budapest, Pf.: 2.
Phone: +36-1-795-1000
Fax: +36-1-795-0002
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Phone of the customer service: +36-1-795-6411
Ministry of Human Resources – Emberi Erőforrás Minisztérium
Ministry of Foreign Affairs – Külügyminisztérium
http://www.kormany.hu/en/ministry-of-foreign-affairs
Courts of Hungary – Magyarország bíróságai
National Chamber of Notaries – Magyar Országos Közjegyzői Kamara
http://www.kozjegyzo.hu

5. Please provide information on accessing and applying foreign family law in your country.

The Law Decree No. 13 1979 (Law Decree on private international law) contains some laconic regulations on the determination of foreign law's content. According to § 5(1) the court or another authority gets a line of the unknown foreign law ex officio, gets also an expert’s opinion if needed and can take into attention the evidences brought by the party. The court or another authority can turn to the Minister being responsible for justice and the Minister shall give the needed information [§ 5(2)]. (According to § 5(3) if it is impossible to determine the content of foreign law the Hungarian law has to be applied.
Another source is the European Judicial Network pages about the Hungarian law.
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

There are several published decisions, mostly in child abduction cases.

- Decision Pfv. II.20.910/2011/8 of the Supreme Court
  Brussels IIbis § 2 (11)
  Hungary is not the habitual residence of the child if the parents regard their employment in Hungary as a provisional one and meanwhile they maintain their habitual residence in another Member State.

- Decision Pfv. II.22.004/2010/6 of the Supreme Court
  Brussels IIbis § 2 (11)
  “Habitual residence of the child” in a child abduction case.

- Decision Pfv. II.21.380/2010/6 of the Supreme Court
  Brussels IIbis § 21, 23
  The recognition and enforcement of a decision relating to parental responsibility given in another Member State cannot be denied because of the fact that the enforcement proceedings is under way on the basis of the final decision of the Hungarian court in the issue of child abduction. Besides, the grounds of non-recognition of a foreign judgment according to Brussels IIbis have to be envisaged if the obligor refers to these grounds.

- Decision Pfv. II.20.699/2011/4 of the Supreme Court
  Brussels IIbis § 2 (11)
  In a child abduction case the child's direct personal hearing in the court and the evaluation of the child's opinion due to the age and maturity if the child is seven and a half years old.

- Decision Pfv. II.21.601/2009/5 of the Supreme Court
  Brussels IIbis § 2 (11)
  The court’s proceeding is not contra legem if the child is heard not by expert's assistance, but personally and directly by the court and takes the child's opinion into attention due to the child’s age and maturity.

- Decision Pfv. II.21.588/2008/5 of the Supreme Court
  Brussels IIbis § 8
  Hungary does not have jurisdiction in a proceeding for replacement of the child (that is the change of the child’s residence, a change in the parents' parental responsibility) if the parent who exercises the parental responsibilities on the basis of a judgement has a domicile abroad and the child has habitual residence there.

- Decision Pfv. II.21.399/2011/5 of the Supreme Court
  Brussels IIbis § 8
  Hungary does not have jurisdiction in a proceeding for termination of joint parental responsibility if the child’s habitual residence is in Belgium on the basis of the parents' agreement but one of the parents brought the child to Hungary for a holiday and
stayed in Hungary with the child wrongful (without the agreement of the another parent).

- Decision Pfv. II.26.080/2008/2 of the Budapest Tribunal
  Brussels Iibis § 12(3)
  The parents can validly agree on the jurisdiction of the Hungarian court for their disputes in parental responsibility cases (child placement that is the residence of the child). The Hungarian law has to be applied in such case.

- Decision Pfv. II.22.073/2009/4 of the Supreme Court
  Brussels Iibis § 12
  The court cannot terminate the proceeding concerning parental responsibilities on the basis of failing the jurisdiction if the defendant undoubtedly accepted the jurisdiction of the Hungarian court and this is also in the best interest of child.

- Decision Pfv. II.20.622/2009/4 of the Supreme Court
  Brussels Iibis § 9
  If the child lawfully moves with one of the parents from Hungary to another Member State and acquires habitual residence there, in a case on the contact between the child and the other parent the Hungarian jurisdiction is retained during a three-month period following the move.

- Decision Pfv. II.21.677/2011/4 of the Supreme Court
  Brussels Iibis
  Brussels Iibis is not applied in a proceeding about the parents' dispute concerning the family name of the child.
III. NATIONAL BIBLIOGRAPHY

Regulation Brussels IIbis: Parental responsibility matters

Chapters in books:

Articles:
### Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)


### Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)


### Preliminary ruling system on family matters


### Family Mediation

National section
IRELAND

Dr Elaine O’Callaghan
Sales and Marketing Manager
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?


Section 11A of the 1964 Act, as amended, contains procedural provisions in relation to parental responsibility.

Reform Proposals


2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

The Child Abduction and Enforcement of Custody Orders Act 1991 and S.I. No. 94 of 2001 set out the law relating to child abduction in Ireland. The Department of Justice and Equality is the Central Authority in Ireland for child abduction. Cases of this nature are always heard by the High Court which operates a case management system every Wednesday morning ensuring that decisions are made as expeditiously as possible. In the event that there is an appeal against a decision of the High Court, this is dealt with expeditiously by the Irish Supreme Court.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

The High Court has inherent, original jurisdiction to hear a cross-border parental responsibility case.

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child's best interests (Article 20 of Regulation Brussels IIbis)?

The most important case law is the case of J McB v. LE [2010] IEHC 123.

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.
Enforcement of Court Orders is a matter for Courts and they may commit a person to prison or impose a fine in the event that there has been a breach of a court order.

6. **Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?**

Case law sets out the procedures on the hearing of the child. For an up-to-date review of the law, see for example, *A K v. A J* [2012] IEHC 234 (High Court, Finlay Geoghegan J, 8 June 2012). The child is generally heard by a child psychologist and his or her views are relayed to the court via an assessment report. The age and maturity of the child are considered by the trial judge in the light of all of the other facts in the case and a balance is struck.

7. **Which is the Central Authority designated to facilitate the application of Regulation Brussels Iibis** *(Chapter IV of the Regulation)*?

The Department of Justice and Equality if the relevant Central Authority.

8. **Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels Iibis?**

S.I. No. 506 of 2005: Rules of the Superior Courts (Jurisdiction, recognition, enforcement and service of proceedings) 2005

### B. Horizontal issues

1. **How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**


2. **How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

Directive 2003/8/EC was not transposed into Irish law as pre-existing legislation, the Civil Legal Aid Act 1995 and the Civil Legal Aid Regulations of 1996 and 2002 (S.I. No. 273 of 1996, S.I. No. 8 of 2002) also give effect to the measures in the Directive.

3. **Is your country a contracting party to any bilateral or international instruments on family law?**
Yes, for example, the Hague Conventions and the UN Convention on the Rights of the Child.

4. Are there any databases or online tools providing information on family law matters available in your country?

- Association of Collaborative Practitioners: www.acp.ie
- Aim Family Services: www.aimfamilyservices.ie
- The Courts Service of Ireland: www.courts.ie
- The Family Lawyers Association: www.familylawyers.ie
- Flac – promoting access to justice: www.flac.ie
- Family Support Agency: www.fsa.ie
- Department of Justice and Equality: www.justice.ie
- Law Reform Commission: www.lawreform.ie
- Law Society of Ireland: www.lawsociety.ie
- Legal Aid Board: www.legalaidboard.ie
- Mediation Forum –Ireland: www.mediationforumireland.com
- One Family: www.onefamily.ie
- Parental Equality: www.parentalequality.ie
- Parental Line: www.parentline.ie
- Roller Coaster: www.rollercoaster.ie
- Support for People Parenting Alone: www.solo.ie
- Information for unmarried parents: www.treoir.ie
- Ombudsman for children: www.oco.ie
- Department of Children and Youth Affairs: www.omc.gov.ie
- Kids’ turn: www.kidsturn.org
- Collaborative Family Law Professionals of South Florida: www.collaborativefamilylawfl.com
- European Judicial Network in Civil and Commercial Matters:
  - Information on divorce: http://ec.europa.eu/civiljustice/divorce/divorce_ire_en.htm
  - Information on maintenance obligations: http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ire_en.htm
  - Information on parental responsibility http://ec.europa.eu/civiljustice/parental_resp/parental RESP_IRE_en.htm
- European Judicial Atlas in Civil and Commercial Matters informs on:
  - Matrimonial matters and matters of parental responsibility
  - Maintenance obligations

5. **Please provide information on accessing and applying foreign family law in your country.**

The Rules of Court and Irish Acts are the main sources of foreign family law in Ireland. All can be accessed via the Courts Service of Ireland website: [www.courts.ie](http://www.courts.ie)

Irish judges access and apply foreign law based on the pleadings which are put forward to them in court by counsel who carry out research on the applicable law.
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility


In this case, McGuinness J. held that where a parent is not actually exercising ‘rights of custody’ but merely holds the rights ‘on paper’ the onus is on the parent asserting such rights to show that they are actually exercised.

*P.A.S. v A.F.S.* (Supreme Court, Unreported, Fennelly J., 29 November, 2004)

In this case, 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.”
III. NATIONAL BIBLIOGRAPHY

Regulation Brussels IIbis: Parental responsibility matters

Acts


• Guardianship of Infants Act 1964.

Books


Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)

Acts


• Child Care Act 1991.

• Child Care (Amendment) Act 2007.

Reports


Articles


Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)

**Books**


**Reports**


**Articles**


**Preliminary ruling system on family matters**

**Books**


Reports


Articles


Family Mediation

Books


Reports

- Family Resolutions Pilot Project (September 2004-August 2005).

Articles

National section

ITALY

Maria Giuliana Civinini
Judge
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?
   
   Civil Code, Articles 315 to 337.
   
   Civil Procedure Code, Articles 737 – 742 bis.
   
   No ongoing proposal to reform.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?
   
   A request of return of the child can be proposed to the Juvenile Court (“Tribunale per i Minorenni”) based on Article 11 Reg. Brussels II, Articles 709 ter, 737 to 742 bis of the Civil Procedure Code providing a simple and informal procedure characterised by relevant *ex officio* powers of the judge.
   
   Against the decision (adopted in the form of a decree) a remedy (“ricorso per Cassazione”) is foreseen by Articles 5, 6, 7 Law n. 64/1994.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?
   

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?
   
   Civil Code, Articles 330 to 336, 342 bis and 342 ter; Civil Procedure Code, Articles 317 bis, 318, 709 ter, **736 bis**, 737 to 742 bis

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.
   
   The probate judge (“Giudice Tutelare”, single judge of the Tribunal with competence in the fields of status, capacity, minors protection) oversees the execution of orders concerning parental responsibility adopted by a foreign Court or by the Italian ordinary tribunal (competent in case of separation / divorce cases). If the decision of the competent Court is not sufficiently detailed, he or she can specify the mode of access rights. The probate judge may be requested by the party personally and decides, without formalities.
The enforcement of the decision of the Juvenile Court is responsibility of the public prosecutors of the Juvenile Prosecution Office. The Prosecutor can be assisted by the Juvenile social services of the Minister of Justice.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

Like in all family procedures, the hearing of the child is decided by the judge of the proceeding.

The child can be heard directly by the panel (the Italian Juvenile Court is composed by both professional and lay judges with expertise in the field of psychology, education etc.) or by one of the judge of the panel (upon delegation) with or without the assistance of an expert or of personnel of public social services or the hearing can be performed by an expert appointed by the court for this purpose or in the context of a psychological expertise; the decision is taken on a case by case base. The same modality apply to the case of hearing of the child during a separation / divorce case in which measures of protection of child are requested or the right of visit has to be regulated.

Age and maturity are taken into consideration on a base by case base; the hearing is a procedural human right of the child, it has to be grant at a maximum extent.

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?


Useful information can be found

- on the website of the Minister of Justice
  http://www.giustizia.it/giustizia/it/mg_2_5_10.wp?previsiousPage=mg_12_4_4_2
- and on the website of the Minister of Foreign Affairs
  http://www.esteri.it/mae/doc/Opuscolo_Bambini_Contesi_30062007.doc

8. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels IIbis?

When the court has jurisdiction, separation (judicial and consensual), divorce (judicial or joint) and annulment proceedings can take place and are governed by the procedural rules applicable to trials between Italian citizens. If the applicable (substantive) law provides that they can obtain directly the divorce, separation is not needed.

To facilitate the implementation of Regulation Brussels IIbis, the Department for Justice Affair at the Ministry of Justice, Civil Justice Direction, Office II is in charge
of:

- compliance relating to the enforcement of international judicial cooperation agreements;
- international cooperation and security, notifications and requests to and from foreign countries and enforcement of foreign judgments and other instruments made abroad in civil

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B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?
   - Law 18 June 2009, n. 69, Article 60
   - Legislative Decree 4 March 2010, n. 28
   - Minister of Justice Decree 6 July 2011
   - Relevant information and legal texts can be found on:
     http://www.giustizia.it/giustizia/it/mg_2_7_5_2.wp?previsiousPage=mg_1_8_1

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes transposed into domestic law?
   - Legislative Decree 27 May 2005, n. 116
   - The authority responsible for receiving and transmitting is the Department for Justice Affair at the Minister of Justice, Civil Justice Direction, Office II
     http://www.giustizia.it/giustizia/it/mg_12_1.wp
     mail: ufficio2.dgcivile.dag@giustizia.it
   - The Consiglio dell’Ordine (BAR Association Board) of the place where the court having jurisdiction sits shall decide on the request for legal aid.

3. Is your country a contracting party to any bilateral or international instruments on family law?

Italy is a contracting party of many international and bilateral agreements on family law; online archives organised by topic and by country can be found on the Minister of Justice website, at the following addresses:
   - http://www.giustizia.it/giustizia/it/mg_14_7.wp?search=convenzioni+internaziali&pageCode=mg_1
Bilateral instruments can be researched also on the website of the Minister of Foreign Affair; it is enough to put the name of the Country and a key word (like: “minori” or “famiglia”, etc):
- http://itra.esteri.it/itrapgm/ricerca1.asp

It is worth mentioning: the Agreement between Italy and Romania on 9 of June 2008 on cooperation for the protection of unaccompanied Romanians minors presents on the Italian territory. On October 2007 the Central Body for the protection of communitarian unaccompanied minors was created at the Minister of Justice; relevant documents on
- http://www.giustizia.it/giustizia/it/mg_2_5_2_4.wp

4. **Are there any databases or online tools providing information on family law matters available in your country?**

On the website of the Minister of Justice relevant information, legal text, modules on family and juvenile law can be found
- http://www.giustizia.it/giustizia/it/mg_12_4.wp (minors)
- http://www.giustizia.it/giustizia/it/mg_2_5_2_5.wp (minors)
- http://www.giustizia.it/giustizia/it/mg_3.wp (heritage, family, divorce)

On the website of the Minister of Interior relevant information on international protection seekers can be found

The European Judicial Network in Civil and Commercial Matters provides accessible information on Italian family law on its website:
- Information on divorce:
- Information on maintenance obligations:
  [http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ita_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ita_en.htm)
- Information on parental responsibility

The European Judicial Atlas in Civil and Commercial Matters informs on
- Matrimonial matters and matters of parental responsibility
- Maintenance obligations

5. **Please provide information on accessing and applying foreign family law in your country.**

Based on Article 14 Law n. 218/1995: “1. The ascertainment of foreign law is made by the judge. For this purpose he or she may use, as well as the instruments referred to in international conventions, information acquired through the Ministry of Justice and may also consult experts or specialised institutions. 2. If the judge is unable to ascertain the foreign law indicated by the conflict of law rules, even with the help of the parties, he or she will apply the law determined based on other conflict of laws rules which may be provided for the same case law. In the absence
of such rules, the case is governed by Italian law."

Information can be requested to the Department for Justice Affair at the Minister of Justice, Civil Justice Direction, Office II

- [http://www.giustizia.it/giustizia/it/mg_12_1.wp](http://www.giustizia.it/giustizia/it/mg_12_1.wp)
  - mail: ufficio2.dgcivile.dag@giustizia.it

or through the European Judicial Network in civil and commercial matters

II. NATIONAL JURISPRUDENCE

(this part is simply representative of national jurisprudence):

### Regulation Brussels IIbis in matters of parental responsibility

- **Court of Cassation, UC, Judgment n. 1984/2012**: With regard to jurisdiction over measures on parental responsibility, Article 8 of Regulation (EC) of 27 November 2003, n. 2201 emphasizes only the criterion of the child’s habitual residence at the time of request’s filing, meaning the place of actual and continuous development of the personal life of the child and not the result of the purely arithmetical calculation of the time spent in a place.

- **Court of Cassation, UC, Judgment no. 16864 of 02/08/2011; see also CC, n. 22507/2006 and CC, n. 397/2006**: With regard to jurisdiction over measures relating to parental responsibility, the Article 1 of the Hague Convention emphasizes only the criterion of habitual residence of the child, as determined on the basis of facts existing at the time of the introduction of the judgment. It does not allow the change of jurisdiction, in accordance with the principle of “proximity”, since this is evoked only in terms of domestic jurisdiction. In case of removal of a child (in this case from Switzerland to Italy) the jurisdiction of the court of habitual residence remains, even if the court or tribunal following the transfer has issued interim measures for urgent reasons.

- **Court of Cassation, judgment n. 5465 of 18/03/2004**: In proceedings relating to international child abduction, the contradictory is ensured by informing the person with whom the child is and the person who lodged the request on the date fixed for the hearing and putting both in a position to intervene.

- **Court of Cassation, Judgment, no. 10577 of 04/07/2003**: The failure to grant the parties a time limit for consideration and deduction in relation to a document (report of the counselling center), acquired to the file the previous day of the hearing, is not a ground for nullity of the proceedings, for violation of the principle of adversarial, when it was still allowed the parties to examine the relationship.

- **Constitutional Court March 7, 2011, n. 83**, relating to proceedings under A 250 of the Civil Code that identifies criteria to be applied also to proceedings de potestate, which states “the child must be recognised as a party in opposition proceedings under Article 250 Civil Code. And, if a rule its substantive and procedural representation is entrusted to the parent who made the award (Article 317-bis and 320 Ref. Civ.). Where there is a conflict of interest, even potential, the judge must proceed to appoint a special administrator. This can occur at the request of the prosecutor, or any party who has interest (Article 79 cod. Proc. Civ.). But also ex-officio, having regard to the specific powers granted in regard to the judicial authority in Article. 9, first paragraph, of the Strasbourg Convention.

- **Juvenile Court of Milan, decree 24 July 2009; decree 20 September 2009; decree 15 February 2010**: With the entry into force of the Brussels IIbis Regulation, an exception has been introduced to the supervisory role of the probate judge also foreseeing for him or her an active role. In particular, Article 48 of Regulation (practical arrangements for exercising the right of access) provides that the enforcement court may determine the practical arrangements for organising the exercise of rights of access. The task of the executing court is not only to better point out how, when and where the rights of access (what time, in total autonomy, where the presence of other subjects) but also to engage in any activity that may
initially be necessary to enable the exercise of the rights of access in cases where there are other difficulties, as a rejection of the child to meet the parent with whom the same is not living. In order to execute the instructions of the national authority it will be required (if the parents do not find direct agreements to that effect) conducting investigations or psychological interventions necessary to achieve the regulation established by the court to restore the place of habitual residence without any forcing that could compromise the serenity and balance of the child.
III. NATIONAL BIBLIOGRAPHY

For bibliography references (organised by field) on European family law see: http://fermi.univr.it/europa/servizi/dossier_diritto_famiglia.pdf

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Dr Irēna Kucina
Director of the Department of Cooperation with the European Court of Justice, Latvian Ministry of Justice
Lecturer, Latvian Judicial Training Centre and University of Latvia
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

- the current source of law:
  a) substantive law: the Civil Law\(^\text{28}\), mainly Article 89 – 145; the Protection of the Rights of the Child Law\(^\text{29}\); the Law On Orphan's Courts\(^\text{30}\).
  b) procedural law: the Civil Procedure Law\(^\text{31}\) 244.1 - 244.7 pants.

- reform proposals:
Reform proposals are expected in matters of enforcement with regard to access rights and custody rights and also substantive reform proposals are expected regarding guardianship institute (drafting is not finalised so far). The draft law (Amendments in the Civil Law) which is being examined at the Latvian Parliament now foresees only amendments of terminological nature concerning child custody and access rights. Other reform proposals are expected concerning civil procedure of the taking of the provisional measures on parental responsibilities. The taking of these provisional measures will be speed up considerably and the procedure will be improved in order to make speed up possible.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels Ibis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

Till June 1, 2012 the Civil Procedure Law provided for the child's return's immediate enforcement based on the judgement. But it was revised because the regulation caused complications and did not correspond to the child's interests. For example, if the decision regarding the child's return was adopted, it was within the child's interests to start prompt child's return process, i.e. to ensure prompt and effective decision's enforcement. Situations occurred when a child has already been returned to the country which was his habitual residence before the unlawful removal, but later during the appeal the Latvian court, however, decided not to return the child. As a result, the child was removed from one country to another, as if on the legal basis, but contrary to the child's interests, because the decision's enforcement's and appeal's issue had not been fully considered. Therefore, from June 1, 2012 amendments were introduced to the Civil Procedure Law foreseeing that the first instance court decides on a return within 15 days after the instituting of the

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\(^{28}\) The Civil Law (the English version is not updated after amendments done in that law in June 22, 2006)

\(^{29}\) Protection of the Rights of the Child Law (the English version is not updated after amendments done in that law in December 16, 2010)

\(^{30}\) Law On Orphan's Courts (the English version is not updated after amendments done in that law in December 10, 2009)

\(^{31}\) Civil Procedure Law (the English version is not updated after amendments done in that law in December 14, 2006)
proceedings and ancillary complaint could be lodged within 10 days from the day when the decision is taken by a court, but if a decision is taken without presence of a party - within 10 days from the service of the decision. An appellate court (as the last instance in child abduction cases) as well decides within 15 days.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

There are no domestic jurisdiction rules if no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation).

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

Article 244.5 of the Civil Procedure Law provides that on the basis of a request from the parties the court shall take a decision with which for a period to the rendering of a judgment shall determine the place of residence of the child, the procedures for the care of the child, procedures for the utilisation of access rights, and a prohibition to taking the child out of the State. That means that in Latvia an application of provisional / protective measures is possible when an action for matters that arise from custody rights or access rights is brought. It is not possible to bring an action on provisional / protective measures when the main action on the matter is not brought.

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

Reform proposals are expected in matters of enforcement with regard to access rights and custody rights, therefore as for now there do not exist specific rules on enforcement as regards access rights and the general rules on enforcement are applicable.

The Civil Procedure Law extensively regulates the enforcement procedure for court decisions or judgments. Where the party requests enforcement of a decision or a judgment of a court, according to the Civil Procedure Law the decision or judgment is enforced by bailiffs. The bailiff commences the enforcement procedure after the court has issued the enforcement order upon the request of the person seeking the enforcement and after this person has submitted the enforcement order to the bailiff. Initially, the bailiff requests and gives a fixed period of time for the person, against whom the enforcement is sought, to comply voluntarily with the judgment (decision). If the person does not comply voluntarily with the judgment, the bailiff may use the enforcement measures determined either in the judgment (decision) or by law.

However, the court can provide in its decision or judgment that a child spends a certain period of time with the parent who does not have custody rights and/or particular time for contacts / meetings. The court also may determine that contact with the child may be exercised only in the presence of a third person and in a
certain place. Such determinations by the court stipulated in the decision or in a judgment would be indications for enforcement.

As regards enforcement rules on return of the child following abduction, amendments to the Civil Procedure Law were made in June 1, 2012. The court decides in a decision on return of a child how a child should be returned in a voluntarily way within the fixed time of a court. If it has not been done, the compulsory enforcement by the bailiff would start on application of the applicant. As well, a fine – 500 LATS - against defendant could be applicable.

The bailiff takes order to the orphan's court to find all circumstances of a situation of a child, if necessary finding the child and the defendant with help of the police. If the orphan's court finds all the circumstances of a situation of a child, the bailiff decides when and where a return of a child will take place and gives an order to the orphan’s court. The bailiff may use the help of psychologist or the police to take part during the enforcement and informs as well the applicant. The defendant is not informed about the time and place of enforcement. During the enforcement the buildings can be opened by forcible means. If the applicant is participating during the enforcement, a child is returned to him/her. If not, a child could be placed in a social care centre in order to enable the orphan’s court to take all the necessary steps to return a child to his/her state of habitual residence. If enforcement is not possible due to the action of defendant, criminal proceedings could be started against him/her.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

In accordance with Article 20 of the Protection of the Rights of the Child Law, a child shall be given the opportunity to be heard in any court or administrative proceedings related to the child, either directly or through a lawful representative of the child or through a relevant institution. In particular the obligation to hear the opinion of the child is stressed in following situations, for example:

a) The Civil Law provides for the obligation to hear the child's opinion in disputes related to parental responsibility matters. In accordance with paragraph 4 of Article 178 ¹ of the Civil Law, disputes between parents regarding the custody rights shall be resolved taking into account the interests of the child and considering the child’s opinion, if he can define it, taking into account his age and level of maturity. In accordance with Article 238 of the Civil Procedure Law in proceedings of divorce or annulment of marriage if they concern a child, the court shall take into account the opinion of the child if he/she can define it. Also in matters regarding custody rights, child care and exercising of access rights the court shall consider opinion of the child if he/she may formulate it.

b) In cases on return of a child to the state of his/her habitual residence Article 644¹⁹ of the Civil Procedure Law provides that the court finds out the child’s opinion, except the case, if this is not appropriate, considering the child’s age and the level of maturity.

Courts can invite the child to court to give testimony or ask the orphan's court to find out the opinion of the child. If the child comes to court for giving testimony, then the court hears the opinion of the child in the court room. However, the national laws and regulations do not provide for the obligation to the officials of
orphan’s courts to hear the child only in the rooms of orphan’s courts. Thus, the hearing of the child by the officials of the orphan’s courts may take place in other places, for example at school or at the place of residence of a child or at psychologist’s place. Usually a psychologist is involved in finding out the opinion of child.

In accordance with the legal acts in force, the opinion of the child is considered by a judge or orphan’s court. If the judge does not carry out the hearing of the child, but it is carried out by the orphan’s court, then the judge does not participate at the hearing of the child. If it is necessary within the framework of the civil proceedings, the decision of the orphan’s court indicating the opinion of the child, who has been heard, shall be submitted to the court, for example, together with the application for adoption. In practice, usually the orphan’s courts submit to the court both, the decision of the orphan’s court and protocol from the hearing indicating the particularities of the conversation.

National law and regulations do not provide for definite age from which the child may be given opportunity to be heard. Decisive criteria are the ability of a child to define its opinion or as it is also provided for in Article 12 of the Convention on the Rights of the Child, which is also binding in Latvia, age and maturity of the child. It is possible that the child is not heard in the court proceedings at the court room if the court is provided with the opinion of the specialist indicating that participation of a child in the court proceedings in court room will affect the health or psychological situation.

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

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8. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

No amendments to national legal instruments/procedures have been made in place for the application of regulation Brussels IIbis as this Regulation is a directly applicable legal instrument.
B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

The Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters has not been transported into domestic law yet. Since so far in Latvia mediation is provided on a self-organised mediators basis, the aims of the Directive are achieved within the framework of current legislation, in particular, within the framework of the court settlements (conciliation between parties encouraged and, if reached, approved by court) provided for in the Civil Procedure Law.

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

The Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes is transposed into the State Ensured Legal Aid Law.32

3. Is your country a contracting party to any bilateral or international instruments on family law?

I) Multilateral international conventions:

Hague Conference on Private International Law:
- Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
- Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations

Council of Europe:
- European Convention on the Adoption of Children
- European Convention on the Legal Status of Children born out of Wedlock
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
- European Convention on the Exercise of Children's Rights

32 State Ensured Legal Aid Law (the English version is not updated after amendments done in that law after October 21, 2010)
II) Bilateral international agreements
The Republic of Latvia has bilateral international agreements on legal assistance and legal relations with Russian Federation, Ukraine, Belarus, Uzbekistan, Kyrgyzstan, Moldova, Lithuania, Estonia and Poland. The scope of the legal assistance treaties includes both civil and criminal law matters. The legal assistance and legal relations agreements entered into by the Republic of Latvia have a very broad field of application: matters as jurisdiction, applicable law, recognition and enforcement of judgments, service of documents, taking of evidence.

4. Are there any databases or online tools providing information on family law matters available in your country?

European Judicial Network in Civil and Commercial Matters
- Information on divorce: http://ec.europa.eu/civiljustice/divorce/divorce_lat_en.htm
- Information on maintenance obligations: http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_lat_en.htm
- Information on parental responsibility: http://ec.europa.eu/civiljustice/parental_resp/parental_resp_lat_en.htm

European Judicial Atlas in Civil and Commercial Matters


The Administration of the Maintenance Guarantee Fund http://www.ugf.gov.lv/eng/


The Ministry of Justice http://www.tm.gov.lv/lv/

5. Please provide information on accessing and applying foreign family law in your country.

In cases where foreign law is applied, the party to proceedings who refers to the application of foreign law shall submit to the court a translation of the text of the foreign law with a certified translation into the official language. Where the content of the submitted law is not clear to the court, it, ex officio or upon request of a party, may submit a request for information under a bilateral or multilateral
In Latvia there is not established a non-governmental body responsible for providing for the text of foreign law as such exists in some countries. The European Convention of 7 June 1968 on Information on Foreign Law and bilateral treaties in the matter of access to information on the content of foreign law are applied very rare due to the fact that in practise foreign law mostly is not applied.

**Extract for the Civil Procedure Law:**

“Chapter 80

Application of Foreign Laws to Adjudication of Civil Matters

[7 April 2004]

**Section 654. Texts of Foreign Laws**

In cases where foreign laws shall be applied, the participant in the matter who refers to the foreign law shall submit to the court a translation of the text in a certified translation into the official language according to specified procedures.

[7 April 2004]

**Section 655. Ascertaining the Contents of Foreign Law**

(1) In accordance with the specified procedures in international agreements binding on the Republic of Latvia, a court shall ascertain the contents of the foreign law to be applied.

(2) In other cases, a court through the intermediation of the Ministry of Justice and within the bounds of possibility shall ascertain the contents of the foreign law to be applied.

[7 April 2004] “
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

There are some cases where Latvian courts have rejected to precede an application or ended the cases with the judgment due to the fact that it was not possible to apply Regulation Brussels IIbis in Latvia in accordance to Article 8 because courts found the habitual residence of a child in another Member State. For example, in case No.C17170610 (April 28, 2011) Jūrmala’s city court decided that the habitual residence of a child was in Spain, because a child was living in that country for the last 2 years and attended school there for that period. In that judgment a court referred on the judgment of the European Court of Justice C-523/07 in order to determine the habitual residence of a child. The similar case is No.C35115711/2 (October 5, 2011) where Sigulda’s court decided that a habitual residence of a child was in the United Kingdom by as well referring on the judgment of the European Court of Justice C-523/07 and taking into account that a child lived in the United Kingdom for two years, knew language, had been registered to attend district doctor and had been started education in primary school.
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- Kucina, I. Bērnu pārrobežu nolaupīšanas civiltiesiskie aspekti. // Jurista Vārds – 2009. - Nr. 29

Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)
No relevant national bibliography available on this subject matter.

Preliminary ruling system on family matters
No relevant national bibliography available on this subject matter.

Family Mediation
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- Rone D. Mediācija: jēdziens un iespējas. // Jurista Vārds – 2006. – Nr.11
National section

LITHUANIA

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

Sources of law

a) Substantive law:

There are several important legal sources for parental responsibility matters in Lithuania. The Constitution of the Republic of Lithuania, as the main law of the country, contains the general principles of family law, as well as indicates the main parental responsibilities (Article 38 establishes the principle of equality between spouses in the family, the right and duty of parents to bring up their children and to support them until they come of age; the right of parents to educate their children (including the sphere of religion) is contained in Articles 26 and 40). Article 38 foresees that the family is the basis of the society and the State, accordingly it deserves special protection. The text of the Constitution: http://www.lrkt.lt/Documents2_e.html.

Another important legal source are international treaties (the United Nations Convention on the Rights of the Child, the Council of Europe Convention on the legal status of children born out of wedlock, the European Convention on Human Rights, the Hague Convention on the Civil Aspects of International Child Abduction, etc.) and bilateral agreements on legal assistance and legal relations in family cases.

The main source for parental responsibilities (the term used to describe it in the Civil Code of Lithuania is ‘parental authority’) is Chapter XI of Book Three of Lithuanian Civil Code (CC). The text of the CC (latest updates of English version made on June 2011): http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc?p_id=404614&p_query=&p_tr2=2

Parental responsibilities (authority)

The legal essence of parental authority defines the Article 3.155 of the Lithuanian CC. The concept of ‘parental authority’ implies the totality of the personal and patrimonial rights and duties of the parents exercised exclusively in the interests of the child; parents have a right and a duty to properly educate and bring up their children, care for their health and, having regard to their physical and mental state, to create favourable conditions for their full and harmonious development so that the child should be ready for an independent life in society (Article 3.155 § 2). Article 3.156 of the CC provides that the father and the mother shall have equal rights and duties in respect of their children. The principle of equal parental authority entails that parents have equal rights and duties towards their children irrespective of whether the child was born to a married or unmarried couple, after divorce, legal separation or judicial annulment of the marriage.

Determination of the place of residence of the child

- Articles 2.14, 3.168 – general rules;
- Article 3.169 - child’s residence where the parents are separated;
- Article 3.174 - disputes over a child’s residence.

The child’s place of residence is the place of residence of his (her) parents. When the parents decide to separate, the child’s residence issue is decided by their mutual
agreement. If the dispute arises on the issue, the determination of the child’s residence may be resolved by a court.  

**Maintenance of contacts (personal relationships)**

A child has a right to have contact with his (her) parents no matter whether parents live together or separately and to have contact with close relatives, except when it is prejudicial to the child’s interests. It is important to mention, that current reform proposals of the CC include a proposal on the amendments to the above-mentioned regulation (see the proposal No. XIP-4603, registered on 26 June 2012). A child should have a right to have contact with relatives (not just with close relatives), with whom the child has close emotional ties. This would help to ensure family relations in a much broader sense.

**Guardianship and curatorship of minors**

If the parents are unable (unwilling) to exercise parental responsibility over their children, another person can be appointed for securing the child's rights, the institute of the guardianship and curatorship of minors is established for this purpose (Chapter XVIII of the CC). The fundamentals of placing a child under temporary and permanent child guardianship (curatorship) are provided in the Articles 3.254 and 3.257. The issues determining the child’s guardianship are also regulated by the Resolution of the Government of Lithuania ‘On the adoption of the provisions of the organisation of the child's custody’ (new version of the act came into force on 1 September 2012).

Current reform proposals of the CC include a proposal to amend the rules on the establishment of the guardianship and curatorship of minors as well (see the above-mentioned proposal No. XIP-4603). In practice temporary guardianship (curatorship) of a child may last for an indefinite period and the question of the restriction of parental authority may be left unsolved. It is assumed that the institutes of the guardianship (curatorship) of minors and restriction of parental authority should be

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33 There was some discussion on whether the removal of the child is unlawful, when the parent, with whom the child's habitual place of residence was declared by the court's judgment, takes the child and departs to live abroad (should the situation be defined as 'child abduction' or should a violation of separated parent and child communication rights be presupposed, etc.). From one standpoint, as was mentioned above, the notion of equal parental authority means that, even when the child's habitual place of residence is declared with one of the parents, both parents have equal rights towards their child. However, it is important to draw attention to the national courts practice of recent years, where it was stated in respect of the matter of the establishment of the residence of a minor with one of the parents (the mother), that: ‘the circumstance that at the time when the residence of the child was established, the mother lived in the Republic of Lithuania does not restrict her constitutional rights to move and to choose the place of residence in Lithuania freely, as well as to leave Lithuania. These rights may not be restricted otherwise than by law and if it is necessary for the protection of the security of the State, the health of the people as well as for administration of justice (Article 32 of the Constitution of the Republic of Lithuania). A change in the place of residence of a minor whether he/she is moving to another town or state automatically does not mean a violation of the communication rights of a parent and the child. Having in mind the possibilities to freely cross the borders of the states, the developed transportation and communication infrastructure, the importance of a geographical distance is diminished. With that in mind, the circumstance that the mother chose her place of residence after the establishment of the residence of the minor with her in another state does not automatically presuppose a violation of the father and child communication rights, as well as does not deny such a fact either. The significance of this factor can be evaluated only at the hearing of the case’ (see Klaipėda Town District Court decision No 25-1368-370/2009; see also Summary review of courts practice on the establishment of child’s residence where the parents are separated, issued by the Supreme Court of Lithuania on 21 June 2002, approved by decree No. 34, where it was noted, that if the circumstances change, for instance, the place of child’s residence was established having in mind his (her) living in Lithuania (but later he(she) moves abroad), the other parent may file a second suit for the determination of the child’s residence (Article 3.169 § 3)).
applicable integrally. A state institution on the protection of the rights of the child
will be obliged to file a claim for the temporary restriction of the parental authority
if during 6 month period the circumstances relating the establishment of temporary
(guardianship) (improper use of the parental authority) have not changed. It is also
proposed to establish a court permission system for the establishment of the
temporary guardianship (curatorship) as in the meantime – the decision (ordinance)
of the municipal board (the mayor) is passed on the issue (there is no intervention
of a court). The court will be also entitled to decide for itself what type of the
guardianship (curatorship) should be appointed, when the parental authority is
temporary restricted. Court's obligation to resolve the questions concerning the
child's residence, maintenance, etc., when restricting the parental authority, is set as
well.

Restriction of parental authority
There are two forms of restriction of parental responsibilities (authority): separation
of the parents from their child and restriction of parental authority (the rules on
the issue are established in Article 3.179-3.184 of the CC). Separation of the parents
from the child is possible without the fault of the parents if the parents do not live
with the child and are unable to exercise their parental responsibilities for objective
reasons, e.g. mental or other serious illness of the parents (Article 3.179 of the CC).
The restriction of parental authority (temporary or unlimited) is possible only on the
basis of the fault of the parent(s) (Article 3.180 of the CC). Temporary or unlimited
restriction of parental authority involves the suspension of the personal and
property rights of the parents based on consanguinity and under the law. The
parents, however, shall retain the right of visitation, except where this is prejudicial
to the child's interests. Where parental authority is restricted unlimitedly, the child
may be adopted without the consent of the parents.

Other legal acts
There are also special laws concerning the protection of children rights, which are
frequently applicable in family relationship matters, for instance, Law on
Fundamentals of Protection of the Rights of the Child (No. I-1234, issued on 14
March 1996, last time amended in 2006). Special regulations on family law matters
may be adopted by the Government and others state institutions as well (see the
abovementioned Resolution concerning the organisation of the child's custody; the
Order of temporary departure of the child abroad (approved by the Government's
Resolution No. 414 on 25 April 2007, came into force on 1 June 2007), etc.).

b) Procedural law:
The main act of civil procedure is Lithuanian Civil Procedure Code (CPC), the major
amendments of the CPC came into force on 1 October 2011. Lithuanian version of
hearing cases concerning family legal relations, a court shall also follow the rules
for procedural law provided in the CC (Article 375 § 2 of the CPC).

Besides the Brussels IIbis Regulation, which is directly applicable, there also exist the
Law of 13 November 2008 No. X-1809 on implementation of the EU and
international legal acts regulating civil process (Implementation law) containing
particular provisions regarding the implementation of the Brussels IIbis Regulation
and the Hague Convention on the Civil Aspects of International Child Abduction
(Hague Convention). Lithuanian version on the following
2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

Child return cases are heard according to a simplified procedure set out in Section XXXIX of the Lithuanian Civil Procedure Code (CPC) as far as the Brussels IIbis Regulation or the Hague Convention on the Civil Aspects of International Child Abduction do not regulate otherwise (Article 7 § 1 of the Law of 13 November 2008 No. X-1809 on implementation of the EU and international legal acts regulating civil process (Implementation law)). The terms established in Article 11 of Brussels IIbis Regulation, which is directly applicable, must be respected strictly when examining the return applications (Article 7 § 5 of the Implementation law). It has to be noted, that the procedure for hearing return applications provides for an active court role in the hearing of the case, the possibility for the court to collect evidence on its own initiative (the existence of public interest), etc. There also exists a general duty of all courts to secure prompt, unprotracted hearing of a civil case and to make efforts to settle a case during one court session (Article 7 of the CPC). The latest amendments of the CPC also provide participants of the proceedings with the procedural measures designed to accelerate the ongoing judicial trial (Article 72). If a first instance court does not perform procedural acts, that must be performed under the CPC (the CPC declares that for certain categories of cases the law may establish a term for case to be heard), a procedure participant interested in the performance of the respective acts has a right to apply to the appellate court with a request to set a term for such acts to be carried out. Furthermore, accelerated hearings may be ensured by the control functions carried out by the administration of the court.

Lithuanian law foresees the possibility of an appeal against a decision regarding the return of the child. Decisions of Vilnius Regional Court (it has jurisdiction in the abduction cases) may be appealed to the Court of Appeal of Lithuania by submitting a separate complaint (Article 7 § 6 of the Implementation law). A written procedure – as a measure for prompter hearing of a case – is established for the examination of separate complaints, except in cases when the court finds a need for an oral hearing (Article 336 of the CPC). Cassation is not allowed.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

Part VII of the Lithuanian Civil Procedure Code (CPC) establishes rules of international civil procedure. There is a general rule, that provisions of Part VII of the CPC shall apply unless an international agreement whereto the Republic of Lithuania is a party governs relevant relations otherwise (Article 780 of the CPC).

Article 785 of the CPC (jurisdiction in the cases regarding the legal relation of the parents and children) states, that the courts of the Republic of Lithuania have exclusive jurisdiction in the cases regarding the legal relation of the parents and children, proceedings on adoption relations if any of the parties is a citizen of the

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Republic of Lithuania or a person with no citizenship and has a permanent place of residence in the Republic of Lithuania. When both parties of the dispute have a permanent place of residence in the Republic of Lithuania, their matters specified above shall be examined exclusively by Lithuanian courts. Furthermore, the Lithuanian courts are competent to decide disputes regarding parents and children legal relation and adoption proceedings in cases when both parties are foreigners but their permanent place of residence is in Lithuania.

Under Lithuanian law the courts of general jurisdiction are competent to hear family cases. According to the Articles 26-28 of the CPC, family cases are examined by the district courts as the first instance courts. Under the general rule of territorial jurisdiction, a claim is brought to a court according to the defendant's place of residence (Article 29 of the CPC). However, alternative territorial jurisdiction is inherent to family cases. It helps to insure more expeditious and effective realisation of access to a court in cases where particularly significant rights and interests of claimant are defended. For instance, claimant's choice of jurisdiction exists in cases concerning the dissolution of the marriage, if the claimant has minor children living with him/her (Article 381 § 1 of the CPC), a claim for restriction of parental authority may be filed with the district court of the claimant's place of residence by one of the child's parents or the guardian (carer), with whom the child is living (Article 401 § 2 of the CPC), an application to dissolve a marriage by the mutual consent of the spouses (non-contentious proceedings) shall be filed with the district court of the place of residence of one of the spouses (Article 538 § 2 of the CPC).

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

Under Lithuanian law interim measures (provisional protection measures) are understood as a safeguard mechanism, the aim of which is to secure that the forthcoming court decision is successfully enforced. Interim measures can be applied when there are reasons to believe that without their application after the claim is satisfied, its execution could be impeded or become impossible. The regulation on interim measures set out in the Lithuanian Civil Procedure Code (CPC) (Article 145 – general measures), the Lithuanian Civil Code (CC) (Article 3.65 – special measures for family cases) and the Law of 13 November 2008 No. X-1809 on implementation of the EU and international legal acts regulating civil process (Implementation law) (Article 12 – measures in child return cases) gives a judge wide discretion to achieve the aim of the child's best interest protection in family cases. Besides the request of participants in a proceeding or other interested persons, a court may initiate application of interim measures on its own initiative. This initiative is exclusively justified when it is necessary for the protection of a public interest and when non-application of particular measures may violate the rights and legitimate interests of individuals, society or the State (Article 144 of the CPC). Mostly the interim measures are applied on the initiative of a court in family cases (in fact it is not a very frequent practice as it relates to the exception of a dispositive principle).

A special act implementing particular EU law states that once a request for the return of a child has been accepted by a court, the court may at the request of the claimant (plaintiff) or the bailiff, or on its own initiative apply the interim measures – prohibition to the defendant (debtor) to leave the Republic of Lithuania and (or) prohibition to remove a child out of the Republic of Lithuania without a permission
of the court. Once a return decision in respect of the child has been taken, the court must apply the abovementioned measures by its own initiative (Article 12 of the Implementation law). Having regard to the particular circumstances of a case, the court may apply the interim measures that it considers necessary for the protection of the child's interests (for instance, establishment of a temporary communication order between a child and a parent until the particular dispute or request for the return is to be solved out, see. Decision No. N2-2189-520/2009 issued by Vilnius Regional Court; Decision No. 25-448-623/2010 issued by Vilnius Regional Court; Summary review of courts practice on the application of interim measures, issued by the Supreme Court of Lithuania, published in the bulletin ‘Court Practice’ No. 34, 2011).

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

Special execution order of decisions regarding access rights and the return of the child following abduction is usually established in the operative part of the decision and it is orientated to the special circumstances of each case. If an execution order is unclear, it is possible to apply to the court that passed the decision for the clarifications to be made.

If a decision delivered by a court is not executed voluntarily, a bailiff carries out the enforcement pursuant to provisions of the Lithuanian Civil Procedure Code (CPC) (Part VI - Enforcement Procedure) and the Rules of the Enforcement of Judgments (approved by decree No. 1R-352 of Minister of Justice on 27 October 2005, latest amendments made on 20 June 2012). Lithuanian version of the act and other useful information may be accessed at: [http://www.antstoliurumai.lt/index.php/pageid/1029](http://www.antstoliurumai.lt/index.php/pageid/1029).

Decisions on the return of children are enforced pursuant to the Article 764 of the CPC (latest actual amendments came into force on 1 October 2011). According to the national rules regarding child’s return a detailed strategy of execution should be prepared (preliminary restoration of contacts between a child and a parent, with whom the child does not live, may be required, etc.). The bailiff is responsible for the organisation of the enforcement procedure, representatives of the competent institutions give adequate recommendations and perform the transfer of the child (bailiff as a legal professional does not carry out functions that require special knowledge of psychology, social work and etc.- these functions are left for the competent specialists).

The procedure
When a decision to return a child is not executed voluntarily during a term set out in the decision or in the warning to satisfy a decision, the bailiff (after assessing the recommendations of the State authority for protection of children’s rights, representative of a police and a psychologist) passes a warrant on the execution order. The nature of execution measures and questions of their appliance must be discussed in detail in the warrant. The copy of a warrant shall be sent to parties of a proceeding and other interested persons.

A person seeking a return of a child and a representative of the State authority for protection of children’s rights must participate during the enforcement of decisions of non-pecuniary nature delivered in respect of the minor. To ensure the protection of the child’s rights, at the request of a party or a representative of the
State authority for protection of children’s rights or, when a bailiff decides to participate in the enforcement procedure, a psychologist is called to take part in the enforcement procedure. If the responsible party fails to implement the decision, the bailiff may apply to the local district court for the permission to take a child by force. When taking a child by force, representatives of a police eliminate the obstacles for the execution of a decision and the representatives of the State authority for protection of children’s rights take the child and hand him over to the person, to whom the child should be returned. When a court dismisses the application for taking a child by force, it must indicate the order of a child’s transfer. All abovementioned decisions should be executed while ensuring the protection of the child’s rights.

In the rules of the Enforcement of Judgments (§ 25) it is established, that when executing other decisions of non-pecuniary nature delivered in respect of the minor (decisions on communication with a child order, etc.), the bailiff informs the child’s residence State authority for protection of the child rights about the acceptance of an enforceable instrument to be executed. To ensure the protection of the child’s rights, at the request of a party, a representative of the State authority for protection of children’s rights or, when a bailiff decides to participate in the enforcement procedure, a psychologist is called to take part in the enforcement procedure. If the responsible party fails to implement the decision during a term set out in the judgment or in the warning to satisfy a judgment, bailiff applies to the child’s residence State authority for protection of children’s rights for the submission of available information (in written form if the bailiff requires). Bailiff can discuss the nature of execution measures and the execution order with a representative of State authority for protection of children’s rights, if there is a need. When available material has been assessed, bailiff passes a warrant on the execution order. No later than the next workday the bailiff sends the warrant to parties of a proceeding and the State authority for protection of children’s rights.

Some particularities of execution order are also described in the Law of implementation. According to the Article 9 the judgments of Member States courts granting access rights and entailing the return of a child are enforceable documents, enforced pursuant to provisions of the CPC (Part VI - Enforcement Procedure) as far as this law does not regulate otherwise. The certificates referred to in the Article 41 and 42 of the Regulation Brussels IIbis and issued in European Union Member States are enforceable documents. In Article 10 of the abovementioned law it is stated that, if the judgment on access rights does not contain the needful (or enough) instructions, the bailiff, in charge of execution of the judgment, applies to the district court of the enforcement place for practical instructions on the use of access rights. A child, capable of providing his opinion (views), has to be interviewed directly on the issue in the court hearing by applying mutatis mutandis rules of the Article 380 of the CPC. The State authority for protection of children’s rights is obliged to prepare a conclusion on the issue. The court’s order containing instructions on the access rights may be appealed by submitting a separate complaint (the cassation is not allowed).

If the responsible party fails to implement the decision, fines may be imposed. In such a situation a bailiff draws up an act of failure to comply with the decision and submits it to the local district court of bailiff office in order that the adequate measures such as imposition of a fine (up to 1000 LTL for each day of non-execution in favour of a judgment creditor) were taken (Article 771 of the CPC establishes the rules on enforcement of judgments obligating a debtor to perform or cancel
particular actions). Child abduction and non-execution of court judgment situations may give rise to criminal liability as well (Articles 245 and 156 of the Criminal Code).

6. **Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?**

In a general sense a child under Lithuanian law is considered as an independent person of law having his own material and non-material rights separated from those of the parents. In Article 380 § 1 of the Lithuanian Civil Procedure Code (CPC) (general provisions on special features of hearing family cases) it is established that when a decision is being made on any issue regarding a child, a child, capable of providing his opinion (views) (*age limits are not established*), has to be interviewed directly, or when it is not possible - through a representative (for instance, parents, guardians, children rights protection authorities) (the same notion is set out in the Articles 3.164, 3.177 of the Lithuanian Civil Code (CC)). When making a decision, the child’s opinion has to be taken into account, as far as it does not contravene with the best interests of the child (Article 380 § 1 of the CPC).

The child’s opinion (views) may be heard through a representative, when the direct interview in the court hearing may conflict with the interest of the child because of his sensitiveness, health condition, etc. The court has a possibility to find out the child’s opinion (views) in the stage of preparation for a court hearing by inviting parents and a child for a conversation.

The child’s opinion can be expressed orally, in writing, or in other ways selected by the child (Article 380 of the CPC). In cases where the court has doubts as to the sufficient maturity of the child to formulate and express his views (opinion) or there arises any others issues as to the psychology of the child, the court may appoint a psychological expertise (Article 212 of the CPC).

The court normally decides on the maturity of the child. When deciding on a child’s sufficient maturity to express his opinion (views), the court takes account to the child’s age and motivation given for the opinion (views) expressed. Under the Article 185 of the CPC, the court assesses all the evidence of the case according to its conviction, based on an overall and objective examination of the circumstances, presented during the process, and the laws. The views and objections of the child are considered together with all the evidence (the child’s opinion is important, but not binding on a court when it passes the judgment).

7. **Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?**

Article 11 of the Law of 13 November 2008 No. X-1809 on implementation of the EU and international legal acts regulating civil process (Implementation law) declares that under the Brussels IIbis Regulation there are two Central Authorities appointed:

- The Ministry of Justice is responsible for the courts cooperation and providing the information on the Lithuanian procedural rules concerning the implementation of Brussels IIbis Regulation

- The Ministry of Social Security and Labour is responsible for all other functions.
The decree of the Minister of the Social Security and Labour of 29 December 2008 No. A1-425 on granting authorisation in respect of the functions of Central Authority empowers the State Child Rights Protection and Adoption Service to perform all the functions of Central Authority.

State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour
A. Vivulskio str. 13
LT-03221 Vilnius
Lithuania
Tel. +370 5 231 0928
Fax +370 5 231 0927
E-mail info@ivaikinimas.lt
http://www.vaikoteises.lt/en/

The languages spoken: English, French, Russian

8. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

The national legal instrument put in place for the application of Regulation Brussels IIbis is the Law of 13 November 2008 No. X-1809 on implementation of the EU and international legal acts regulating civil process containing particular provisions regarding the implementation of the Brussels IIbis Regulation and the Hague Convention on the Civil Aspects of International Child Abduction.

Lithuanian version on the following link: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=429289&p_query=&p_tr2=2

B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

The Directive was transposed into the Law on Conciliatory Mediation in Civil Disputes (adopted on 15 July 2008, No. X-1702, the Directive was formally transposed by the latest amendments on 24 May 2011), which provides an opportunity to use conciliatory mediation in judicial and non-judicial civil disputes. English version of the Law may be accessed at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=404617

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

The provision of State-guaranteed legal aid is governed by the Law on State-Guaranteed Legal Aid (adopted 28 March 2000, No. VIII-1591, latest amendments were made on 19 June 2012). Lithuanian version of the Law may be accessed
English version (latest updates made on 16 April 2009)

The Directive is transposed into this act. The Ministry of Justice has also prepared a proposal on the amendment to the abovementioned law. The amendment provides that in cases of child abduction persons shall be eligible to secondary legal aid regardless of the property and income levels established by the Government of the Republic of Lithuania. This amendment should eliminate any delays when receiving State-guaranteed legal aid. There is also mentioned that conciliatory mediation will be an integral part of State-guaranteed legal aid. The respective service will be provided when at least one party to the dispute is entitled to receive secondary legal aid. Special institutions under the Ministry of Justice will organise the conciliatory mediation. An attorney, providing secondary legal aid, will be able to initiate the abovementioned process.

3. Is your country a contracting party to any bilateral or international instruments on family law?

I) Multilateral international conventions

Convention for the Protection of Human Rights and Fundamental Freedoms with additional protocols (1950)
European Convention on the Legal Status of Children Born out of Wedlock (1975)
Convention on protection of children and co-operation in respect of intercountry adoption (1993)
European Agreement on the Transmission of Applications for Legal Aid (1977); Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid

II) Bilateral agreements

Lithuania has bilateral agreements (establishing provisions on jurisdiction in family cases, conflicts of law, recognition of judgments, etc.) with the following States: Armenia, Azerbaijan, Belarus, Estonia, Moldova, Kazakhstan, Latvia, Poland, China,
4. Are there any databases or online tools providing information on family law matters available in your country?

Seimas (Lithuanian parliament)
(Search of the Legal Acts of the Republic of Lithuania)
http://www3.lrs.lt/dokpaieska/forma_e.htm

Supreme Court
(Case-law search, the information is available only in Lithuanian)

National Courts Administration
http://www.teismai.lt/en/?type=0

Ministry of Justice
http://en.tm.lt/

Ministry of Social Security and Labour
http://www.socmin.lt/index.php?-1774400810

Ministry of Foreign Affairs
http://www.urm.lt/index.php?2572939637

State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour
http://www.vaikoteises.lt/en/

European Judicial Network in Civil and Commercial Matters:
- Information on divorce:
  http://ec.europa.eu/civiljustice/divorce/divorce_lit_en.htm
- Information on maintenance obligations:
  http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_lit_en.htm
- Information on parental responsibility
  http://ec.europa.eu/civiljustice/parental_resp/parental_resp_lit_en.htm

European Judicial Atlas in Civil and Commercial Matters informs on:
- Matrimonial matters and matters of parental responsibility
- Maintenance obligations

5. Please provide information on accessing and applying foreign family law in your country.

According to the Article 808 § 1 of the Lithuanian Civil Procedure Code (CPC) (application of foreign law) in cases envisaged in international treaties or laws, a court shall apply, interpret and define the contents of foreign law on its own initiative (ex officio). If application of foreign law is set forth by a mutual agreement, all evidence related to the contents of applicable foreign law in accordance with the official interpretation of such law as well as practice of its application and doctrine in a relevant foreign state shall be provided by the party to the dispute that bases the arguments on the foreign law; at a request of the
party, the court may assist in the party’s efforts to collect information about the applicable foreign law (Article 808 § 2).

The official texts of laws, relevant case-law, legal doctrine and other important information may be received in various ways – through judicial cooperation networks by contacting the appointed persons or using available legal databases on the websites (for instance, the European judicial network in civil and commercial matters is a really effective tool; the Network of the Presidents of the Supreme Judicial Courts of the Member States of the European Union may be also used; INCADAT (the Hague Conference on Private International Law) provides significant information in child abduction cases, etc.). Furthermore, it is also possible to seek information on the basis of bilateral agreements or other international instruments (for instance, on the basis of the European Convention on information on Foreign Law – through the Ministry of Justice; in fact, it’s an exceptional measure).
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

- jurisdiction, alleged ‘child abduction’ (child’s habitual residence as the main criterion to determine the jurisdiction (application of Article 8 of the Regulation Brussels IIbis; the child’s place of a permanent residence was established in another EU country – family moved to live abroad by mutual consent, the child has been living in another EU country for 3 years, etc.); the interpretation of a notion ‘wrongful removal’ and ‘wrongful retention’ - the situation wrongly identified as ‘child abduction’; interpretation of the Articles 2(11), 10 (a), (b)(i) of the Regulation Brussels IIbis): decision No. 3K-3-254/2007 of the Supreme Court of Lithuania in essence approving the decisions of lower courts (the shortcomings identified were not essential).

- the possibility of the re-opening proceedings in child return cases (the rules on the re-opening proceedings, established in the Chapter XVIII of the Lithuanian Civil Procedure Code (CPC), correlate with Regulation Brussels IIbis and the Hague Convention, if the enforcement of a final judgment on the return of the child is not suspended and relations between the child and father (mother), with whom the child does not reside, are not affected and the child is protected from the harmful effects in this respect): decision No. 3K-3-91/2008 of the Supreme Court of Lithuania annulling the decisions of lower instance courts, the case was remitted for a rehearing.

- grounds for the re-opening proceedings in child’s return cases; grave risk of harm/intolerable situation in Hague abduction case; relation between the Article 13 of the the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) and the Article 11 (4) of the Regulation Brussels IIbis; the prejudicial power of the ECJ preliminary ruling (the request to reopen proceedings was not granted, as no grounds for such an extraordinary measure were established; no exceptional circumstances and evidences, that there was a grave risk, that return would expose the child to physical harm or otherwise place the child in an intolerable situation, were adduced (for instance, new, strange language environment for a young age child is not the exceptional factor); adequate arrangements have been made to secure the protection of the child after the return – that eliminated the application of the Article 13 of the Hague convention; furthermore, there was a reference to the preliminary ruling of the ECJ (No. C-195/08 PPU) on the effects of the ‘certified’ decision of the court of the Member State of origin to the on-going proceeding in the ‘enforcement’ state made - it is for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child): decision No. 3K-3-403/2008 of the Supreme Court of Lithuania by which the appellate court’s decision was left unchanged. Also please note, that, a contrario, in the decision No. N2-2189-520/2009 of Vilnius Regional Court (the appeal was not lodged) where the request on the return of a child was denied by applying the Article 13 (b) of the Hague Convention (young child’s separation from his mother, with whom he has close emotional ties, mother’s financial inability to reside in the UK until the custody case is resolved and the applicant’s refusal to secure family’s living condition in the UK justified the denial of the request; no evidence on measures to secure the protection of the child after the return were adduced).

- jurisdiction (Article 15 (3) (d) (transfer of the case would be unreasonable), court’s active role in parental responsibility cases and not formal participation in the
proceedings of the representatives of the State authority for protection of children’s rights (no activity established), direct and indirect cooperation between courts and central authorities (Article 55-58 of the Regulation Brussels IIbis) (no cooperation established), the rules on admissibility of documents as evidence (assessment of documents issued in other countries under the rules of EU and international civil procedure): decision No. 3K-3-141/2011 of the Supreme Court of Lithuania by which the part of the case was remitted for a rehearing.

Judicial cooperation in civil matters, jurisdiction and enforcement of judgments, enforcement in matrimonial matters and matters of parental responsibility, application for non-recognition of a decision requiring the return of a child wrongfully retained in another Member State: decision No. 3K-3-126/2008 by the Supreme Court of Lithuania by which the appellate court’s judgment was left unchanged, but reasoning was corrected in accordance with the ECJ ruling (opposition to the recognition of the ‘certified’ decision ordering return is not permitted and it is for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child).
III. NATIONAL BIBLIOGRAPHY

**Regulation Brussels IIbis: Parental responsibility matters**


**Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)**


**Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)**


**Preliminary ruling system on family matters**


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Family Mediation


National section

LUXEMBOURG

Jean Claude Wiwinius
Président de Chambre à la Cour Supérieure de Justice
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

Except divorce, Title IX of the Civil Code deals with Parental Authority, Chapter I being of Parental Authority with regard to the Person of a Child, Chapter II of Parental Authority with regard to the Property of a Child, Chapter III of the Delegation of Parental Authority and Chapter IV of the Loss of Parental Authority.

It is possible to mention more precisely Article 372 of the Civil Code which lays down that parental authority is vested in the father and mother until the majority or emancipation of the child in order to protect him in his security, health and morality. They have the right and duty of custody, supervision and education of the child.

Article 375 of the Civil Code lays down that during marriage, the father and mother shall exercise in common parental authority.

Article 375-1 considers the hypothesis where parents can’t find an agreement on what the child’s interest requires, and Articles 376 and 377 the one where one of the parents is deprived of the exercise of parental authority.

According to Article 378 of the Civil Code, if the father and mother are divorced, parental authority will be exercised by the one of the parents to whom the judge committed custody, except for the exercise of the right of access and supervision of the other parent.

Article 379 disposes that if there is neither father nor mother in state to exercise parental authority, a guardianship will be ordered by the court.

Article 380 provides that concerning an natural child, parental authority will be exercised by the parent who did legally recognized the child, if he has not been recognized by both. If both did legally recognized it, parental authority will be exercised by the mother. (N.B The Constitutional court decided that this last clause of Article 380, because granting parental authority of a natural child recognized by both parents exclusively to the mother, is not in accordance with Article 11 (2) of the Constitution (see Judgment n° 7/99 of 26 March 1999, Mémorial A 1999, 1087). However, parental authority can be exercised in common by both parents if they produce a joint declaration before the judge of guardianships.

Anyway, the guardianship court can, after one of the parents or the public prosecutor’s request, modify the conditions for parental authority concerning a natural child. He can decide if this parental authority will be exercised either by one of the parents or jointly by the father and the mother; he will set, in that case, the habitual residence of the child at one of the parents’.

The guardianship court can grant a right of access, lodging and supervision to the parent who does not benefit of parental authority.

Article 380-1 disposes that the same rules are applicable, in the absence of voluntary affiliation, when affiliation is established by a judgement, either to both parents or one of them. However, during the judgment, provisional custody can be entrusted to a third person who will have to require the guardianship’s organisation.
We can also add that Articles 382 to 387 of the Civil Code deal with parental authority with regard to the property of a child.

The procedure before the guardianship court is provided for at Articles 1047 et seq. of the New Code of Civil procedure.

Concerning divorce, again, Article 302 of the Civil Code provides that the court judging about the divorce will also entrust the custody of the children, following the children’s interest requirements, either to one or the other of the spouses, or to a third person, relative or not, parental authority being exercised according to Articles 378 and 389. In case of divorce pronounced according to Articles 229, 230, 231 and in case of divorce by mutual consent, the juvenile court can always, afterwards, determine, modify or complete the custody for the child’s welfare.

The exercise of the right of access and lodging may be refused to the parent who didn’t get parental authority only for serious reasons.

For the minor children’s welfare, the judge can take consideration of the feelings expressed according to Article 388-1.

Article 303 provides that whoever would be the person in charge of the children, father and mother shall keep the right and duty to supervise the support and education of the child and contribute to it in proportion to his or her means.

A reform proposal on parental authority is actually in preparation. It is, however, too early to know the outcome of this reform (for example, it is still debated whether the term «parental authority» or «parental responsibility» should be kept).

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

National law does not plan a particular procedure in this subject matter. Practically, the return will take place, in case of a decision of the competent court for right of custody, respectively right of access, by the law enforcement authority.

In this context, we can indicate that «non-compliance with a custodianship order», this to say the refusal to restore a child, is a punishable act provided by Article 371-1 of the Penal Code, which is often pursued for.

According to common law and if nothing special has been provided for by a legal text, the appeal court, sitting in civil matter, is competent to decide in this matter.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

According to common law, the district court of Luxembourg or Diekirch (depending on the child’s residence) will be competent to decide and the appeal court will be competent to decide about the appeal against the district court’s decision.

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?
In case of divorce, Article 267 of the Civil Code provides that the provisory administration of the person and property of the children will belong to the parents, and according to Article 372 and 389, except decisions taken for the children's welfare by the president, or the judge replacing him, deciding the case in chambers, after a demand, of either both parties or one of them, or the public prosecutor.

Article 267 bis provides that the president deciding the case in chambers, once the public prosecutor heard, as soon as the petition for divorce has been presented to the record officer, takes provisory measures relating to the person, maintenance and property of the parties and their children.

The public prosecutor can ask for all the useful information concerning the moral and material situation of the children.

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

Title XIV of the New Code of civil procedure is devoted to international mutual legal assistance with regard to access rights and right of custody.

According to Articles 1109 et seq., the public prosecutor is enabled to lodge all necessary suits, along with all interested party or a lawyer charged by the Central Authority.

The president of the district court where the child is found, deciding the case in chambers, is competent to decide on the return of the child.

The application for a declaration of enforceability shall be submitted to the president of the district court where the child is living or to the president of the district court of Luxembourg. The application may only be rejected, if the foreign decision does not fulfil the conditions of the convention. No revision of the foreign decision is allowed.

An appeal against the decision of enforceability shall be lodged with the court of appeal within 8 days of the notification.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

According to Article 388-1 of the Civil Code, in every procedure a minor who is able to discern may be heard by the judge or by a person designated by the judge. The hearing must be held if the minor asks for it. If the minor refuses to be heard, the judge appreciates the grounds of the refusal. The minor might be heard alone, with his lawyer or a person of his choice. If this choice seems not to be in his interest, the judge may designate another person.

Article 1046 of the New code of civil procedure (Title XI: Hearing of a child in court) provides for the procedure in front of the judge when the minor asks to be heard in compliance to Article 388-1 of the Civil code.

The court in front of which the case has been laid will appreciate if the minor has enough discerning ability to be heard. It will also appreciate, considering this discernment, how the minor's declaration will be taken account of. Should this
happen, the court will call for a professional (for example a psychologist or a welfare worker) to hear the minor.

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

According to the Communication du Luxembourg, this Central Authority is the General Prosecutors' Office of the Supreme Court of Justice.

8. Are there any other national legal instruments/procedures put in place for the application of Regulation Brussels IIbis?

At the time the Regulation Brussels IIbis came into effect, the Government published the following communications (in addition to those mentioned in other places of this questionnaire):

Ad Article 29: “The application for a declaration of enforceability shall be submitted to the president of the district court.”

Ad Article 33: “The appeal shall be lodged with the court of appeal.”

Ad Article 34: “The judgment given on appeal may be contested only by the way of cassation.”

Ad Articles 45 and 47: “Luxembourg accepts that the communications are made in German and in English, in addition to French.”

B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?


According to Article 1251-1 of this Code, in civil or commercial matters, every dispute, except those on which the parties are not allowed to dispose themselves, is subject to either a contractual or a judicial mediation. In divorce or other separation matters, including liquidation and division, maintenance claims and exercise of parental responsibility, the judge may suggest the parties a family mediation. Articles 1251-2 to 1251-4 provide for the details of this matter's procedure.

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

A Law of 21 June 2007, which incorporated into national law the aforementioned Directive of 27 January 2003, modified the pertinent Articles (Articles 28 and 37-1)
of the Law of 10 August 1991 about the profession of Solicitor by instituting the benefice of a free legal aid for those persons whose resources aren’t sufficient to defend themselves in front of a court.

3. **Is your country a contracting party to any bilateral or international instruments on family law?**

   We can mention the following international conventions:
   - Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants, approved by a law of 17 May 1967.

4. **Are there any databases or online tools providing information on family law matters available in your country?**

   European Judicial Network in Civil and Commercial Matters
   - Information on divorce:
   - Information on maintenance obligations:
     [http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_lux_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_lux_en.htm)
   - Information on parental responsibility:

   European Judicial Atlas in Civil and Commercial Matters
   - Parental responsibility
   - Maintenance obligations
5. **Please provide information on accessing and applying foreign family law in your country.**

Generally, the Luxembourgish judge is well equipped to apply foreign law and, inevitably (in view of the Grand Duchy's territory's smallness), he is often lead to do so, except of course for those matters he isn't obliged to apply foreign law to, and not asked for by the parties.

In all the other cases, and especially in a matter of right of individuals, the Luxembourgish judge has, first of all, an ease access to all the text of European law concerning civil judicial co-operation thanks to the publication, by the Ministry of Justice, 2009, of a «Report of Community Acts», and, subsequently, through the frequently used Internet.

As for the foreign law itself, in a number of cases (above all divorce but also maintenance), judges of specialized chambers have, thanks to the « Magistrateship Central Library » or their own library, a personal knowledge of the most used texts (for example: Portuguese, German, French or Belgian Law of divorce). Otherwise, they regularly have recourse to the European Convention on Information on Foreign Law signed in London on 7 June 1968, approved in Luxembourg by a Law of 5 May 1977 (see on this subject, the book « Le droit international privé au Grand-Duché de Luxembourg » published by Monsieur Jean-Claude WIWINIUS, n° 148 à 171).
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

- Regulation Brussels IIbis institutes a general competence in terms of parental responsibility, beside divorce, this is to say, in compliance with Article 8, the competence of the courts of the state where the child commonly resides at the moment the case is laid before the court. This new instrument enlarges upon all children and all protective measures, even those who have no link with a matrimonial procedure. (Cour, 5 juillet 2006, no 31299, demande en obtention d’un droit de garde et d’un droit de visite introduite devant la juridiction des référés).

- The court has the obligation to check on its own its competence with regard to the provisions of the Regulation. The court of a member state, when referred to for a case it is not competent for regarding the Regulation, and for which a court of another member state is competent, immediately must declare itself incompetent, according to Article 17 of the Regulation. It is a real obligation and not only a simple right. (Référé Luxembourg, 12 octobre 2004, no 436/2004).

- Within the framework of a demand on attribution of exclusive parental authority for a natural minor, Luxembourgish courts are incompetent if the child has its common residence abroad, even if he has been written, with his mother, on the population register of the city of Luxemburg. (Cour, 20 octobre 2010, no 36175).
III. NATIONAL BIBLIOGRAPHY

The only book dealing completely with private international law in Luxembourg, and therefore with family law is entitled « LE DROIT INTERNATIONAL PRIVÉ AU GRAND-DUCHÉ DE LUXEMBOURG », and has been published in February 2011 by Mr Jean-Claude WWINIUS, President of the Chamber at the Supreme Court of Justice.

We therefore sent you, concerning the subjects mentioned in the questionnaire, to the following pertinent pages:

Regulation Brussels IIbis: Parental responsibility matters
→ See pages 324 and 367

Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)
→ See pages 368 et seq.

Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)
→ See pages 368 et seq.

Preliminary ruling system on family matters
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Family Mediation
- 

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Annex

**Articles 1109 et seq. of the New Code of civil procedure**

**Article 1109**
« Le procureur d'Etat a qualité pour intenter toutes actions relatives à l'application de ces conventions. Le présent article ne fait pas obstacle à la faculté pour toute personne intéressée de saisir directement, à tout moment de la procédure, la juridiction compétente, ni pour l'autorité centrale, de charger un avocat. »

**Article 1110**
« Le président du tribunal d'arrondissement dans la juridiction duquel l'enfant a été trouvé est compétent pour statuer sur toute action concernant le retour immédiat. Il statue comme en matière de référé. »

**Article 1111**
« La demande en reconnaissance et en exécution d'une décision étrangère est présentée par voie de requête au président du tribunal d'arrondissement dans la juridiction duquel l'enfant a sa résidence ou est présumé résider, sinon au président du tribunal d'arrondissement de Luxembourg. Le demandeur doit faire élection de domicile dans le ressort du tribunal saisi. »

**Article 1112**
« Il est statué sur la demande par ordonnance du président, sans que la partie contre laquelle l'exécution est demandée puisse, en cet état de la procédure, présenter d'observation.
La requête ne peut être rejetée que si la décision étrangère ne remplit pas les conditions prévues par la convention invoquée pour pouvoir être reconnue et exécutée. En aucun cas, la décision étrangère ne peut faire l'objet d'une révision au fond. L'ordonnance est notifiée au requérant par lettre recommandée à la diligence du greffier. »

**Article 1113**
«... Contre la décision autorisant l'exécution la partie contre laquelle l'exécution est demandée peut former un recours devant la Cour d'appel dans les 8 jours de la signification. »

**Article 388-1 of the Civil Code**
« (1) Dans toute procédure le concernant, le mineur capable de discernement peut, sans préjudice des dispositions prévoyant son intervention ou son consentement, être entendu par le juge ou, lorsque son intérêt le commande, la personne désignée par le juge à cet effet.
(2) Cette audition est de droit lorsque le mineur en fait la demande. Lorsque le mineur refuse d'être entendu, le juge apprécie le bien-fondé de ce refus.
(3) Le mineur peut être entendu seul, avec son avocat ou une personne de son choix. Si ce choix n'apparaît pas conforme à l'intérêt du mineur, le juge peut procéder à la désignation d'une autre personne. ...».  

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Article 1251-1 of the New Code of civil procedure

« (1) En matière civile et commerciale, tout différend, à l'exception (i) des droits et obligations dont les parties ne peuvent disposer, (ii) des dispositions qui sont d’ordre public et (iii) de la matière relative à la responsabilité de l’État pour des actes et des omissions commis dans l’exercice de la puissance publique, peut faire l’objet d’une médiation soit conventionnelle, soit judiciaire.

(2) En matière de divorce, de séparation de corps, de séparation pour des couples liés par un partenariat enregistré, y compris la liquidation, le partage de la communauté de biens et l’indivision, d’obligations alimentaires, de contribution aux charges du mariage, de l’obligation d’entretien d’enfants et de l’exercice de l’autorité parentale, le juge peut proposer aux parties de recourir à la médiation familiale. ».
National section

MALTA

Dr Lorraine Schembri Orland, LL.D.M.Jur. (Eur.Law)
Lawyer
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals for reform?

Parental responsibility and authority is regulated by the Maltese Civil Code (Chapter 16 of the Laws of Malta).

Article 7 provides that parents are bound to look after, maintain, instruct and educate their children taking into account the abilities, natural inclinations and aspirations of the children. Marriage imposes on both spouses the same obligations.34

The relationship between parents and children is often referred to as one of responsibilities rather than rights. Parental Authority (patria potestas) is vested in both parents equally and jointly. In case of disagreement either parent may apply to the court to resolve a dispute and the court may even elect which of the parents it deems better suitable to protect the interests of the child. Children who have reached the age of fourteen years of age have a right to be heard. The courts also hold residual authority as parens patriae to act in the supreme interests of the child even if this is contrary to the decision or course of action agreed between the parents. Parents also administer their children’s property and represent them in judicial proceedings. Maltese law provides for the emancipation of children when they reach the age of sixteen but in all other cases minority ends at eighteen years of age.

The Courts furthermore, have consistently determined that in matters concerning the care, custody and welfare of minor children, the supreme interests of the child shall prevail. For example, in one case35 it was held that “In this case the Court must seek to do what is in the sole interest of the minor child. In its decision whether the care and custody of the child should be given to one parent or the other the Court must solely be guided by what is most beneficial to the child.” In the case Jurgen Sixt v Rosemarie Sixt (App.Civ. JSP of the 3rd March 1999) “The Court has repeatedly stated that in matters of custody and access to children, the primary consideration is not the wishes of the parents but the welfare and best interests of the child”.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of a child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of a child?

The Civil Court (Family Section) is competent to decide cases on wrongful removal or unlawful retention of a child. The Hague Convention on the Civil Aspects of Child Abduction was ratified in Malta by the Child Abduction and Custody Act 1999, which entered into force on August 1, 2000 (Chapter 410) of the Laws of Malta. This Act also ratified the European on recognition and enforcement of custody

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34 Article 3 of the Maltese Civil Code.
decisions.\textsuperscript{36} Article 6 of the Act provides for a right of Appeal to the Court of Appeal from a decision on abduction of a minor by any party to the proceedings.

A legal notice was enacted\textsuperscript{37} to regulate court procedures in abduction cases. In terms of Article 8A (5) of the Legal Notice the competent court shall set the case for hearing within four working days from the date of filing of the application. This is to be served on the respondent without delay. The regulation provides that the case shall be heard expeditiously and shall continue to be heard on consecutive days or, when this is not possible, on dates close to one another. The Court shall also give its decision without any delay.

The time limits otherwise applicable to appeals are also abbreviated and an application for appeal shall be filed within eight working days with the time for a written reply set at six working days from date of service or such shorter time as the Court may determine. These time limits are peremptory. The Court of Appeal shall fix a date for hearing within eight working days from the date of filing of the application or from the filing of the reply by respondent within the time limit therefore, or if no such reply is filed, from the expiry of such time.\textsuperscript{38} The Court of Appeal is also to give a final decision without delay.\textsuperscript{39}

Interim measures providing for access as well as preventing the further clandestine removal of the child from the jurisdiction can be taken until the final decision. Although Brussels IIbis stipulates a maximum time period of six weeks after the application is lodged, it is highly unlikely that a final judgment will be given within this time limit particularly if there is an appeal although the Maltese courts are conscious of the urgency. The Court may also give directions to ensure the disclosure of information about any child subject to the proceedings and to safeguard his or her welfare.

The Court has discretion whether to surrender the child to the applicant or to order the Central Authority to take such measures as to ensure the return of the child to the State of origin.

3. **In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation) which court is competent for hearing a cross-border parental responsibility case according to domestic jurisdiction rules.**

Maltese courts will exercise their residual jurisdiction in terms of Article 742 of the Code of Organisation and Civil Procedure which means that a Maltese Court, will exercise jurisdiction if seized of a case involving a minor who is a citizen of, and domiciled in Malta, or any person if he is domiciled in Malta or even if the child is present in Malta.

**Forum non Conveniens:** In terms of Article 742(2) of the Code of Organization and Civil Procedure where a foreign court has a concurrent jurisdiction with the Maltese Courts, the courts may in their discretion, declare the defendant to be non-suited or

\textsuperscript{36} European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children which was signed in Luxembourg on 20th May, 1980.


\textsuperscript{38} Regulation 8A(9) of L.N. 129 of 2000.

\textsuperscript{39} Regulation 8A(10) of L.N. 129 of 2000.
stay proceedings on the ground that if an action were to continue in Malta it would be vexatious, oppressive or unjust on the defendant.\textsuperscript{40}

It is likely that in the absence of the applicability of the relevant Articles on jurisdiction of Brussels IIbis a Maltese court would consider the court of the child’s nationality or domicile as the competent court.

4. What national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

The main legal provisions stem from the Maltese Civil Code and the Code of Organisation and Civil Procedure.

The Courts of Malta have a wide discretion to take all measures as are required in the supreme interests of a child and the court may, upon good cause being shown, give such directions as regards the person of the property of a minor as it may deem appropriate in the best interests of the child notwithstanding any other provision of the Maltese Civil Code.\textsuperscript{41} A Maltese court can, for example, order the child to be taken into the care of either parent, or by an appropriate institution if the child is exposed to physical or psychological harm. The Court may also order that contact be arranged under the supervision or monitoring of a social worker, appoint a Child’s Advocate to hear the child’s wishes, make interim contact orders, and establish interim maintenance orders. The Court may also order the deposit of the child’s passport with a fiduciary appointee, usually a Notary Public or in the Court registry to be withdrawn upon further instructions from the Court.

An interested party may also apply for a warrant of prohibitory injunction pending proceedings restraining any person from raking any minor outside Malta.\textsuperscript{42} This order is notified to all exit points through the Commissioner of Police as Principal Immigration Officer, the Comptroller of Customs and the Principal Passport Officer. If the child possesses a Maltese passport, that passport is to be delivered to the Principal Passport Officer.

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

A court order on the return of a child is automatically enforceable. The Court has the authority to order that the child be taken from the other parent with the assistance of a Court bailiff who will be assisted by a social worker. The bailiff can also ask for the assistance of the Executive Police.

The child may be surrendered to the Central Authority or left in the care of the parent who has been found to have unlawfully removed or retained the child, or to the left behind parent if he/she is present in the jurisdiction.

\textsuperscript{40} Reginald Micallef noe vs. Silvio Mifsud noe (Commercial Appeal 26/11/2006), the Court of Appeal examined this issue in detail. It sets out the position under Maltese Law in the sense that unless there are valid and grave reasons for the Maltese Courts to decide otherwise, the expression of the parties’ will should not be disturbed and the Maltese Courts will decline jurisdiction even in favour of a non-EU State.

\textsuperscript{41} Section 149 of the Maltese Civil Code (Chapter 16 of the Laws of Malta).

\textsuperscript{42} Article 877 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta).
A Maltese court may also provide temporary contact or access rights to govern the interim period following the return until the Court of the country of habitual residence would determine the issue. Such an order is enforceable in Malta and sanctioned by the Criminal Code such that its breach would expose the offender to criminal prosecution. A breach of such an order would also render the offender liable to civil prosecution for contempt of court.

6. What are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

In matters concerning the best interests of the child, the Court shall hear a child who has reached the age of fourteen. No such minimum age requirement is imposed by Brussels IIbis. However despite the provision of the Civil Code, Maltese judges have provided for the hearing of the child even of an age as young as four years.

Legal Notice 397 of 2003 introduced the concept of Children’s Advocates. The role of the Children’s Advocate is to represent the interests of the minor but the Advocate is not, per se a party to the proceedings. A Children’s Advocate can be appointed at any stage of the proceedings ex officio by the Court, or at the request of either party, or, in mediation proceedings at the initial stage of separation and divorce proceedings, even at the request of the mediator.

A court may appoint a Children’s Advocate to hear the child’s wishes and report to the Court or appoint a social worker to do so. The Judge may, at his discretion, appoint a child psychologist which is usually the case when the child manifests anger at one parent or is alienated from such parent. The instances in which the Court hears the child are rare and usually depend on the advanced age and maturity of the child. The child is heard in camera by the Judge or privately by the Child’s advocate or social worker. The parents are not present during the hearing, nor are the child’s statements reports in detail.

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

Applications made under the Convention are received and processed by the Central Authority and filed before the competent court by the Office of the Attorney General. The Central Authority in Malta is the Director of the Department of Family Welfare which was changed to the Department of Social Welfare Standards following a change in role.

8. Are there any other national legal instruments/procedures put in place for the application of Regulation Brussels IIbis?

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43 Section 338 (ll) of the Criminal Code (Chapter 9 of the Laws of Malta).
44 Article 131(4) of the Maltese Civil Code.
45 The Civil Court (Family Sections), the Civil Court (General Jurisdiction ) and the Court of Magistrates (Gozo)/Superior Jurisdiction ) (Family Sections) Regulations, 2003.
46 Article 5 and 16 of the Child Abduction Act (Chapter 410 of the Laws of Malta).
The Code of Organization and Civil Procedure was amended in 2004 in order to ensure that where Regulations of the European Union provide, with regard to matters concerning enforcement of foreign judgments, in any manner which is different to the Code, the said Regulations shall prevail. Accordingly, this state of affairs provides that in cases involving the recognition and enforcement of judgments emanating from Courts of a Member State, this procedure is regulated by the applicable Regulation.47

B. Horizontal issues

1. How is Directive no. 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

Legislative amendments in 2003 not only provided for the setting up of the Family Court in a separate competence, but also introduced a mandatory mediation procedure in the settlement of family disputes. Mediation is mandatory in connection with “disputes between parties, whether married or otherwise, concerning the custody and maintenance of, or visitation rights to their children”.48

The Mediation Act (Chapter 474 of the Laws of Malta) regulates domestic mediations, which mean “any mediation of a civil, family, social, commercial and industrial nature” and cross-border mediations.

2. How is Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes transposed into domestic law?

The Maltese Government is not bound to assume any costs related to participation of legal counsel/advisers or court proceedings, except when such costs may be covered by legal aid. The provision of legal aid would be applicable if the requirements of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) are met with. The relevant provisions were introduced to give effect to Directive 2003/8/EC. The Competent Authority in Malta is the Advocate for Legal Aid.49

Article 928B provides that “(1) Legal aid shall be granted to the applicants involved in a cross-border dispute who are, partially or totally, unable to meet the costs of the proceedings as a result of their economic situation.

(2) Applicants who have received legal aid in a Member State other than Malta in respect of proceedings before a court in that other Member State shall be entitled to receive legal aid in Malta if recognition or enforcement of the judgement is sought in Malta.

(3) Legal aid applies to:

47 Article B25A of Chapter 12 of the Laws of Malta
48 The Civil Court (Family Section), the First Hall of the Civil Court and the Court of Magistartes (Gozo) (Superior Jurisdiction) (Family Section), L/N. 397 of 2003 Article 9(1)(a).
(a) pre-litigation advice with the aim of reaching a settlement prior to instituting legal proceedings;
(b) legal assistance and representation in court, even at the appeal stage, with or without the cost of proceedings of the recipient;
(c) the costs of the opposing party had the recipient lost the case and would be so obliged to pay such costs if he were domiciled or habitually resident in the Member State in which the court is sitting;
(d) the enforcement of authentic instruments in another Member State;
(e) extrajudicial procedures under the conditions defined in the Directive if there is a legal requirement for the parties to use them or if the parties to the dispute are ordered by the court to have recourse to them.

(4) Legal aid shall be granted or refused by the competent authority when the Court is sitting in Malta and by the competent authority of the Member State other than Malta when the Court is sitting outside Malta.

(5) Without prejudice to subarticle (4), legal aid applicants may not be prevented from legal aid if they prove that they are unable to pay the cost of the proceedings as a result of differences in the cost of living between the Member State of domicile or habitual residence and of the forum.”

Article 928D provides that “It shall be the duty of the competent authority:

(a) to act as a receiving or transmitting authority for legal aid applications;
(b) to assist the applicant in ensuring that the application is accompanied by all the supporting documents known by such applicant to be required to enable the application to be determined;
(c) as a transmitting authority, to assist the applicant in providing the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in another Member State;
(d) as a receiving authority, to assess the economic situation of a person in the light of the provisions of Article 912, including the amount of the resources of persons who are financially dependent on the applicant;
(e) to grant or refuse legal aid;
(f) to consider, when taking a decision on the merits of an application, and without prejudice to paragraph (d), the importance of the individual case to the applicant, and may also take into account the nature of the case when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss, or when the application concerns a claim arising directly out of the applicant’s trade or self-employed profession;
(g) to keep the applicant informed with the processing of the application, and where the application is totally or partially rejected, to give reasons for the rejection;
(h) to decide whether recipients of legal aid must refund in whole or in part the assistance granted if their financial situation has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient and to collect any reimbursement so due.”

Article 928E provides that “(1) Legal aid applications by persons who are domiciled or habitually resident in Malta may be submitted either:
(a) to the competent authority in Malta hereinafter referred to as “the transmitting authority”; or
(b) to the competent authority of the Member State in which the court is sitting or where the decision is to be enforced, hereinafter referred to as “the receiving authority”.

(2) Legal aid applications shall be completed in accordance with such forms as may be prescribed by the Minister responsible for justice by Order in the Gazzette.

(3) The competent authority in Malta may decide to refuse to transmit an application to the receiving authority of another Member State if it is manifestly:
(a) unfounded; or
(b) outside the scope of the Directive.

When an application for transmission is totally or partially rejected, the reasons for rejection shall be given and the report shall be examined by the Civil Court First Hall. The parties shall have the opportunity to be heard and make submissions before it decides.\(^{50}\)

When the competent authority in Malta receives a request for legal aid in relation to proceedings which are being heard before a court in a Member State other than Malta, it shall transmit the application to the competent receiving authority in the other Member State within fifteen days of the receipt of the application duly completed in one of the languages of the Member State of the competent receiving authority, and the supporting documents translated, where necessary, into one of those languages.

**When Malta is acting as a receiving authority, legal aid shall cover the costs as follows:**

(a) interpretation;
(b) translation of documents required by the court or by the competent authority and presented to the recipient, which are necessary for the resolution of the case;
(c) travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant’s case is required in court, and the court is satisfied that the persons concerned cannot be heard to the satisfaction of the court by any other means.

Legal aid granted by the competent authority in Malta when it is acting as a transmitting authority shall cover the following costs:

(a) costs relating to the assistance of a local lawyer or another person entitled to give legal advice, incurred by the competent authority until the application for legal aid has been received in the Member State where the court is sitting;
(b) the translation of the application and of the necessary supporting documents when the application is submitted to the authorities of that Member State where the court is sitting.\(^{51}\)

Costs related to the translation of the application and supporting documents incurred by the competent authority following an application for legal aid by a

\(^{50}\) Article 917 C.O.C.P.

\(^{51}\) Article 928F of the C.O.C.P.
person domiciled or habitually resident in Malta shall be repaid to the competent authority if the application is rejected by the competent authority of the Member State other than Malta where the Court is sitting.52

3. Is your country a contracting party to any bilateral instruments on family law?

Malta has signed and ratified the Hague Convention of the 25th October 1980 on the Civil Aspects of International Child Abduction. This Convention was acceded to on the 30th of January 1995. The provisions of this convention, together with the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children which was signed in Luxembourg on the 20th May, 1980 are enshrined in Maltese Law in Chapter 410 of the Laws of Malta (Child Abduction and Custody Act).

Malta has also signed reciprocal agreements on the Reciprocal Enforcement of Maintenance Orders which is regulated by Chapter 242 of the Laws of Malta Chapter entitled Maintenance Orders (Reciprocal Enforcement) Act.53

4. Are there any databases or online tools providing information on family law matters available in your country?

There are no specific family law databases.

Judgments of the Courts of Malta can be accessed online through the website www.gov.mt.

Other useful websites are:

Agenzija Appogg at www.appogg.mt

Foundation for Social Welfare Services
www.fsws.gov.mt

Agenzija Sedqa
www.sedqa.gov.mt

Ministry for Justice and Home Affairs
www.mjha.gov.mt

The European Judicial Network in Civil and Commercial Matters:
- Information on divorce:
  http://ec.europa.eu/civiljustice/divorce/divorce_mlt_en.htm
- Information on maintenance obligations:
  http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_mlt_en.htm
- Information on parental responsibility
  http://ec.europa.eu/civiljustice/paternal_resp/paternal_resp_mlt_en.htm

The European Judicial Atlas in Civil and Commercial Matters informs on
- Matrimonial matters and matters of parental responsibility
- Maintenance obligations

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52 Article 982G C.O.C.P.
53 Reciprocal orders were signed with Gibraltar, Manitoba (Canada) the United Kingdom and Australia.
5. Please provide information on accessing and applying foreign family law in your country.

There are no such tools at the disposal of the practitioner in Malta. Foreign law is a matter of proof.
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis on parental responsibility

There have been a number of decisions concerning child abduction.

In “Director of the Department of Social Welfare Standards v AB”\(^{54}\) the Court ordered the return of the child. In this case the respondent raised the plea of Article 13(b) of the Abduction Convention due to alleged domestic violence practised by the left behind father. The Court disagreed and, quoting from a judgment given in Re: H (Children) (Abduction) by the UK Court of Appeal held that “There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence."

In the case “Director of the Department of Social Welfare Standards v Chrostopher Burdge” (App. 53/2007 decided on the 15th June 2007 by the Civil Court (Family Section)) the court held that the protection of the supreme interests of the child did not mean that the wishes of the child would prevail. In this case the Court declared the removal of a minor child from the United Kingdom to have been unlawful and ordered the return of a fourteen year old child, despite the declaration of the minor that he was happy in Malta.

In “Director of the Department of Social Welfare Standards v Lara Maria Merleverde nee Borg St. John” (Civil Appeals (Superior Jurisdiction) of the 25th February 2011 (App 370/2010)) the Court held that consent to the removal of children for the purposes of Chapter 410 of the Laws of Malta need not be expressed nor in writing, suffice that it be “clear and unequivocal". The court quoted the case Re: H (Minors) (Abduction: Acquiescence) decided by the House of Lords in 1998 whereby it was held that acquiescence depends on “actual state of mind”. “Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced." The Court did not go into the other issue raised in terms of Article 13(b) of the Convention, deciding that respondent had proved acquiescence and refused the request for the return of the minors.

\(^{54}\) Court of Appeal (Superior Jurisdiction) of the 3rd December 2010 (Applic. 251/2010). The name of the parties has been exluded from this publication to protect the privacy of the minor.
III. NATIONAL BIBLIOGRAPHY

No relevant bibliography available.
National section

THE NETHERLANDS

Professor Katharina Boele-Woelki
Roderic ter Rele
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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?
   - Dutch Civil Code, Book 1, Titles 14 and 15
     (http://wetten.overheid.nl/BWBR0002656/)
     (http://wetten.overheid.nl/BWBR0001827/)
   There are no proposals to reform.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?
   The most expeditious procedure is a summary proceeding before the summary proceedings judge (voorzieningenrechter) in The Hague (Article 11 paragraph 1 Uitvoeringswet internationale kinderontvoering) (http://wetten.overheid.nl/BWBR0004746/).
   Appeal against the decision can be lodged with the Court of Appeal in The Hague (Article 13 paragraph 7 Uitvoeringswet internationale kinderontvoering). No appeal can be lodged against the court of appeal’s decision (Article 13 paragraph 8 Uitvoeringswet internationale kinderontvoering).

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?
   According to domestic jurisdiction rules, the Dutch judge shall have no jurisdiction if the child is not habitually resident in the Netherlands unless, in an extraordinary case, due to the case’s connectivity with the Dutch jurisdiction, the judge deems himself capable of assessing the child’s best interest (Article 5 Dutch Civil Procedure Code).

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIibi)?
   - provisional placing under supervision (voorlopige ondertoezichtstelling) (Article 1:255 Dutch Civil Code)
   - stay of parental authority (schorsing ouderlijk gezag) (Article 1:271 paragraph 1 and 1:331 paragraph 1 Dutch Civil Code)
   - provisional guardianship (voorlopige voogdij) (Article 1:271 paragraph 4 and 1:331 paragraph 4 Dutch Civil Code, Article 13 paragraph 4 International child abduction Implementing Act)
5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

In case the child enters a foreign country for the purpose of access rights to that child, the parent with parental authority may request the court to make the following decisions (Article 14 Uitvoeringswet internationale kinderontvoering):

- specify that the applicant has parental authority
- specify place and duration of the child’s stay outside the Netherlands
- request the authorities of the country where the child stays, to supervise the access right’s just compliance and, if necessary, to take measures to lead the child back after the end of the access right.

Enforced delivery of an abducted child requires a court order. A request to such an order shall be handled with priority. The court may appoint a provisional guard to the child during the proceeding (Article 13 Uitvoeringswet internationale kinderontvoering).

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

The court decides upon the request to enforced delivery of the child only after that the child has been given the opportunity to give his opinion, unless this is impossible due to the child’s physical or mental condition (Article 13 paragraph 2 Uitvoeringswet internationale kinderontvoering).

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels Ibis (Chapter IV of the Regulation)?

The Minister of Security and Justice has been designated as the Central Authority (Article 4 paragraph 1 International Protection of Children Implementing Act, Uitvoeringswet internationale kinderbescherming)

(https://wetten.overheid.nl/BWBR0019574/)

Contact details:
c/o Ministry of Security and Justice
P.O. Box 20301
2500 EH Den Haag
Netherlands
phone number: +31 70 370 62 52
(Monday to Friday 09:00-12:30 AM)

8. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels Ibis?
For the Netherlands the implementation rules have been laid down in the *Uitvoeringswet internationale kinderbescherming* (International Child Protection Implementation Act of the 16th February 2006, Netherlands Bulletin of Acts and Decrees 2006, no. 123.) The Act entered into force on 1st May 2006. This Implementation Act also implements the Hague Convention of the 10th October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibilities and measures for the protection of the child.

### B. Horizontal issues

1. **How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?**

   The Mediation Directive will be implemented by an amendment of the Dutch Civil Code and the Dutch Civil Procedure Code. The Bill (No. 32 555) is under discussion in the Senate. This amendment contains the following provisions:

   - a limitation period will be interrupted by mediation
   - during a procedure, the judge may invite parties to use mediation to settle their dispute at any moment
   - if parties agree the mediation to be confidential, the mediator shall not be compelled to give evidence in a proceeding, unless (i) where this is necessary for overriding considerations of public interest in particular to protect the best interest of children or (ii) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.
   - if mediation results in a settlement, parties may request to have their agreement to be contained in the (enforceable) court’s minutes

2. **How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

   The Directive has been transposed in Dutch law by an amendment of the *Wet op de Rechtsbijstand* (Legal Aid Act) (*Staatsblad* 2005, No. 90). A chapter on legal aid in cross-border disputes within the European Union has been added to this act.

3. **Is your country a contracting party to any bilateral or international instruments on family law?**

   The Netherlands is party to the following instruments on family law:

   **Council of Europe**

- Convention on the Establishment of a Scheme of Registration of Wills, Basle 16 May 1972

Hague Conference


International Commission on Civil Status

- Convention on Legitimation by Marriage, Rome 10 September 1970
- Convention on the Recognition of Decisions Recording a Sex Reassignment, Vienna 12 September 2000
- Convention applicable to Surnames and Given Names, Munich 5 September 1980

United Nations

- Convention on the Recovery Abroad of Maintenance, New York 20 June 1956

4. Are there any databases or online tools providing information on family law matters available in your country?

- Kluwer Navigator
- Opmaat
- Rechtsorde
- Legal Intelligence
- European Judicial Network in Civil and Commercial Matters:
- Information on divorce: http://ec.europa.eu/civiljustice/divorce/divorce_net_en.htm
- Information on maintenance obligations: http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_net_en.htm
- Information on parental responsibility http://ec.europa.eu/civiljustice/parental_resp/parental_resp_net_en.htm
- European Judicial Atlas in Civil and Commercial Matters:

5. **Please provide information on accessing and applying foreign family law in your country.**

In the Dutch system, conflict of law rules and the law designated by these rules are to be applied ex officio (Article 10:2 Dutch civil Code). The court can obtain information about foreign law from the International Judicial Institute (Internationaal Juridisch Instituut). This institute has a special arrangement with the Ministry of Security and Justice regarding the costs for courts which require legal information providing by the institute. Information about foreign family law as regards European jurisdictions can also be obtained at the website of the Commission on European Family Law (ceflonline.net)
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

The Dutch decisions on the application of the Brussels IIbis Regulation are reported in the *Nederlands international privaatrecht* journal which is published by the T.M.C. Asser Instituut in The Hague. More than 720 decisions in which the Brussels IIbis Regulation has been applied are documented in this journal. The most important decisions and trends are analysed in the recently published book *Nederlands internationaal personen- en familierecht*, Deventer: Kluwer 2012 (see the list under National Bibliography).
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**Regulation Brussels IIbis: Parental responsibility matters**

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**Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)**


**Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)**


**Preliminary ruling system on family matters**


**Family Mediation**

- P. Vlaardingerbroek, ‘Voorkoming van vechtscheidingen’, *FJR* 2009/17
- M. Pel, ‘Mediation in rechtspraak in familiezaken’, *EB* 2006/72

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National section
POLAND

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Judge, Court of Appeal Wroclaw
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

First of all there is a need to clarify some terminological issues in relation to the term “parental responsibility”. In the Polish legal system, the term parental responsibility does not exist, there is only a “parental authority” (“władza rodzicielska”). Nevertheless, the legal institution of parental authority in the Polish legal system is equivalent to parental responsibility in other legal systems in terms of rights and duties within the legal relationship between parents and child. Therefore, where considerations concern parental responsibility, in fact they refer to parental authority within the meaning of the Polish legal system.

The current substantive source of law for parental responsibility in the Polish legal system is the Family and Guardianship Code55 of February 25, 1964 (O.J. 1964 No 9, pos. 59 with later amendments). The Family Code entered into force on 1 January 1965. The last relevant amendment concerning parental responsibility was made on 13 June 2009, when an amendment introduced by the Act of November 6, 2008 entered into force. Regulation on parental responsibility is contained in Articles 92 – 112. The Family Code also contains legal regulations relating to custody for minors (Articles 145 – 174) and guardianship (Articles 178 – 184). There are no proposals to reform the legal institution of parental responsibility in Poland.

The current procedural source of law for matters concerning parental responsibility, custody and guardianship is the Code of Civil Procedure of November 17, 1964 (O.J. 1964 No 43, pos. 296 with later amendments). The above mentioned matters are settled in a non-litigious mode of civil proceedings. There are separate provisions in the Code of Civil Procedure concerning this kind of matter (Articles 568 – 584 and Articles 590 – 605).

There are proposals to reform in the area of parental responsibility. They are connected with the work on progress on the new Civil Code in Poland56, carried out by the Civil Law Codification Commission (“Komisja Kodyfikacyjna Prawa Cywilnego”) working at the Ministry of Justice. The work of the Commission is not far advanced, when it comes to changes on parental responsibility. The main assumption of the proposed changes is the inclusion of the regulation on parental responsibility, now contained in the Family Code, in the new Civil Code.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

Poland is a party to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, therefore in matters concerning return of an abducted child the provisions of the convention are applicable. Under Article 11 of the convention, the judicial or administrative authorities of the contracting states

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55 Hereinafter referred to as “Family Code”;
shall act expeditiously in order to return the child and if the judicial or administrative authority does not act within six weeks from the date of receipt of the application, the applicant or the Central Authority may request the reasons for the delay. Moreover, in Polish legal procedure, as a rule, only final and valid court decisions are effective and enforceable. Nevertheless, there is an exception under which the guardianship court decisions are effective and enforceable from the moment of announcement of a verdict or release (if there is no announcement according to relevant provisions), unless a specific provision provides otherwise. Therefore in order to accelerate the proceedings, the legislator has also decided to extend this approach to matters concerning the return of the abducted child. That is why, according to Article 578 CCP, a decision on the return of an abducted child is effective and enforceable from the moment of announcement or announcing of a verdict.

Polish civil procedure foresees the possibility of an appeal against a decision entailing the return of the child. A decision entailing the return of an abducted child is a verdict that concerns the essence of the matter (it has essential character). Therefore, an appeal may be brought against such a decision (“apelacja”), under Article 518 CCP. Nevertheless, an extraordinary appeal against a decision from a second instance court is not acceptable (“skarga kasacyjna”) to the Supreme Court.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

If no court has jurisdiction to hear a matter concerning parental responsibility, it may be described as a negative jurisdictional conflict. The Code of Civil Procedure envisages a specific provision in order to prevent such an undesirable effect. If there is a lack of circumstances which justify jurisdiction by the Polish courts and it is impossible to carry out proceedings before a foreign court or other foreign competent authority, under Article 109 CCP, the Polish court shall be competent to hear such a matter only if it manifests sufficient connection with the Polish legal system. Criteria of sufficient connection is not strictly specified, therefore it should be evaluated in the light of the circumstances of the specific matter.

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

On the one hand, protective measures intended to protect the child’s best interests are provided in Article 109 Family Code. According to this provision, if the child’s best interests are threatened, the guardianship court shall render proper order concerning the said child’s person or property. It should be clarified that the guardianship court (“sąd opiekuńczy”) is a family court (“sąd rodzinny”). The family court is a separate department within the structure of the district and regional courts, appointed to consider matters concerning family law and juveniles. Article 109 § 2 Family Code contains a non-exhaustive catalogue of protective measures that may be imposed in a court decision. The court may \textit{inter alia} determine what

\textsuperscript{57} See: decision ("postanowienie") of the Supreme Court from February 21, 2002, case No IV CZ 602 – System of Legal Information Lex No 564830;
actions cannot be taken by the parents without the permission of the court or impose other restrictions on the parents, subject performance of parental responsibility to the supervision of a court curator, refer the minor to an organisation or institution for vocational training or to a school that has partial custody of the child or order placing the minor in a family-run children's home or in institutional foster care. The guardianship court may also appoint a custodian and entrust him with the administration of the child's property.

On the other hand, there are also general protective measures ("zabezpieczenie") provided in civil procedure. Protective measures may be established in any civil matter by a court. These measures may be imposed before the start of proceedings or during it. In addition, it is possible, at the request of a party or participant in proceedings, if they have legal interest, that protective measures be granted. If proceedings are commenced ex officio protective measure may also be established ex officio. According to Article 755 § 1 4) PCC that provides a non-exhaustive list, protective measures may consist of establishing how child care should be exercised. It is important that these protective measures are only introduced in connection with pending proceedings or when proceedings are about to be commenced.

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

In order to enforce a court decision on the return of the child issued by an EU member state court or non EU member state court, there is a need to lodge a motion for enforcement with the guardianship court by an entitled person after declaration of its enforceability. Proceedings intended to execute a decision on the return of the child are governed by Articles 5986 – 59814 CCP. If the child, despite the existence of a court decision ordering return, has not been released and if a motion for return of the child was lodged by an entitled person, then the court shall order forced return of the child, to be executed by a court curator (in the Polish legal system, a court curator is a public officer whose executing tasks are defined by law as being of an educational, correctional, diagnostic, preventive and control character, associated with the exercise of judicial decisions).

The court curator is entitled to remove the child from the care of any person who may be holding the child. Forced return of a child enforced by a court curator may take place only in the presence of an entitled person or persons or representatives from an institution authorised by the entitled person who has lodged a motion for forced release. If none of the persons mentioned above appear within the deadline set by the court curator, forced return will not be carried out. In order to execute the court decision, the court curator may ask the police for assistance during his action, if there is such a need. When a child is hidden or forced return is impossible due to actions taken to prevent them, then the court curator shall inform the prosecutor. The court curator may request the provision of information on the whereabouts of the child. During the procedure of forced child return he should exercise his duties with caution and do everything not to violate the best interests of the child, especially not to cause any physical or moral harm to the child. If necessary, the court curator may request the assistance of social services or other institutions created for this purpose. If, as a result of enforcement, the child's well-being should suffer serious harm, the court curator should refrain from execution of the decision until
the threat ceases to exist, unless the suspension of the execution of the decision would constitute a serious threat to the child.

Proceedings concerning the execution of decisions on access rights is governed by Articles 59815 – 59821 CCP.

When the proceedings are commenced on the basis of a foreign court decision, or another foreign state authority or settlement concluded before a court or other foreign authority, there is a need to declare the enforceability of such a court decision or settlement. In accordance with Polish civil procedure, if there is a decision or settlement on access rights and a person having custody of a child does not comply with it, then the court, following the application by a person having access rights, threatens the person violating the decision or settlement with the imposition of an obligation to pay a certain amount of money for every potential breach of access rights. The court determining the amount of potential payments shall take into account the financial position of this person. If a person having custody of a child continues to violate the decision or settlement, despite the threat imposed of an obligation to pay, then the court shall order this person to pay a pre-determined sum of money for each of the violations that took place.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

As a rule the child will be heard if the proceedings concern it. There is no age limit which would affect whether or not the child’s testimony should be taken into account. But in matters concerning the child or its property, the court shall hear the child only if mental development, health and level of maturity allows it and the court shall also take into consideration as far as possible the reasonable wishes of the child (Article 576 § 2 CCP). At the same time, the court should assess the child’s testimony in the context of all the relevant circumstances and decide what significance should be given to this. Assessment of the hearing of the child is carried out individually by the court for the purposes of the particular matter. Polish law provides that the child shall be heard by a judge outside the courtroom, but there is no regulation concerning the method of a child hearing. However, guidelines have been established (see text on website: http://ms.gov.pl/pl/dzialalnosc/przeciwdzialanie-przemocy-wobec-dzieci/przyjazne-przesluchanie-dziecka/download,1776,0.html) by Nobody’s Children Foundation (“Fundacja Dzieci Niczyje”) and the Ministry of Justice in cooperation with the Coalition for Child Friendly Interviewing (“Koalicja na rzecz Przyjaznego Przesłuchiwania Dzieci”) concerning standards for hearing children. These guidelines are not binding for courts and they have been adopted mainly for the hearing of children in criminal proceedings. In spite this, the guidelines play a key role in practice. According to these, the child’s hearing should take place in a child-friendly interview room. The interview room should be adequately furnished, painted and provide equipment helpful to promoting the receipt of information from a child (for example toys, painting materials, etc.). The room should permit the child to be interviewed by a judge with the assistance of a psychologist. According to information placed on the Ministry of Justice’s website, in Poland there are 62 fully equipped interview rooms (see: http://ms.gov.pl/pl/dzialalnosc/przeciwdzialanie-przemocy-wobec-dzieci/przyjazne-przesluchanie-dziecka/download,1776,3.html).
7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

The Central Authority to facilitate the application of Regulation Brussels IIbis in Poland is the Ministry of Justice – Department of International Cooperation and European Law (address: Al. Ujazdowskie 11, PL - 00-950 Warsaw). It has been designated pursuant to article 53 of Brussels IIbis.

8. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

In order to apply Regulation Brussels IIbis, no legal instruments or procedures have been introduced, because the existing legal framework enables the application of Regulation Brussels IIbis without any obstacles.

B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

The provisions of Civil Procedure on mediation in civil and commercial matters are consistent with Directive No 2008/52/EC. The Polish regulation on mediation has been altered via an act amending Civil Procedure of July 28, 2005, it entered into force on 10 December 2005. This provision concerning mediation entered into force before Directive No 2008/52/EC was adopted, nevertheless they are fully compatible with the provisions of the Directive58. That is why there was no need to amend Civil Procedure or introduce a new act in order to implement the provisions of the Directive in the Polish legal order.

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

Directive No 2003/8/EC has been implemented through an act on legal aid in civil proceedings conducted in the Member States of the European Union and on legal aid in order to settle the dispute before the commencement of such proceedings of December 17, 200459. In order to implement the provisions of the Directive a completely new legal act (mentioned above) has been introduced. Issues that are the subject of this new act in relation to domestic disputes are contained in the act on court costs in civil matters of July 28, 2005. Therefore the legislature has decided not to put the legislation on legal aid in domestic and cross-border disputes in a

58 S. Pieckowski, Arbitraż a alternatywne metody rozwiązywania sporów w sprawach cywilnych (ADR) [in:] Arbitraż handlowy Tom 8 System Prawa Handlowego, Ed. by A. Szumański, Warsaw 2010, p. 1009;
single act but has introduced separate acts in order to implement the provisions of the Directive.

3. Is your country a contracting party to any bilateral or international instruments on family law?

Poland is a contracting party to twelve multilateral conventions on family law and fourteen bilateral conventions on family law. Many of the multilateral conventions to which Poland is a contracting party have been concluded under the auspices of international organisations, in particular the Hague Conference on Private International Law.

Poland is a party to the following multilateral conventions on family law concluded under the auspices of the United Nations:

- Convention on the Recovery Abroad of Maintenance done at New York, on 20 June 1956\(^60\);

Poland is a party to the following multilateral conventions on family law concluded under the auspices of the Hague Conference on Private International Law:

- Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants\(^61\);
- Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations\(^62\);
- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations\(^63\);
- Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations\(^64\);
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction\(^65\);
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption\(^66\);
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children\(^67\);
- According to Article 216 (2), Treaty on the Functioning of the European Union, Poland is bound by the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations\(^68\).

\(^{60}\) Text available on web site: http://www.hcch.net/upload/ny_conv_e.pdf;
\(^{61}\) Text available on web site: http://www.hcch.net/upload/conventions/txt10en.pdf;
\(^{62}\) Text available on web site: http://www.hcch.net/upload/conventions/txt11en.pdf;
\(^{63}\) Text available on web site: http://www.hcch.net/upload/conventions/txt23en.pdf;
\(^{64}\) Text available on web site: http://www.hcch.net/upload/conventions/txt24en.pdf;
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\(^{66}\) Text available on web site: http://www.hcch.net/upload/conventions/txt33en.pdf;
\(^{67}\) Text available on web site: http://www.hcch.net/upload/conventions/txt34en.pdf;
\(^{68}\) Text available on web site: http://www.hcch.net/upload/conventions/txt35en.pdf.
Poland is a party to the following multilateral conventions on family law concluded under the auspices of the Council of Europe:

- ETS No.: 58 – European Convention on the Adoption of Children, signed 24 April 1967, in Strasbourg;
- CETS No.: 85 – European Convention on the Legal Status of Children born out of Wedlock, signed 15 October 1975, in Strasbourg;
- CETS No.: 105 – European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, signed 20 May 1980, in Luxembourg;

Poland is a party to fourteen bilateral agreements relating, among others, to family law and three protocols which have amended bilateral agreements:

- Agreement between the People's Republic of Poland and the Kingdom of Belgium on the recognition of judgments in divorce of 17 December 1986;
- Agreement between the Polish Republic and the Republic of Belarus on Legal Assistance and Legal Relations in civil, family, employment and criminal matters of 26 October 1994;
- Agreement between the People's Republic of Poland and the People's Republic of Bulgaria on legal assistance and legal relations in civil, family and criminal matters of 4 December 1961 amended by the Protocol to the Agreement between the People's Republic of Poland and the People's Republic of Bulgaria on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, signed at Warsaw on 4 December 1961, of 27 June 1980;
- Agreement between the People's Republic of Poland and the Czechoslovak Socialist Republic on legal assistance and legal relations in civil, family, employment and criminal matters of 21 December 1987 amended by an Agreement between the Republic of Poland and the Czech Republic to amend
and supplement the Agreement between the People’s Republic of Poland and the Czechoslovak Socialist Republic on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters, signed at Warsaw on 21 December 1987, of 30 October 200379;

- Agreement between the People’s Republic of Poland and the Republic of Finland on legal protection and legal assistance in civil, family and criminal matters of 27 May 198080;

- Agreement between the People’s Republic of Poland and the Republic of France on Applicable Law, Jurisdiction and the Enforcement of personal and family law of 5 April 196781;

- Agreement between the People’s Republic of Poland and the Democratic People’s Republic of Korea on legal aid in civil, family and criminal matters of 28 September 198682;

- Agreement between the People’s Republic of Poland and the Republic of Cuba on mutual assistance in civil, family and criminal matters of 18 November 198283;

- Agreement between the People’s Republic of Poland and the People’s Libyan Arab Jamahiriya Socialist state on legal assistance in civil, commercial, family and criminal matters on 2 December 198584;

- Agreement between the Republic of Poland and the Republic of Lithuania on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters of 26 January 199385;

- Agreement between the Republic of Poland and the Republic of Latvia on legal assistance and legal relations in civil, family, employment and criminal matters of 23 February 199486;

- Agreement between the Republic of Poland and Mongolia on legal assistance and legal relations in civil, family, employment and criminal matters of 19 October 199887;

- Agreement between the Republic of Poland and the Socialist Republic of Vietnam on legal assistance and legal relations in civil, family and criminal matters of 22 March 199388.

4. **Are there any databases or online tools providing information on family law matters available in your country?**

There are public databases with judgments of all Courts of Appeal in Poland (11 courts). These databases are general in nature and apart from decisions in other branches of civil law also include rulings on some family law matters. In databases there are not published matters concerning divorce, legal separation and incapacitation. The databases can be found online: [http://orzeczenia.ms.gov.pl/](http://orzeczenia.ms.gov.pl/). Selected Supreme Court decisions are also published on its website [http://www.sn.pl/orzeczniictwo/SitePages/Najnowsze%20orzeczenia.aspx](http://www.sn.pl/orzeczniictwo/SitePages/Najnowsze%20orzeczenia.aspx). The database on this website is general in nature and contains court decisions concerning different branches of law among others family law. There is no database that contains only judgments in family law matters.

5. **Please provide information on accessing and applying foreign family law in your country.**

According to Article 1143 Civil Procedure, if relevant conflict of law rules are designated as applicable foreign law, a Polish court is obliged to establish the content and to apply such a foreign law. This provision is applicable in all kinds of civil matters and also includes family law matters. A Court may fundamentally obtain information on the content of foreign family law in two ways, and this is provided for expressly in the Civil Procedure. First of all, a Court may request the Ministry of Justice to make available the text of a foreign law or to explain foreign court practice. A Court may also ask a legal expert to prepare an opinion on the content of foreign law. In addition, Poland is a party to the European Convention on information on foreign law, signed in London on 7 June 1968, therefore, the Polish courts may request other states, which are a party to the London convention, to provide information on the content of this law. In fact, a Court is not obliged to use the above mentioned measures in order to establish the contents of foreign family law. A Court may obtain information on the content of foreign family law by any available means. A catalogue of tools to establish the content of foreign family law according to Polish Civil Procedure is non exhaustive. Parties in dispute are not obliged to prove or provide the content of foreign family law. If foreign family law is applicable under the relevant conflict of laws rule, a Court is obliged to establish the content of foreign family law and parties might find it useful to meet this obligation but they are not obliged to do so. A Court applies foreign family law as a law not as a fact, foreign law is treated as equivalent to national law. A Polish court

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may refuse to apply foreign family law in only two situations, where its use could lead to results incompatible with the fundamental principles of public order and when a Court cannot determine the content of foreign law in a reasonable time.
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

1. Decision ("Postanowienie") of the District Court in Włocławek of August 28, 2009, Case No V CZ 37/09;
   According to the decision: staying in the territory of a Member State may be qualified as “habitual residence” within the meaning of Article 8 paragraph 1 Regulation Brussels IIbis only if the person’s centre of life is in the Member State.

2. Resolution ("Uchwała") of the Supreme Court of December 9, 2010, Case No III CZP 99/10;
   According to the resolution: it is unacceptable to appeal against the court decision in which a court of one member state calls a court of another member state to recognise jurisdiction based on article 15 paragraph 1 b) Regulation Brussels IIbis.

3. Decision ("Postanowienie") of the Court of Appeal in Katowice of May 15, 2009, Case No V ACz 252/09;
   According to the decision: the fact that the current place of habitual residence of the child is away from a divorce court cannot be equated to threats of the good of the child.

4. Decision ("Postanowienie") of the Supreme Court of August 24, 2011, Case No IV CSK 566/10;
   According to the decision: 1) Article 23 Regulation Brussels IIbis should be regarded as a substantive rule; 2) Article 23 e) Regulation Brussels IIbis for the dismissal of the application requires that the judgment presented for recognition (enforceability) is contrary to other later judgments relating to parental responsibility such that these two judgments cannot be reconciled.
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Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)


3. J. Gudowski, *Postępowanie w sprawach o odebranie osoby podlegającej władzy rodzicielskiej lub pozostającej pod opieką*, Przegląd Sądowy No 1, 2002;


Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)


6. M. Świderska, *Przemiany polskiego prawa rodzinnego w ostatnim dziesięcioleciu w świetle standardów międzynarodowych*, Studia Iuridica Toruniensia No 1, 2002;

**Preliminary ruling system on family matters**


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4. M. Bukaczewska, K. Mularczyk, *Uwagi w przedmiocie możliwości zatwierdzenia ugody zawartej w postępowaniu rozwodowym*, ADR Mediacja i Arbitraż No 4, 2009;

National section

PORTUGAL

Carlos M. G. de Melo Marinho
Judge of Court of Appeal
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

The current source of law for parental responsibility matters is the Law on Minors Protection – Decree Nº 314/78, of 27 October – and the Civil Code.

In this Code on the matters of parental responsibility the following Articles have an effect: 17(1), 85(2), 124, 125(1)(a) and (2), 131, 139 to 144, 318(b), 1612, 1775(1)(b), 1776-A, 1832(5), 1877 to 1926.

Articles 1877 to 1926 contain the core rulings on rights of custody, rights of access and guardianship.

The main procedural provisions in this domain are in Articles 146 to 161, 163 to 167 and 174 to 201 of the above indicated Law on Minors Protection.

There are no proposals to reform this legislative area.

2. Which are the most expeditious procedures applicable when the Court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

The way to ensure the enforcement of a decision determining the return of the child is the special proceeding for the return of the child established in Articles 191 to 193 of the Law on Minors Protection – Decree Nº 314/78, of 27 October. This proceeding is considered urgent according to Article 160 of the same Decree, so it does not stop during judicial holidays.

Since this matter belongs to the so called 'voluntary' or 'non-contentious' jurisdiction area, the judge is not bound by strict legality criteria and can adapt the procedural rules and decisions to the superior interest of the child, within the bounds of the legal regime contained in Regulation Brussels IIbis.

It is possible to lodge an appeal against a decision entailing the return of the child in such proceedings but it cannot suspend the efficacy of such decision.

3. In case no Court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which Court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

According to Article 155 of the Law on Minors Protection – Decree Nº 314/78, of 27 October, the following Courts have jurisdiction for hearing a parental responsibility case:

- The Court of the residence of the child at the moment of the lodging of the proceeding;
- Where such residence is unknown, the Court of the residence of the persons bound by the parental responsibility has jurisdiction;
- If these persons have different residences, the Court of the place of the residence of the person to whom the custody of the child was allocated has
jurisdiction or, in cases of joint custody, the person with whom the child lives;

- If some proceedings relate to two or more children of the same parents, and living in the area of different Courts, the Court of the residence of the largest number of children shall have jurisdiction; where this situation does not apply, the Court first seized shall have jurisdiction;

- If at the moment the action is brought, the child lives outside the national territory, the Court of residence of the applicant or of the defendant has jurisdiction;

- If these persons also live outside the country and the Portuguese Court has international jurisdiction, the case must be brought before the Lisbon Court.

For these purposes, all changes that occur after the point of the beginning of the action are irrelevant.

According to Article 65(1)(d) of the Civil Procedure Code, the Portuguese Courts have international jurisdiction where the right which justifies the action cannot became effective without the intervention of such Courts or if the claimant has appreciable difficulty in bringing it outside the country, provided that there is some personal or 'in rem' connection element between the object of the conflict and the Portuguese legal order.

4. **Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?**

Article 157 of the Law on Minors Protection – Decree № 314/78, of 27 October establishes that, at any moment of the proceeding on civil protection of minors the Court can decide, provisionally, whenever it considers necessary, matters that will be ruled definitively at the end and can order whatever it considers indispensable to assure the effectiveness of the final judgement.

This Article also allows the provisional change of definitive decisions already taken.

To allow it to adopt provisional, as well as protective measures, the Court can initiate any inquiries or researches that it considers necessary.

Complementary to this, Article 160 of the same law allows the attribution of a statute of urgency to any proceedings on minors’ protection where the delay can result in damage to the child's best interests.

5. **Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.**

Article 181 of the Law on Minors Protection regulates the situations where what has been ruled on parental responsibility has not been fulfilled by the parties. It allows for the presentation of an application for the coercive enforcement of what has previously been decided, for the imposition of a fine and for damages liability (for the minor and/or the applicant).

Confronted with such an application, the judge must call the persons with parental responsibility to a conference or invite them to allege what they consider
appropriate. During the conference, they can, if desired, agree on a change in the parental responsibility ruling, provided that this is in the interest of the child.

If no such conference is called or the parties do not agree, the judge can order a summary inquiry and, after it, can make his own decision.

This decision is enforced through a procedure that uses all the mechanisms allowed by the system in order to ensure its effectiveness.

Where both parents cannot achieve consensus on parental responsibility, the Court can be asked to change any ruling and the application is attached to the lawsuit that contains the corresponding judicial decision. The defendant(s) is (are) served with the application and can state what he/she/they consider appropriate. Subsequently the procedural rules of the parental responsibility proceedings will apply.

Article 191 rules on matters of delivery of the child in cases of undue removal, establishing a swift procedure aiming at the speedy return to the house where he/she belongs in line with rulings on parental responsibility. After a swift phase of opposition and a summary inquiry, the prompt delivery of the child can be ordered, if legally justified.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

In the area of the judicial regulation of parental responsibility, Article 1901 of the Civil Code stipulates that the Court must hear the child. The judge that will decide the case must be the one to hear the child.

After the entry into force of the Law Nº 61/2008 of 31 October there is no minimum age for the hearing of the minor, which means that he/she has to be heard by the judge if he/she shows enough discernment (maturity) and the ability to express himself/herself about the matters object of the Court’s intervention.

Article 4 of the Law Nº 147/99 of 1 September – here applicable by virtue of Article 147 of the Law on Minors Protection – stipulates not only the hearing of the child separately or accompanied by his/her parents or a person that he/she chooses but also his/her intervention in the proceeding.

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

The Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation) is:

Direcção-Geral de Reinserção Social
Avenida Almirante Reis, 72
1150-020 Lisboa
Tel.: +351 21 114 25 00
Fax: +351 21 317 61 71
Email: correio.dgrs@dgrs.mj.pt
8. Are there any other national legal instruments/procedures put in place for the application of Regulation Brussels IIbis?

No, there are no other national legal instruments or procedures put in place for the application of Regulation Brussels IIbis. This European Regulation is directly applicable without the intervention or previous application of distinct legal rules.

B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

The Law Nº 29/2009 of 29 June (amended by the Law Nº 1/2010 of 15 January) started the process of transposition of Directive No 2008/52/EC, adding new Articles to the Civil Procedure Code in order to promote the use of mediation as a mean for the solution of conflicts.

Following this, Decree No 203/2011 of 20 May was approved with a view to defining and regulating the systems of pre-judicial mediation which suspend the time periods for caducity and loss of right. It also sought to identify the judicial mediation systems that can suspend proceedings. It stated that, for the effects of Articles 249-A, 249-B, 249-C and 279 of the Civil Procedure Code, can be considered as mediation systems: a) the public systems already existing or b) the mediation systems of another Member State of the European Union whose activity is legally recognised in the country of its insertion.

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes transposed into domestic law?


Via these laws legal aid is available to solve concrete questions or in the context of judicial procedures. The applicant must show an individual interest connected with rights violated or under risk of violation.

Legal aid can consist of pre-litigation advice, legal assistance, representation in Court and exemption from (or assistance with) the cost of proceedings.

In cross-border cases where the Court with jurisdiction is that of another state, legal aid also includes the payment of the specific expenses that might emerge from such cross-border nature – interpretation and translation services and travel by the applicant, where such travel appears strictly necessary.

Its rules are applicable before all Courts and for systems of extra-judicial solution of disputes.

National citizens, EU citizens, foreigners and stateless persons with valid residence title in one Member State are entitled to legal aid. Foreigners without a valid title
of residence can apply for legal aid if there is reciprocity from their countries in relation to Portuguese citizens.

Also non-profit legal persons have the right to legal aid, apart from pre-litigation advice.

Evaluation of inability to meet the costs of pre-litigation advice and the proceedings is made under the terms of objective criteria expressly specified by the legislator.

The application can be presented before any public social security attendance service and the decision given can be the object of an application for a review by a Court.

3. Is your country a contracting party to any bilateral or international instruments on family law?

In Portugal the following international instruments are applicable in the area of family law:

I. Multilateral international conventions

   Council of Europe
   • European Convention on the Adoption of Children of 24-04-1967;
   • European Convention on the Legal Status of Children born out of Wedlock of 15-10-1975;

   Hague conference on private international law
   • Convention of 12 June 1902 relating to the settlement of the conflict of laws and jurisdictions as regards to divorce and separation – applicable to Portugal and Romania;
   • Convention of 12 June 1902 relating to the settlement of guardianship of minors – applicable to Belgium, Portugal and Romania;
   • Convention of 17 July 1905 relating to conflicts of laws with regard to the effects of marriage on the rights and duties of the spouses in their personal relationship and with regard to their estates – applicable to Italy, Portugal and Romania;
   • Convention of 24 October 1956 on the law applicable to maintenance obligations towards children;
   • Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children;
   • Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants;
   • Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;
   • Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations;
   • Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations;
   • Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption;

**International Commission on Civil Status**
- Convention extending the competence of authorities empowered to receive declarations acknowledging natural children, signed at Rome on 14 September 1961;
- Convention on the issue of a certificate of legal capacity to marry, signed at Munich on 5 September 1980.

II. **Bilateral international conventions**
- Convention on judicial cooperation on minors protection between Portugal and France, signed on 20-07-1983;
- Convention between Portugal and Luxembourg on legal aid in matters of custody rights and rights of access, signed on 12-06-1992;
- Concordat between the Holy See and Portugal, signed on 18-05-2004;
- Agreement on recovery of maintenance between Portugal and Cape Verde, signed on 03-03-1982;
- Agreement on recovery of maintenance between Portugal and São Tomé and Príncipe, signed on 07-05-1984;

4. **Are there any databases or online tools providing information on family law matters available in your country?**

   Information on family law matters can be found in the following online databases:

   The European Judicial Network in Civil and Commercial Matters provides accessible information on Portuguese Family Law on its website:
   - Information on divorce:
http://ec.europa.eu/civiljustice/divorce/divorce_por_en.htm

- Information on maintenance obligations: http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_por_en.htm
- Information on parental responsibility http://ec.europa.eu/civiljustice/parental_resp/parental_resp_por_en.htm

The European Judicial Atlas in Civil and Commercial Matters informs on


5. Please provide information on accessing and applying foreign family law in your country. Please list applicable procedural provisions and any institutions, mechanisms, available tools or other sources of foreign law at national level.

Information on accessing and applying foreign family law can be obtained on the basis of the:

- European Convention on Information on Foreign Law of 07-06-1968;

Portugal is bound by both international law texts and the national organ of reception and transmission on foreign law under the Convention is:

Gabinete de Documentação e Direito Comparado
Rua do Vale de Pereiro, 2
1269-113 Lisboa
Portugal
Telef: (351) 213820300
Fax: (351) 213820301
e-mail: mail@gddc.pt

The Courts can also collect information on foreign law in civil and commercial matters through:

The Portuguese Contact Point of the European Judicial Network in Civil and Commercial Matters
Rua Mouzinho da Silveira, n.º 10, 1269-273 Lisboa, Portugal
Tel.: (+351) 213 220 042/020
Fax: (+351) 213 474 918
E-mail: redecivil@csm.org.pt
URL: in http://www.redecivil.mj.pt/
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

Supreme Court of Justice:

- Return of the child; Article 11 of the Regulation (EC) 2201/2003; swift decision oriented to assure the effectiveness of a judicial decision on custody; decision powers of the Supreme Court; unlawfulness of the child abduction; Hague Convention on the Civil Aspects of Child Abduction of 25 October 1980; exceptional character of the decisions rejecting the return of the child – Case 1735/06.OTMPRT.51 of 05-11-2009:
  http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/c796caea6f0651b4802576600373793?OpenDocument&Highlight=0,Regulamento,2201%2F2003;
- International jurisdiction of the Court; foreign element; applicability of the Regulation (EC) 2201/2003; Article 8(1) of this Regulation; habitual residence of the child – Case 08B2777 of 20-01-2009:
  http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/ead9bc92743407e80257546003e8044?OpenDocument&Highlight=0,Regulamento,2201%2F2003;

Lisbon Appeal Court:

- Applicability of Regulation (EC) 2201/2003; Article 8; habitual residence of the child at the moment of the beginning of the proceeding; effective connection between the child and its parents and a specific Country; protection of the superior interest of the child; proximity criteria – Case 1729/10.0TMLSB-B.L1-8 of 22-09-2011:
- Child abduction; Articles 10 and 11 of the Regulation (EC) 2201/2003; hearing of the person who requested the return of the child – Case 8395/10.1TBCSC.L1-7 of 14-07-2011:
  http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eeec/e9c5e8bde55d6b4a8025790c003e2b17?OpenDocument&Highlight=0,Regulamento,2201%2F2003;
- Return of the child; Hague Convention on the Civil Aspects of International Child Abduction (concluded 25 October 1980) – Articles 1(b), 3(b), 5 (a), (c) and (f), 11, 13(b) and 21; Articles 2(a), 8, 10 and 11 of the Regulation (EC) 2201/2003; taking of evidence under Article 13(b) of the referred Convention – Case 2273/07.9TMLSB-A.L1-2 of 27-01-2011:
  http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eece/e68e95b86f3800b28025783b005c1451?OpenDocument&Highlight=0,Regulamento,2201%2F2003;
provisional, including protective, measures until the final decision of the appeal; Article 20; enforcement – Case 1239/09.9TMLSB-A.L1-1 of 27-09-2010:


• Article 8 of Regulation (EC) 2201/2003; jurisdiction of the internal Courts; parental responsibility; habitual residence; interdiction of the analysis of the nature of the jurisdictional authorities to which the internal law attributes jurisdiction to solve the case – Case 3232/08.0TBTVD-A.L1-8 of 16-09-2010:


• Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction; quick return of the child; rights of custody and access; notion of wrongful removal or retention of a child – Case 9127/09.2TBCSC.L1-7 of 20-04-2010:


• Parental responsibility; Regulation (EC) 2201/2003; superior interest of the young child; separation from the mother – Case 10411/06.2TMSNT.L1-8 of 12-11-2009:


• Regulation (EC) 2201/2003; Article 8; prevalence of the internal law; Article 1(3)(b) of such Regulation; inapplicability on matters of divorce – Case 8215/07.4TMSNT.L1-1 of 06-10-2009: http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec63ad3d448a6d16a80257654003dc4c5?OpenDocument&Highlight=0,Regulamento,2201%2F2003;

• Habitual residence of the child; Regulation (EC) 2201/2003; Article 2(11) – Case 2273/07.9TMLSB-7 of 24-03-2009:


• Jurisdiction for the attribution of parental responsibility; Articles 9, 10, 12 and 13 of the Regulation (EC) 2201/2003; protection of the superior interest of the child; real connection of the minor with a Country; choice of Court according with efficacy criteria; non opposition of the defendant – Case 10097/2008-7 of 20-01-2009:


• Denmark; non applicability of the Regulation (EC) 2201/2003; superior interest of the child; principles of proportionality, actuality, prevalence of the family, obligatory character of participation and audition of the child; attribution of jurisdiction; flexibility of the measures and absence of strict legality methods; wrongful removal or retention of a child; immediate return of the child in the
first year; refusal of such return; caducity of the provisional measures – Case 4956/2007-6 of 20-07-2007:


Porto Appeal Court:

- Superior interest of the child; establishment of the child’s habitual residence – Case 180/05.9TMMTS-B.P1 of 07-04-2011:
  http://www.dgsi.pt/jtrp.nsf/c3fb530030ea1c61802568d9005cd5bb/ac9fd177c72092c58025787e00459b8f?OpenDocument&Highlight=0,Regulamento,2201%2F2003;
- Lack of jurisdiction of the Portuguese Courts; Article 17 of Regulation (EC) 2201/2003; wrongful removal or retention of a child; habitual residence in the previous year; enforcement of the decision that determines the return of the child: hearing of the child and the parties – Case 2254/09.8TMPRT-B.P1 of 31-03-2011:
- Parental responsibility; Court of the Member State of habitual residence of the child at the time the Court is seised; concept of habitual residence – Case 0855376 of 12-11-2008:

Coimbra Appeal Court

- Article 28 of the Regulation (EC) 2201/2003; enforcement; declaration of enforceability; application of the parties; rejection of the application only in the cases referred in Articles 22, 23, 24, 31(1),(2) and (3); interdiction of opposition, except in the appeal; burden of allegation and proof; Articles 22, 23 and 24 of the Regulation – Case 593/10.4TBVIS.C1 of 29-03-2011:
- Return of the child; voluntary jurisdiction; non submission to strict legality criteria; Article 11 of the Hague Convention on the Civil Aspects of International Child Abduction; Article 11(3) of the Regulation (EC) 2201/2003; urgent proceeding in order to assure the swift return, if it is granted his/her protection in the Member State of origin – Case 786/09.7T2OBR-A.C1 of 22-06-2010:
• Change of the parental responsibility settlement; principle of 'perpetuatio
jurisdicionis'; international jurisdiction of the Portuguese Courts; supremacy of
the treaties, conventions and community Regulations rules in face of the
internal laws; jurisdiction of the Courts of a Member State in matters of parental
responsibility over a child who is habitually resident in that Member State at the
time the Court is seised – Case 668-F/2002.C1 of 27-05-2008:
http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/317976fc0ea39
98080257460005144f8?OpenDocument&Highlight=0,Regulamento,2201%2F2003;

• Wrongful removal of a child; previous joint decisions of the parents; habitual
residence of the child; lack of jurisdiction of the Portuguese Court – Case
870/09.7TBCTB.C1 of 10-11-2009:
http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/48e1d89a7514b
70480257671003d8310?OpenDocument&Highlight=0,Regulamento,2201%2F2003;

Évora Appeal Court:

• Change of habitual residence; access rights; aggravation of expenses due to such
change; compensation of the increased costs – Case 784/07.7TMFAR.E1 of 19-05-
2010:
http://www.dgsi.pt/jtre.nsf/c3fb530030ea1c61802568d9005cd5bb/18b10ca5a7c81
9528025788c00515098?OpenDocument&Highlight=0,Regulamento,2201%2F2003;

• Recognition and enforcement of a foreign judicial decision; Articles 64(3) and 47
of the Regulation (EC) 2201/2003 and 9, 21 and 24(3) of the Regulation (EC)
1347/2000 – Case 553/06-2 of 27-02-2006:
http://www.dgsi.pt/jtre.nsf/c3fb530030ea1c61802568d9005cd5bb/1bbf8d4d20bf0
322802573c500421ca0?OpenDocument&Highlight=0,Regulamento,2201%2F2003;

• Prevalence of the rules of Articles 64(3) and 47 of the Regulation (EC) 2201/2003
and 19, 21 and 24(3) of the Regulation (EC)1347/2000 – Case 1239/05-2 of 16-05-
2005:
http://www.dgsi.pt/jtre.nsf/c3fb530030ea1c61802568d9005cd5bb/49115ce2ef37e
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Mediation


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National section

ROMANIA

Simona Bacsin
Judge, Court of Appeal Galati
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

Substantive provisions:

**New Civil Code of Romania**, it entered into force on 1st October 2011 and it replaced the current Civil Code:

- Book I, Title III, Chapter II - “Tutorship of the minor”, **Articles 110-163 of the New Civil Code of Romania (NCC)**;
- Book II, Title IV - “Parental Authority”, **Articles 483-512 of the NCC**;
- Title II-Chapter VII - “Effects of divorce on the relations between the parents and their minor children”, **Articles 396-404 of the NCC**;

For the full legal text please consult: [http://noulcodcivil.just.ro/Materialeutile.aspx](http://noulcodcivil.just.ro/Materialeutile.aspx)

For more details please see:

- [http://noulcodcivil.just.ro/Desprefamilie/Divor%C5%A3ul/Efecteledivor%C8%9Bului.aspx](http://noulcodcivil.just.ro/Desprefamilie/Divor%C5%A3ul/Efecteledivor%C8%9Bului.aspx)

Procedural provisions:

**Article 612, Article 613² of the Civil Procedure Code of Romania (CPC)**, published in Brochure No.0 of July 26, 1993, as amended and supplemented *inter alia* by Law No.177/2010 for the amendment and supplementation of Law No.47/1992 on the organisation and operation of the Constitutional Court;

**Law No.202/2010** on certain measures for the acceleration of trial settlement, published in the Romanian Official Gazette, Part I No.714 of October 26, 2010 - for general procedural provisions


2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels Ilibis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

In accordance with Article 2 Para.2 of the Law No.369/2004 on the application of the Convention on the civil aspects of the international child abduction, concluded in the Hague on October 25, 1980, in which Romanian acceded through the Law No.100/1992, the competent court for solving this case is the **Minors and Family Tribunal of Bucharest**, which uses a summary proceedings. The court will establish, in the very contents of the court order, a deadline for the fulfilment of the obligation to return the child, under sanction of a civil fine in favour of the Romanian State, comprised between 5 and 25 million ROL. The substantiation of the court order shall be made within 10 days from the date of the verdict.
Article 12 Para. 2 of the Law No.369/2004 provides the possibility of an appeal against the judgments issued by the first instance courts decision, entailing the return of the child within the deadline of 10 days from the moment the judgement was served. The Bucharest Court of Appeal is competent to rule on the appeal settled by 3-judge panels.

For the full legal text of Law No.369/2004 please consult: http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEnmateriecivil%C4%83%C5%9Ficomercial%C4%83/Cadruljuridicintern/tabid/817/Default.aspx

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

As a general rule, under of the New Civil Procedure Code of Romania (NCPC), the district courts - called “courts of tutorship” - are granted jurisdiction expressly in the matters of parental responsibility (Art.111 of the NCPC). In matters of territorial jurisdiction the district court where the child has domicile is competent.

According to Article 155 of the Law No.105/1992 on the settlement of the private international law relations, if the Romanian courts are competent and it is not possible to establish which of them is competent to settle the suit, the request shall be addressed, according to the rules of competence ratione materiae to the Court of First Instance of the Municipality of Bucharest, District 1.

For the full legal text of Law No.105/1992 please see: http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEnmateriecivil%C4%83%C5%9Ficomercial%C4%83/Cadruljuridicintern/tabid/817/Default.aspx

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

The Law No.272/2004 on the protection and the promotion of the child’s rights, published in the Romanian Official Gazette, Part I No.557 of June 23, 2004, lays down the provisional, including protective measures that shall be adopted in order to protect the child’s best interest.

According to Article 39 Para.1 and 2, any child who is temporarily deprived of the care of his or her parents, or who, in order to protect his or her interests, cannot be left in their care, has the right to alternative protection, which includes the special protection measures: placement, emergency placement, specialised supervision.

The placement of the child represents a temporary special child protection measure, which may be decided, as follows: a) with a person or family; b) with a maternal assistant; c) in a residential service, licensed in accordance with the law (Article 58 Para.1).

The emergency placement of the child is a temporary special child protection measure, which is undertaken in the situation of the abused or neglected child, as well as in the situation of the founding or of the child abandoned in healthcare institutions (Article 64 Para.1).
The specialised supervision measure is decided for the child who has committed a criminal act and who is not criminally liable (Article 67 Para.1).

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

Law No. 369/2004 contains special provision on the enforcement of the returning order and access rights. In case the party does not obey the order, it shall be obliged by the court to pay a civil fine from 500,000 ROL to 1,000,000 ROL, set forth per day of delay, until fulfilment of the obligation provided for in the writ of execution. The court can also authorise the other parent to take over, in person or by proxy, the child who is wrongfully on the territory of Romania, at the debtor's expense. In such latter case, the parent can obtain the assistance of the police department, of the police stations or of other public force agents, as well as of other authorities or institutions the cooperation whereof is necessary (Article 14 Para.4).

Access rights - The Romanian central authority (Ministry of Justice) shall try to settle in an amiable way the application on the performance of the right of access. It shall draw the attention of the person whom the child is entrusted with on the sanctions that can be applied, in case of refusal. If necessary, it shall request the participation of the tutelary authority, of other authorities every time it deems to be necessary in order to organise the exercise of the access right. If the approaches fail, the Romanian tutelary authority shall take the necessary measures for compulsory enforcing the access right. Anyway, if the child keeps on refusing the contact with his/her parent, the court of law can order, subject to the child's age, a psychological counselling treatment on a period of time that cannot be in excess of 3 months (Article 17, 18).

The Law No. 369/2004 can be found here: [http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEnmateriecivil%C4%83%C5%9Ficomercial%C4%83/Cadruljuridicintern/tabid/817/Default.aspx](http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEnmateriecivil%C4%83%C5%9Ficomercial%C4%83/Cadruljuridicintern/tabid/817/Default.aspx)

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

Article 264 Para.1, 2, 3, 4 of the New Civil Code of Romania (NCC) regulates the child's right to be heard. Unlike the previous Family Code (Article 42), the new regulation requires all judicial or administrative authorities:

- to hear children past the age of 10 in all procedures concerning them,
- to provide them with information appropriate for their age, including reference to the consequences the decisions will be having on them,
- to take into account the children's opinions, depending on their maturity and age. Hearing a child under the age of 10 is optional but, if the child requests to be heard, such request could only be denied by a motivated decision.

The NCC creates a specialised court competent to settle all disputes arising from the relations regulated in Book II, as called “courts of tutorship”.

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The minor is heard by the judge, but if he considers it necessary, a psychologist shall be present, or shall draw up a psychological report.

For the full legal text of NCC please consult: http://noulcodcivil.just.ro/Portals/0/documente/Legea%20nr.%20287%20din%202009%20privind%20Codul%20civil.pdf

7. **Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?**

The **Ministry of Justice** is the Romanian Central Authority designated to facilitate the application, pursuant to Article 53 of the Regulation No.2201/2003, and to carry out the communications concerning the information required to apply the provisions of this Regulation (Law No.191 of 19 June 2007 for the approval of the Government Emergency Ordinance No.119/2006 concerning certain measures required for the implementation of certain Community Regulations as from the date of Romania's accession to the European Union - Article 1)

For the full legal text please consult: http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEnmateriecivil%C4%83%C5%9Ficomercial%C4%83/Cadruljuridicintern/tabid/817/Default.aspx

8. **Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

The instrument put in place for the application of this Regulation is **Law No. 191 of 19 June 2007** for the approval of the Government Emergency Ordinance No. 119/2006 concerning certain measures required for the implementation of certain Community Regulations as from the date of Romania's accession to the European Union.

According to Article1 Para.1, the **tribunal shall be competent to solve** the requests for recognition, as well as those for approval of enforcement on the Romanian territory of the judgments in matrimonial matters and the matters of parental responsibility, given in another Member State of the European Union, under the terms of the provisions of Regulation No. 2201/2003.

The judgment given according to paragraph 1 shall **only be subject to appeal**.

As for the judgments given in Romania for which recognition or the approval of enforcement in another Member State of the European Union is requested, the **first instance shall be competent to issue**, according to Article 39, Article 41 (1) and Article 42 (2) of the Regulation No. 2201/2003, the **certificates provided in Annexes I, II, III and IV of the same Regulation**.

For the full legal text please consult: http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEnmateriecivil%C4%83%C5%9Ficomercial%C4%83/Cadruljuridicintern/tabid/817/Default.aspx
B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

Unfortunately, the Directive No.2008/52/EC has not yet been transposed into national legislation, but the national law, adopted in 2006 (Law No.192/2006 on mediation and organising the mediator profession) took into consideration the GREEN PAPER on alternative dispute resolution in civil and commercial law.

More information about national law:

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?


In order to improve the access to justice for the citizens of the European Union, the Government Emergency Ordinance is applicable in family, civil, commercial, administrative, labor and social security disputes for all physical persons having domicile or residence in Romania or in other Member States of the European Union, with a net medium income per family member of up to 300 lei and up to 600 lei. For the first case there is no tax involved, while for the second, half of the established tax has to be paid. According to Article 8, legal aid shall not exceed, per total, during a year, the maximum amount equivalent to 10 minimum gross salaries, at the level of the year in which the application was lodged.

As an exception, legal aid is granted regardless of the financial situation of the applicant, if a special law provides the right to legal aid or free legal aid, as a measure of protection, considering special situations such as minority, disability, a certain statute and other such situations.

3. Is your country a contracting party to any bilateral or international instruments on family law?

I) Multilateral international conventions

The Hague Conference on Private International law

  
  a. The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children:

Council of Europe:
b. The Convention of 15 May 2003 on Contact concerning Children;  

c. The European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;  

d. The European Convention of 7 July 1968 on Information on Foreign Law;  

For further details:  
   http://www.just.ro/Sections/Cooperarejudiciar%C4%83interna%C5%A3ional%C4%83/Ghiddecooperare%C3%AEnmateriecivil%C4%83%C5%9Ficomercial%C4%83/ConsiliulEuropei/tabid/823/Default.aspx

Other


II) Bilateral international agreements

Romania has bilateral international agreements including judicial cooperation in civil matters with the following States (that are applicable also to family matters, like recognition and enforcement of judgment): Albania, Algeria, Bosnia and Herzegovina, Croatia, Serbia, PR of China, PDR of Korea, Cuba, Egypt, Macedonia, Morocco, Moldova, Mongolia, Russia, Syria, Tunisia, Turkey and Ukraine

4. Are there any databases or online tools providing information on family law matters available in your country?

The European Judicial Network in Civil and Commercial Matters provides useful information on national family law existing before the New Civil Code of Romania (NCC) and the New Civil Procedure Code of Romania (NCPC):

a. Information on divorce  
   http://ec.europa.eu/civiljustice/divorce/divorce_rom_en.htm

b. Information on maintenance obligation  
   http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_rom_en.htm

• Information on parental responsibility  
   http://ec.europa.eu/civiljustice/parental_resp/parental_resp_rom_en.htm

The European Judicial Atlas in Civil and Commercial Matters informs on
- Matrimonial matters and matters of parental responsibility  
- Maintenance obligations  

The Superior Council of Magistracy provides useful information on the current NCC and NCPC
c. Information on divorce  

- Parental responsibility  

- Marital agreement  

Ministry of Justice

e. Information on parental responsibility-related to Brussels IIbis Regulation  
http://www.just.ro/Sections/Cooperarejudiciar%C4%83inta%C5%A3ional%C 4%83/Raportdestinatpracticienilor/tabid/1696/Default.aspx

- Information on judicial cooperation on civil matters  
http://www.just.ro/Sections/Cooperarejudiciar%C4%83inta%C5%A3ional%C 4%83/Ghiddecooperare%C3%AEmateriecivil%C4%83%C5%9Ficomercial%C4 %83/tabid/736/Default.aspx

The Romanian Association for Common Custody provides relevant information on parental responsibility and child abduction:  
http://www.arpcc.ro/wiki

5. Please provide information on accessing and applying foreign family law in your country.

According to Article 2562 Para 1, 2, 3 of the New Civil Code of Romania (NCC) the content of the foreign law is established by the court by obtaining information from the state authorities who issued it, by an expertise of a specialised person or by in other adequate manner. The party who invokes a foreign law can be asked to prove its contents. If the content of the foreign law can not be established, the Romanian law shall be applied.

There are two ways of obtaining the content of the foreign law:

- By accessing the European Judicial Network in civil and commercial matters between the Member States that was established by Council Decision 2001/470/EC (an informal way, but very efficient and broadly used). Romania has appointed 2 contact persons, both of them employees of the Ministry of Justice. Each Romanian judge has direct access to the contact points and is invited to ask information related to judicial cooperation.

- Through Law No.189/2003 regarding international judicial assistance in civil and commercial cases, republished in in the Romanian Official Gazette, Part I No.543 of August 5, 2009(Chapter IV, Articles 27-29), for the legal text in English please consult:  
http://www.hcch.net/upload/auth20ro_att.pdf
II. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

1. **Return of the child in case of the international child abduction** (wrongful removal and wrongful retention, Article 2(11) of the Hague Convention, Article 11 of Regulation Brussels IIbis)
   - Decision No.794/2008 of the Bucharest Tribunal (final judgment);
   - Decision No. 2151/2007 of the Bucharest Court of Appeal, Civil Minor and Family Department 3 (as appellate court) approving Decision No.1284/2007 of the Bucharest Tribunal, Department 4;
   - Decision No.295/2008 of the Bucharest Tribunal, Department 3 (final decision);
   - Decision No.1167/2008 of the Bucharest Court of Appeal, Civil Minor and Family Department 3 (as appellate court), approving Decision No.1224/2008 of the Bucharest Tribunal, Department 3;
   - Decision No.1393/2007 of the Bucharest Court of Appeal, Civil Minor and Family Department 3 (as appellate court), approving Decision No.490/2007 of the Bucharest Tribunal, Department 4;

   For more jurisprudence on child abduction: [http://ro.wikibooks.org/wiki/Jurispruden%C8%9Ba_nou%C4%83_%C3%AEn_materia_%C3%AEncredin%C8%9B%C4%83rii_minorilor/R%C4%83pirea_interna%C8%9Bional%C4%83_de_minori](http://ro.wikibooks.org/wiki/Jurispruden%C8%9Ba_nou%C4%83_%C3%AEn_materia_%C3%AEncredin%C8%9B%C4%83rii_minorilor/R%C4%83pirea_interna%C8%9Bional%C4%83_de_minori)

2. **Access rights** (jurisdiction of the court, Articles 8, 9 of Regulation Brussels IIbis)
   - Decision No. 532/R/2011 of the Galati Court of Appeal (as final appellate court), approving decision 6872/2010 of the District Court of Focsani;

3. **Right of custody** (jurisdiction of the court where the child is habitually resident, Article 8 of Regulation Bruxelles II bis)
   - Decision No.1426/R/2009 of the Vaslui Tribunal (as appellate court), approving Decision No.1984/2009 of the Vaslui District Court

4. **Provisional measures regarding children during the divorce** (Article 20 of Regulation Brussels IIbis)
   - Decision No.231/2011 of the Galati Tribunal (as final appellate court) that quashed decision 3156/2010 of the District Court of Teciuc
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National section

SCOTLAND

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

Jurisdiction

Subject to Sections 2 and 3 of Chapter II of Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (Brussels II\textit{bis}), the relevant primary legislation in Scotland with regard to jurisdiction in respect of parental responsibility matters is the Family Law Act 1986, Part I, Chapter III.\textsuperscript{91}

‘Part I orders’, with respect to jurisdiction of courts in Scotland, mean the following:

(b) an order made by a court of civil jurisdiction in Scotland under any enactment or rule of law with respect to the residence, custody, care or control of a child, contact with or access to a child or the education or upbringing of a child, excluding—

(i) an order committing the care of a child to a local authority or placing a child under the supervision of a local authority;

... 

(iv) an order giving parental responsibilities and parental rights in relation to a child made in the course of proceedings for the adoption of the child (other than an order made following the making of a direction under section 53(1) of the Children Act 1975);

(v) an order made under the Education (Scotland) Act 1980;

(vi) an order made under Part II or III of the Social Work (Scotland) Act 1968;

(vii) an order made under the Child Abduction and Custody Act 1985;

(viii) an order for the delivery of a child or other order for the enforcement of a Part I order;

(ix) an order relating to the guardianship of a child;

(x) an adoption order (as defined in section 28(1) of the Adoption and Children (Scotland) Act 2007 (asp 4));

\textsuperscript{91} Family Law Act 1986, s 17A (added by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations SSI 2005/42, reg 4(3); and modified by the Parental Responsibility and Measures for the Protection of Children (International Obligations) (Scotland) Regulations SSI 2010/213, Sch 1 para 4 – entry into force on date to be appointed, to implement in relation to Scotland the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children).
(xi) a permanence order (as defined in subsection (2) of section 80 of that Act)

which includes provision such as is mentioned in paragraph (c) of that subsection.92

**Recognition and enforcement of judgments**

The relevant primary legislation, with regard to recognition of overseas decrees concerning parental responsibility matters, differs according to the geographical source of the decree.

**Intra-UK recognition**


**Brussels Ibis**

Recognition in Scotland of a parental responsibility judgment granted by a court of an EU Member State (other than Denmark) rests upon the scheme of rules contained in Brussels Ibis.

**1996 Hague Convention**

In June 2008, the EU Council adopted a decision authorising certain EU Member States to ratify or accede to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children,93 but the instrument still has not yet been ratified by the UK.94 Accordingly, at the time of writing, recognition in Scotland of a non-EU parental responsibility decree, or of a Danish decree, or, upon UK ratification of the 1996 Convention, of such a decree from a country which is not a Contracting State party to the 1996 Hague Convention, depends/will depend upon common law rules.

At common law in Scotland, questions of custody were regarded as pertaining to status, and custody orders made by the court of the father's domicile were accorded respect by courts in Scotland.95 Following the introduction of the Family Law Act 1986, section 26, the significance of, and respect accorded to, decrees of the father's domicile, switched to decrees of the child's habitual residence. This continues to be the case for the instant category of case (i.e. non-EU/Danish/non-Hague), subject to the principle that the Scottish court will regard as paramount the best interests of the child.

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95 e.g. Westergaard 1914 S.C. 977; Radoyevitch 1930 S.C. 619.
Relevant procedural rules recognition

See generally:

Rules of the Court of Session, Ch 62 (Recognition, Registration and Enforcement of Foreign Judgments, etc) Part XI (Registration and Enforcement of Judgments under Council Regulation (E.C.) No. 2201/2003 of 27th November 2003); and

Rules of the Court of Session, Ch 62 (Recognition, Registration and Enforcement of Foreign Judgments, etc), Part XIV (Parental Responsibility and Measures for the Protection of Children).

Applicable law

Prior to 1995, the Scottish choice of law rule concerning parental responsibility matters was to the effect that courts in Scotland, once seised of jurisdiction, would apply the internal rules of Scots law.

The Scots domestic law on parental rights and responsibilities now is to be found in the Children (Scotland) Act 1995, Part I. For the purpose of applicable law, account must also be taken now of a specific rule, found in section 14 of the 1995 Act.

Children (Scotland) Act 1995, section 14

Section 14 of the 1995 Act makes specific provision in relation to choice of law (and jurisdiction) re. (1) orders relating to the administration of a child’s property; and (2) parental responsibilities or parental rights or the responsibilities or rights of a guardian.

The choice of law rule, per section 14(3), is that any question arising under section 14 and concerning (i) parental responsibilities or parental rights; or (ii) the responsibilities or rights of a guardian, in relation to a child shall (insofar as it is not also a question concerning the immediate protection of a child) be determined by the law of the place of the child’s habitual residence at the time when the question arises.

Any question concerning the immediate protection of a child shall be determined by the law of the place where the child is when the question arises.

Any question as to whether a person is validly appointed or constituted guardian of a child shall be determined by the law of the place of the child’s habitual residence on the date when the appointment was made (the date of death of the testator being taken to be the date of appointment where an appointment was made by will), or the event constituting the guardianship occurred.

These choice of law rules must be qualified, however, in the case of a Scottish lex fori, by three principles contained in section 11(7) of the 1995 Act, viz. in considering whether or not to make an order in respect of parental rights and responsibilities, the Scottish court—

(a) shall regard the welfare of the child concerned as its paramount consideration; and

(b) shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and

(c) taking account of the child's age and maturity, shall so far as practicable—

(i) give him an opportunity to indicate whether he wishes to express his views;

(ii) if he does so wish, give him an opportunity to express them; and

(iii) have regard to such views as he may express.

1996 Hague Convention

As indicated above, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, still has not yet been ratified by the UK. When that instrument enters into force in Scotland, its rules concerning applicable law (Articles 15 to 22) shall apply in relevant cases.

Other relevant procedural rules

- Rules of the Court of Session, Ch 49 (Family Actions);
- Rules of the Court of Session, Ch 62 (Recognition, Registration and Enforcement of Foreign Judgments, etc), Part XIV (Parental Responsibility and Measures for the Protection of Children);
- Rules of the Court of Session, Ch 70 (Applications under the Child Abduction and Custody Act 1985); and
- Rules of the Court of Session, Ch 88 (Civil Matters involving Parental Responsibilities under the Council Regulation).

Proposals for reform

Subject to the UK position regarding the 1996 Hague Convention, there are, at present, no proposals for reform of the rules here outlined.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

See generally:

- Rules of the Court of Session, Ch 70 (Applications under the Child Abduction and Custody Act 1985), Part IV (Applications under the Hague Convention where the Council Regulation applies); and
- Rules of the Court of Session, Ch 88 (Civil Matters involving Parental Responsibilities under the Council Regulation).

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With regard to appeals, see Rules of the Court of Session, Ch 62 (Recognition, Registration and Enforcement of Foreign Judgments, etc) Part XI (Registration and Enforcement of Judgments under Council Regulation (E.C.) No. 2201/2003 of 27th November 2003), including, in particular:

**Appeals under the Council Regulation**

62.74.- (1) An appeal under Article 33 (appeals against the enforcement decision) of the Council Regulation shall be made by motion—

(a) to the Lord Ordinary; and

(b) where the appeal is against the granting of warrant for registration under rule 62.70(1) within one month of service under rule 62.73 (service of warrant for registration under the Council Regulation) or within two months of such service where service was executed on a person domiciled in another Member State.

(2) Where the respondent in any such appeal is domiciled furth of the United Kingdom—

(a) in relation to an appeal against the granting of warrant for registration under rule 62.70(1), intimation of the motion shall be made to the address for service of the respondent in Scotland;

(b) in relation to an appeal against a refusal to grant warrant for registration under rule 62.70(1), intimation of the motion shall be made in accordance with rule 16.2 (service furth of United Kingdom) or rule 16.5 (service where address of the person is not known), as the case may be.

**Reclaiming under the Council Regulation**

62.75. Any party dissatisfied with the interlocutor of the Lord Ordinary in any appeal mentioned in rule 62.74 (appeals under the Council Regulation) may reclaim on a point of law against that interlocutor.

3. **In case no court of a Member State has jurisdiction according to Regulation Brussels II bis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?**

By Article 14 of Brussels II bis, where no court has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State. Accordingly, residual national rules can apply only where no Member State court has jurisdiction by reason of the following connections: the habitual residence of the child (Art 8), the continuing jurisdiction of the former habitual residence of the child (Art 9), the habitual residence of the child immediately before wrongful removal or retention (Art 10), prorogation by divorcing etc. parents, or substantial connection of the child plus acceptance of jurisdiction by relevant parties (Art 12), or the presence of the child (Art 13).

**Family Law Act 1986**

The rules of residual national jurisdiction for Scots courts in parental responsibility matters are set out in Part I, Chapter III of the Family Law Act 1986.98 Overlap

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98 Family Law Act 1986, s 17A (added by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations SSI 2005/42, reg 4(3) (and modified by the Parental Responsibility and Measures for the Protection of Children
between the rules contained in the 1986 Act and those in Brussels IIbis, Chapter II, Section 2, may have the effect of rendering some of the rules in the 1986 Act redundant.

Section 9: Habitual residence of the child
An application for a parental responsibilities order otherwise than in matrimonial proceedings\(^9\) may be entertained by (a) the Court of Session if, on the date of the application, the child\(^10\) concerned is habitually resident in Scotland; or (b) the sheriff, if, on that date, the child concerned is habitually resident in the sheriffdom.

This ground may be precluded now, on account that it coincides with Brussels IIbis, Art 8.

Section 10: Presence of the child
An application for a parental responsibilities order may be entertained by (a) the Court of Session if, on that date, the child is (i) present in Scotland and (ii) not habitually resident in any part of the United Kingdom; or (b) the sheriff if, on that date, the child is (i) present in Scotland; (ii) not habitually resident in any part of the United Kingdom; and (iii) either the pursuer or the defender in the application is habitually resident in the sheriffdom.

This ground may be precluded now, on account that it coincides with Brussels IIbis, Art 13.

Section 11: Relevant matrimonial proceedings
The jurisdiction of a court to entertain an application under sections 9, 10, or 15(2) is excluded if, on the date of the application, matrimonial\(^1\) proceedings in respect of the marriage of the parents of the child are continuing in a court in any part of the United Kingdom (unless that other court has made an order under the 1986 Act enabling the Part I proceedings to be taken in Scotland).

Cf. possible overlap with Brussels IIbis, Art 12.

Section 12: Emergency jurisdiction
Notwithstanding that any other court, whether within or outside Scotland, has jurisdiction to entertain an application for a Part I order, the Court of Session or the sheriff shall have jurisdiction if (a) the child concerned is present in Scotland or in the sheriffdom on the date of the application; and (b) the Court of Session or sheriff considers that, for the protection of the child, it is necessary to make such an order immediately.\(^2\)

This ground may be precluded now, on account that it coincides with Brussels IIbis, Art 13.

Section 13: Jurisdiction ancillary to matrimonial proceedings

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\(^9\) or civil partnership proceedings.

\(^10\) A person who has not attained the age of 16: s 18(1).

\(^1\) or civil partnership proceedings.

A court in Scotland has ancillary jurisdiction to entertain an application for a Part I order in the context of matrimonial\textsuperscript{103} proceedings.

Cf. possible overlap with Brussels II\textit{bis}, Art 12.

\textit{Section 14: Power to refuse application or sist proceedings}

The court may refuse application or sist proceedings\textsuperscript{104} where the matter has been determined already in other proceedings,\textsuperscript{105} or where concurrent proceedings regarding the same matters are continuing, and where it would be more appropriate for those matters to be determined in proceedings outside Scotland or in another court in Scotland, and such proceedings are likely to be taken there.

\textit{Section 16: Tutory and curatory}

The Court of Session shall have jurisdiction for an order relating to the guardianship of a child if on the date of the application, the pupil or minor is habitually resident in Scotland. The sheriff shall have such jurisdiction if, on the date of the application, the pupil or minor is habitually resident in the sheriffdom.

\textbf{Children (Scotland) Act 1995}

Section 14 of the 1995 Act makes specific provision in relation to jurisdiction (and choice of law) orders relating to the administration of a child's property.

The jurisdictional provision, which is subject\textsuperscript{106} to Sections 2 and 3 of Chapter II of Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (Brussels II\textit{bis}), is to the effect that (1) the Court of Session shall have jurisdiction to entertain an application for an order relating to the administration of a child's property if the child is habitually resident in, or the property is situated in, Scotland; and (2) a sheriff shall have jurisdiction to entertain such an application if the child is habitually resident in, or the property is situated in, the sheriffdom.

\textbf{4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child's best interests (Article 20 of Regulation Brussels II\textit{bis})?}

See \textit{Family Law (Scotland) Act 1986}, sections 9, 10 and 12, at Question A. 3.


\textbf{5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.}

\textsuperscript{103} or civil partnership proceedings.


\textsuperscript{105} Al-Najjar, Petr 1993 G.W.D. 27-1661.

\textsuperscript{106} Children (Scotland) Act 1995, s 14(5).
Practical arrangements for the exercise of rights of access

62.80.-(1) An application by a party having an enforceable judgment granting a right of access, that has been certified under Article 41 of the Council Regulation or registered for enforcement, seeking an order making practical arrangements for organising the exercise of rights of access under Article 48 of the Council Regulation, shall be made by petition.

(2) There shall be produced with the petition-
(a) an authentic copy of the judgment;
(b) any certificate under Article 41 of the Council Regulation;
(c) any extract of the registered judgment with a warrant for execution; and
(d) where applicable, a document showing that the applicant is in receipt of legal aid in the country where the judgment was given.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?


Views of child

70.17.-(1) In an application under rule 70.5(1) (application for the return of a child) where the Council Regulation applies and the child has-
(a) returned Form 49.8-N (form of notice of intimation to a child), or
(b) otherwise indicated to the court a wish to express views on a matter affecting him,
the court shall not grant any order unless an opportunity has been given for the views of that child to be obtained or heard.

(2) Where a child has indicated his wish to express his views, the court shall order such steps to be taken as it considers appropriate to ascertain the views of that child.

(3) The court shall not grant an order in a petition under rule 70.5(1) (return of a child) affecting a child who has indicated his wish to express his views, unless due weight has been given by the court to the views expressed by that child, having regard to his age and maturity.

See also Court of Session Rules, Form 49.8-N.

Further, more generally, see Rules of the Court of Session, Ch 49 (Family Actions), rules 49.20 – 49.63.

For equivalent sheriff court procedures, see Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 SI 1993/1956, as amended, Chapter 33 (Family Actions), especially:
Procedure in respect of children

33.19. (1) In a family action, in relation to any matter affecting a child, where that child has-
(a) returned to the sheriff clerk Form F9, or
(b) otherwise indicated to the court a wish to express views on a matter affecting him,
the sheriff shall not grant any order unless an opportunity has been given for the views of that child to be obtained or heard.

(2) Where a child has indicated his wish to express his views, the sheriff shall order such steps to be taken as he considers appropriate to ascertain the views of that child.

(3) The sheriff shall not grant an order in a family action, in relation to any matter affecting a child who has indicated his wish to express his views, unless due weight has been given by the sheriff to the views expressed by that child, having due regard to his age and maturity.

Recording of views of the child

33.20. (1) This rule applies where a child expresses a view on a matter affecting him whether expressed personally to the sheriff or to a person appointed by the sheriff for that purpose or provided by the child in writing.

(2) The sheriff, or the person appointed by the sheriff, shall record the views of the child in writing; and the sheriff may direct that such views, and any written views, given by a child shall-
(a) be sealed in an envelope marked "Views of the child-confidential";
(b) be kept in the court process without being recorded in the inventory of process;
(c) be available to a sheriff only;
(d) not be opened by any person other than a sheriff; and
(e) not form a borrowable part of the process

Appointment of local authority or reporter to report on a child

33.21. (1) This rule applies where, at any stage of a family action, the sheriff appoints-
(a) a local authority, whether under section 11(1) of the Matrimonial Proceedings (Children) Act 1958 (reports as to arrangements for future care and upbringing of children) or otherwise, or
(b) another person (referred to in this rule as a "reporter"), whether under a provision mentioned in sub-paragraph (a) or otherwise,
to investigate and report to the court on the circumstances of a child and on proposed arrangements for the care and upbringing of the child.

(2) On making an appointment referred to in paragraph (1), the sheriff shall direct that the party who sought the appointment or, where the court makes the appointment of its own motion, the pursuer or minuter, as the case may be, shall-
(a) instruct the local authority or reporter; and
(b) be responsible, in the first instance, for the fees and outlays of the local authority or reporter appointed.

(3) Where a local authority or reporter is appointed-

(a) the party who sought the appointment, or

(b) where the sheriff makes the appointment of his own motion, the pursuer or minuter, as the case may be,

shall, within 7 days after the date of the appointment, intimate the name and address of the local authority or reporter to any local authority to which intimation of the family action has been made.

(4) On completion of a report referred to in paragraph (1), the local authority or reporter, as the case may be, shall send the report, with a copy of it for each party, to the sheriff clerk.

(5) On receipt of such a report, the sheriff clerk shall send a copy of the report to each party.

(6) Where a local authority or reporter has been appointed to investigate and report in respect of a child, an application for a section 11 order in respect of that child shall not be determined until the report of the local authority or reporter, as the case may be, has been lodged.

**Referral to family mediation**

33.22. In any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may, at any stage of the action, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation.

**Child Welfare Hearing**

33.22A (1) Where-

(a) on the lodging of a notice of intention to defend in a family action in which the initial writ seeks or includes a crave for a section 11 order, a defender wishes to oppose any such crave or order, or seeks the same order as that craved by the pursuer,

(b) on the lodging of a notice of intention to defend in a family action, the defender seeks a section 11 order which is not craved by the pursuer, or

(c) in any other circumstances in a family action, the sheriff considers that a Child Welfare Hearing should be fixed and makes an order (whether at his own instance or on the motion of a party) that such a hearing shall be fixed,

the sheriff clerk shall fix a date and time for a Child Welfare Hearing on the first suitable court date occurring not sooner than 21 days after the lodging of such notice of intention to defend, unless the sheriff directs the hearing to be held on an earlier date.

(2) On fixing the date for the Child Welfare Hearing, the sheriff clerk shall intimate the date of the Child Welfare Hearing to the parties in Form F41.

(3) The fixing of the date of the Child Welfare Hearing shall not affect the right of a party to make any other application to the court whether by motion or otherwise.
(4) At the Child Welfare Hearing (which may be held in private), the sheriff shall seek to secure the expeditious resolution of disputes in relation to the child by ascertaining from the parties the matters in dispute and any information relevant to that dispute, and may-

(a) order such steps to be taken, make such order, if any, or order further procedure, as he thinks fit, and

(b) ascertain whether there is or is likely to be a vulnerable witness within the meaning of section 11(1) of the Act of 2004 who is to give evidence at any proof or hearing and whether any order under section 12(1) of the Act of 2004 requires to be made.

(5) All parties (including a child who has indicated his wish to attend) shall, except on cause shown, attend the Child Welfare Hearing personally.

(6) It shall be the duty of the parties to provide the sheriff with sufficient information to enable him to conduct the Child Welfare Hearing.

**Applications for orders to disclose whereabouts of children**

33.23. (1) An application for an order under section 33(1) of the Family Law Act 1986 (which relates to the disclosure of the whereabouts of a child) shall be made by motion.

(2) Where the sheriff makes an order under section 33(1) of the Family Law Act 1986, he may ordain the person against whom the order has been made to appear before him or to lodge an affidavit.

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis *(Chapter IV of the Regulation)*?

The designated Central Authority for Scotland is the Scottish Ministers. In practice, the Scottish Government’s Private International Law Branch exercises the relevant powers.

Contact details are as follows:
Scottish Government - International and Human Rights Branch
2nd Floor West
St Andrew’s House
Edinburgh EH1 3DG.
Tel: 0131 244 4827 or 0131 244 2417
Fax: 0131 244 4848

9. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

Relevant secondary legislation includes:

- **Rules of the Court of Session, Ch.62 (Recognition, registration and enforcement of foreign judgments, etc.)**


- **Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No.1956 (S.223) (as amended), Ch.33 (Family Actions)**
B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

**Cross-Border Mediation (EU Directive) Regulations 2011**

The Cross-Border Mediation (EU Directive) Regulations 2011 came into force on 20 May 2011, and apply only in respect of mediations relating to cross-border disputes (as defined in Article 2 of the Directive), commencing on or after that date. They make provision to implement Directive 2008/52/EC. Part 1 of the Mediation Regulations extends to the whole of the UK; Part 2 to England and Wales; and Parts 3 and 4 to the same extent as the provisions that they amend.

The definition of cross-border disputes, *per* Article 2 of the Directive, has been adopted by the UK. Article 2.1 defines a cross-border dispute, for its purposes, as one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

(a) the parties agree to use mediation after the dispute has arisen;
(b) mediation is ordered by a court;
(c) an obligation to use mediation arises under national law; or

for the purposes of Article 5 (judicial invitation to the parties to have recourse to mediation), an invitation to go to mediation is made to the parties.

**Cross-Border Mediation (Scotland) Regulations 2011**

The Cross-Border Mediation (Scotland) Regulations 2011 came into force on 6 April 2011, making further provision to implement Directive 2008/52/EC in Scotland. The pre-existing arrangements for mediation in Scotland already complied with Articles 4 (ensuring the quality of mediation), 5 (recourse to mediation), 6 (enforceability of agreements resulting from mediation) and 9 (information for the general public) of the Directive, and so no further implementation was required in

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107 SI 2011/1133.
108 The European scheme does not extend to domestic mediations or to mediations between parties based within the separate jurisdictions of the UK (namely those of England and Wales; Northern Ireland; and Scotland). Mediations which are internal as opposed to cross-border, as defined in the Directive, are not subject to any formal legislative structure.
111 Determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
112 SSI 2011/234.
113 See Executive Note, Cross-Border Mediation (Scotland) Regulations 2011 (SSI 2011/234).
relation to those provisions. Implementation was required in Scotland, however, of Articles 7 and 8 of the Directive.

**Article 7 – Confidentiality of mediation**

Regulation 3 of the Mediation (Scotland) Regulations 2011 implements Article 7 of the Directive by providing that a mediator or person involved in the administration of mediation in relation to a relevant cross-border dispute is not to be compelled in any civil proceedings or arbitration to give evidence, or produce anything, regarding any information arising out of or in connection with that mediation, except where all the parties to the mediation otherwise agree; or in the circumstances set out in Article 7.1(a) or (b) of the Directive, namely, overriding public policy considerations; or where disclosure is necessary to implement the terms of the agreement.

**Article 8 – Effect of mediation on limitation and prescription periods**

Regulations 4 to 9 of the Mediation (Scotland) Regulations 2011 implement Article 8 of the Directive by amending prescription and limitation periods in primary legislation, most importantly in the Prescription and Limitation (Scotland) Act 1973, to ensure that if a prescription or limitation period would have expired while cross-border mediation is ongoing, or within 8 weeks after the mediation has ended, that period will be extended until 8 weeks after the end of the mediation and the parties’ rights to go to court are not prejudiced.

In family actions, the court may direct a referral to a mediator accredited to a specified family mediation organisation, at any stage of an action in which an order in relation to parental responsibilities or parental rights is at issue.

Regulation 9(4) of the Cross-Border Mediation (Scotland) Regulations 2011 has inserted into the Family Law (Scotland) Act 2006, as section 29A, a provision to the effect of extending time limits for applications under sections 28 (financial provision where cohabitation ends otherwise than by death) and 29 (application to court by

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114 With regard to family mediation, see the Civil Evidence (Family Mediation) (Scotland) Act 1995, ss.1 and s 2 (exceptions thereto); and Act of Sederunt (Civil Evidence) (Family Mediation)) 1996 (SI 1996/140). See, on recovery of evidence, including confidentiality, in civil and commercial actions: Rules of the Court of Session (1994, as amended), Ch 35); and Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993/1956), as amended, Ch 28.

115 In respect of which, see Mediation (Scotland) Regulations 2011, reg. 5.

116 As defined in Rules of the Court of Session (Ch 49 – Family Actions), rule 49.1, to include divorce, dissolution of civil partnership, judicial separation of spouses or partners, nullity of marriage or civil partnership, declarator of marriage, aliment, financial provision after divorce or annulment (or dissolution or annulment of a civil partnership) in an overseas country, and declarator of recognition or non-recognition of a relevant foreign decree. There are certain family actions, however, in which referral to mediation is considered inappropriate, e.g. cases involving domestic abuse or threats of violence.

117 Rules of the Court of Session (Ch 49 – Family Actions), rule 49.23 (Referral to family mediation). See also Rules of the Court of Session, (Ch 40 – Appeals from Inferior Courts), rule 40.21 (Referral to family mediation in appeals from the sheriff court): In an appeal from the sheriff court in which an order in relation to parental responsibilities or parental rights under section 11 of the Children (Scotland) Act 1995(a) is in issue, a procedural judge may, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation. Further, Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993/1956), as amended, rule 33.22: in any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may at any stage of the action where he considers it appropriate refer that issue to a mediator accredited to a specified family mediation organisation (and rule 33A.22, mutatis mutandis, re. any civil partnership action in which an order in relation to parental responsibilities or parental rights is in issue).
survivor for provision on intestacy) where parties have been referred to mediation in the context of a cross-border dispute.

2. **How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

   **Civil Legal Aid (Scotland) Regulations 2002**


   The Civil Legal Aid (Scotland) Regulations 2002 were amended by the **Civil Legal Aid (Scotland) Amendment (No. 2) Regulations 2004**, so as to provide, in regulation 48 of the 2002 Regulations, for cross-border disputes.

   Regulation 5 of the 2004 Regulations disapplies certain of the regulations in the Civil Legal Aid (Scotland) Regulations 2002 where a person is applying for legal aid for the purposes of pursuing a cross-border dispute. Cross-border dispute, for this purpose, has the same meaning given by Article 2 of Council Directive 2003/8/EC. (New) Regulation 48(2) provides that:

   2) These [2002] Regulations are modified to the extent provided in the following sub paragraphs in the case of a person resident outwith the United Kingdom in a Member State to which Article 1 of the Council Directive applies, who applies for legal aid for the purpose of pursuing by way of proceedings a cross-border dispute, namely–

   (a) regulation 5 above is modified so as to provide that such an application for legal aid shall be in such form and completed and signed in such manner as is specified in terms of Article 16 of the Council Directive;

   (b) paragraphs (1) and (4) of regulation 19 above are modified so as to provide that the Board is not required to notify its decision to grant, or as the case may be, refuse legal aid, or its grounds for refusing legal aid to that person's solicitor; and

   (c) paragraph (2) of regulation 20 above is modified so as to provide that that person, or any solicitor acting for that person, is not required to intimate to any opponent an application for review of a decision by the Board to refuse legal aid.

3. **Is your country a contracting party to any bilateral or international instruments on Family Law?**

   In addition to Brussels Iibis, the following instruments apply in the UK:

   **Multilateral instruments**

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118 SSI 2002/494.
120 SSI 2004/491.
The United Kingdom is a contracting state to various Hague Conventions: see, for detail, status charts at http://www.hcch.net

The United Nations Convention on the Rights of the Child was signed by the UK on 19 April 1990, and ratified on 16 December 1991.

**Bilateral instruments**

In 2003, senior judges from Pakistan and the UK signed the UK-Pakistan Protocol on Children Matters. This is a judicial understanding between the two countries, which aims to secure the return of an abducted child to the country where they normally live, without regard to the nationality, culture or religion of the parents.

4. **Are there any databases or online tools providing information on Family Law matters available in your country?**

   Information is available from the following websites:

   The Scottish Courts Website:
   http://www.scotcourts.gov.uk/

   The Scottish Government:
   http://www.scotland.gov.uk/Topics/Justice/legal

   The British and Irish Legal Information Institute:
   http://www.bailii.org/

   The European Judicial Network:
   http://ec.europa.eu/civiljustice/index_en.htm:
   - Information on divorce:
     http://ec.europa.eu/civiljustice/divorce/divorce_sco_en.htm
   - Information on maintenance obligations:
     http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_sco_en.htm
   - Information on parental responsibility:
     http://ec.europa.eu/civiljustice/parental_resp/parental_resp_sco_en.htm

   The European Judicial Atlas in Civil and Commercial Matters
   - Parental responsibility
   - Maintenance obligations

   The Scottish Law Commission:
5. Please provide information on accessing and applying foreign Family Law in your country.

Where foreign law arguably is applicable in a British court, its content requires to be pleaded and proved to the court as a matter of fact by the party who seeks to rely upon it. There is a presumption in UK courts that the law of a foreign country is the same as the *lex fori* – or, alternatively, that on failure of proof of foreign law, the *lex fori* applies by default – and the onus is on a person who maintains otherwise to aver the foreign law and to prove it.121 Pleading foreign law is voluntary. If the foreign law is not pleaded and proved to the court's satisfaction, then the court will not have judicial knowledge of that law and will treat the case as a purely domestic one. In this way, the content of a foreign *lex causae* may be assumed to be the same as the *lex fori*, through default of proof to the contrary.

A UK court generally does not take notice of foreign laws; the judge is treated as neither knowing, nor being able to know of his own volition, the content of the foreign law to be applied, and s/he cannot investigate and apply foreign law *ex officio*. The court cannot of its own initiative order a proof of the content of foreign law. Although it will apply the appropriate choice of law rule (even if the parties fail to plead it), in the absence of proof of foreign law, operation of the choice of law rule of the forum effectively will be frustrated.

Proof of foreign law generally is done by means of expert evidence delivered orally. The effect of absence of proof of foreign law, or of proof being incomplete, is that the *lex fori* supplies the lack.

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II. NATIONAL JURISPRUDENCE

Regulation Brussels llbis in matters of parental responsibility


- **G v G** [2011] CSOH 126; 2012 S.L.T. 2 (Court of Session (Outer House)); International child abduction; Right to respect for private and family life.

- **B v B** 2009 S.L.T. (Sh Ct) 24; 2008 Fam. L.R. 138 ((Sheriff Court – Tayside, Central and Fife) (Dunfermline)); Intra-UK Allocation of jurisdiction re. Contact orders; Stay of proceedings; Transfer of proceedings.

- **C v C** [2008] CSIH 34; 2008 S.C. 571(Court of Session – Inner House, Extra Division); International child abduction; Rights of custody; Wrongful removal or retention.

- **S v D** 2007 S.L.T. (Sh Ct) 37; 2006 S.C.L.R. 805 (Sheriff Court (Lothian and Border)); allocation of jurisdiction; England; Habitual residence; Jurisdiction; Parental contact; Parental responsibility; Prorogation; Scotland; Surnames; Variation.
III. NATIONAL BIBLIOGRAPHY

**Regulation Brussels IIbis: Parental responsibility matters**

**Books**

**Articles**

**Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)**

**Books**

**Articles**

**Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)**
Preliminary ruling system on family matters

Family Mediation


- [http://www.scottishmediation.org.uk](http://www.scottishmediation.org.uk)

- [http://www.relationships-scotland.org.uk/](http://www.relationships-scotland.org.uk/)

- [http://www.calmscotland.co.uk](http://www.calmscotland.co.uk)
Scotland

[1.— Orders to which Part I applies.

(1) Subject to the following provisions of this section, in this Part “Part I order” means— (a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order;

(aa) a special guardianship order made by a court in England and Wales under the Children Act 1989;

(ab) an order made under section 26 of the Adoption and Children Act 2002 (contact), other than an order varying or revoking such an order;

(b) an order made by a court of civil jurisdiction in Scotland under any enactment or rule of law with respect to the residence, custody, care or control of a child, contact with or, access to a child or the education or upbringing of a child, excluding—

(i) an order committing the care of a child to a local authority or placing a child under the supervision of a local authority;

(ii) […]

(iii) […]

(iv) an order giving parental responsibilities and parental rights in relation to a child made in the course of proceedings for the adoption of the child (other than an order made following the making of a direction under section 53(1) of the Children Act 1975);

(v) an order made under the Education (Scotland) Act 1980;

(vi) an order made under Part II or III of the Social Work (Scotland) Act 1968;

(vii) an order made under the Child Abduction and Custody Act 1985;

(viii) an order for the delivery of a child or other order for the enforcement of a Part I order;
(ix) an order relating to the guardianship of a child;

[(x) an adoption order (as defined in section 28(1) of the Adoption and Children (Scotland) Act 2007 (asp 4);

(xi) a permanence order (as defined in subsection (2) of section 80 of that Act) which includes provision such as is mentioned in paragraph (c) of that subsection.

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(c) an Article 8 order made by a court in Northern Ireland under the Children (Northern Ireland) Order 1995, other than an order varying or discharging such an order;

d) an order made by a court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children—
(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child; but

(ii) excluding an order varying or revoking such an order;

(e) an order made by the High Court in Northern Ireland in the exercise of its inherent jurisdiction with respect to children—
(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child; but

(ii) excluding an order varying or discharging such an order;

(3) In this Part, “Part I order”— (a) includes any order which would have been a custody order by virtue of this section in any form in which it was in force at any time before its amendment by the Children Act 1989 or the Children (Northern Ireland) Order 1995, as the case may be; and

(b) (subject to sections 32 and 40 of this Act) excludes any order which would have been excluded from being a custody order by virtue of this section in any such form.

(6) Provision may be made by act of sederunt prescribing, in relation to orders within subsection (1)(b) above, what constitutes an application for the purposes of this Part.

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Words substituted by Children Act 1989 c. 41 Sch.13 para.62(2)(a) (October 14, 1991: represents law in force as at date shown)

1. 
2. Substituted by Children Act 1989 c. 41 Sch.13 para.63(1)(a) (October 14, 1991: represents law in force as at date shown)
Chapter III JURISDICTION OF COURTS IN SCOTLAND

8. Jurisdiction in independent proceedings.

A court in Scotland may entertain an application for a [Part I order] otherwise than in matrimonial [ or civil partnership] proceedings only if it has jurisdiction under section 9, 10, 12 or 15(2) of this Act.


Subject to section 11 of this Act, an application for a [Part I order] otherwise than in matrimonial [ or civil partnership] proceedings may be entertained by—

(a) the Court of Session if, on the date of the application, the child concerned is habitually resident in Scotland;

(b) the sheriff if, on the date of the application, the child concerned is habitually resident in the sheriffdom.
10. **Presence of child.**

Subject to section 11 of this Act, an application for a [Part I order] \(^1\) otherwise than in matrimonial [or civil partnership] \(^2\) proceedings may be entertained by—

(a) the Court of Session if, on the date of the application, the child concerned—

(i) is present in Scotland; and

(ii) is not habitually resident in any part of the United Kingdom;

(b) the sheriff if, on the date of the application,—

(i) the child is present in Scotland;

(ii) the child is not habitually resident in any part of the United Kingdom; and

(iii) either the pursuer or the defender in the application is habitually resident in the sheriffdom.

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1. Words substituted by Children Act 1989 c. 41 Sch.13 para.62(2)(a) (October 14, 1991: represents law in force as at date shown)

2. Words inserted by Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005/623 (Scottish SI) art.13 (December 5, 2005)

11.— **Provisions supplementary to sections 9 and 10.**

(1) Subject to subsection (2) below, the jurisdiction of the court to entertain an application for a [Part I order] \(^1\) with respect to a child by virtue of section 9, 10 or 15(2) of this Act is excluded if, on the date of the application, matrimonial [or civil partnership] \(^2\) proceedings are continuing in a court in any part of the United Kingdom in respect of the marriage [or civil partnership] \(^3\) of the parents of the child.

(2) Subsection (1) above shall not apply in relation to an application for a [Part I order] \(^1\) if the court in which the matrimonial [or civil partnership] \(^2\) proceedings are continuing has made one of the following orders, that is to say—

(a) an order under [section 2A(4), 13(6) or 19A(4)] \(^5\) of this Act (not being an order made by virtue of section 13(6)(a)(ii)); or

(b) an order under section 5(2), 14(2) or 22(2) of this Act which is recorded as made for the purpose of enabling [Part I proceedings with respect to] \(^5\) the child concerned to be taken in Scotland or, as the case may be, in another court in Scotland,

and that order is in force.

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1. Words substituted by Children Act 1989 c. 41 Sch.13 para.62(2)(a) (October 14, 1991: represents law in force as at date shown)

2. Words inserted by Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005/623 (Scottish SI)
Notwithstanding that any other court, whether within or outside Scotland, has jurisdiction to entertain an application for a [Part I order], the Court of Session or the sheriff shall have jurisdiction to entertain such an application if—

(a) the child concerned is present in Scotland or, as the case may be, in the sheriffdom on the date of the application; and

(b) the Court of Session or sheriff considers that, for the protection of the child, it is necessary to make such an order immediately.

13.— Jurisdiction ancillary to matrimonial proceedings.

(1) The jurisdiction of a court in Scotland to entertain an application for a [Part I order] 1 in matrimonial [ or civil partnership] 2 proceedings shall be modified by the following provisions of this section.

[(2) A court in Scotland shall not have jurisdiction—

(a) after the dismissal of matrimonial proceedings or after decree of absolvitor is granted therein; or

(b) after the dismissal of civil partnership proceedings,


to entertain an application for a Part 1 order in those proceedings unless the application therefor was made on or before such dismissal or the granting of the decree of absolvitor.

] 3

(3) Where, after a decree of separation has been granted, an application is made in the separation process for a [Part I order], a court in Scotland shall not have jurisdiction to entertain that application if, on the date of the application, proceedings for divorce or nullity of marriage [ or proceedings for dissolution or nullity of civil partnership] 4 in respect of the marriage [ or civil partnership] 5 concerned are continuing in another court in the United Kingdom.

(4) A court in Scotland shall not have jurisdiction to entertain an application for the variation of a [Part I order] 1 made [ in matrimonial [ or civil partnership] 2
proceedings where the court has refused to grant the principal remedy sought in
the proceedings] ⁵ if, on the date of the application, matrimonial [ or civil
partnership] ⁶ proceedings in respect of the marriage [ or civil partnership] ⁸
concerned are continuing in another court in the United Kingdom.

(5) Subsections (3) and (4) above shall not apply if the court in which the other
proceedings there referred to are continuing has made—

(a) an order under [section 2A(4) or 19A(4)] ⁹ of this Act or under
subsection (6) below (not being an order made by virtue of paragraph (a)(ii)
of that subsection), or

(b) an order under section 5(2), 14(2) or 22(2) of this Act which is recorded
as made for the purpose of enabling [Part I proceedings with respect to] ¹⁰
the child concerned to be taken in Scotland or, as the case may be, in
another court in Scotland,

and that order is in force.

(6) A court in Scotland which has jurisdiction in matrimonial [ or civil
partnership] ¹¹ proceedings to entertain an application for a [Part I order] ¹
with respect to a child may make an order declining such jurisdiction if—

(a) it appears to the court with respect to that child that—

(i) but for section 11(1) of this Act, another court in Scotland would have
jurisdiction to entertain an application for a [Part I order] ¹ , or

(ii) but for section 3(2), 6(3), 20(2) or 23(3) of this Act, a court in
another part of the United Kingdom would have jurisdiction to make a
[Part I order] ² or an order varying a [Part I order] ² ; and

(b) the court considers that it would be more appropriate for [Part I matters
relating to] ¹² that child to be determined in that other court or part.

(7) The court may recall an order made under subsection (6) above.

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Words substituted by Children Act 1989 c. 41 Sch.13 para.62(2)(a) (October 14, 1991: represents law in force as at date
shown)

1. Words inserted by Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005/623 (Scottish SI)
   art.15(2) (December 5, 2005)

2. Words substituted by Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005/623 (Scottish SI)
   art.15(3) (December 5, 2005)

3. Words inserted by Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005/623 (Scottish SI)
   art.15(4)(a) (December 5, 2005)

4. Words inserted by Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005/623 (Scottish SI)
   art.15(4)(b) (December 5, 2005)

5. Words inserted by Children (Scotland) Act 1995 c. 36 Sch.4 para.41(3)(b) (November 1, 1996)

6. Words substituted by Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005/623 (Scottish SI)
   art.15(5)(a) (December 5, 2005)

7. Words substituted by Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005/623 (Scottish SI)
   art.15(5)(b) (December 5, 2005)

8. Words substituted by Children (Northern Ireland Consequential Amendments) Order 1995/756 art.12(5)(e) (November 4,
   1996 being the day appointed by SR 1996 No. 297)
14.— **Power of court to refuse application or sist proceedings.**

(1) A court in Scotland which has jurisdiction to entertain an application for a [Part I order] ¹ may refuse the application in any case where the matter in question has already been determined in other proceedings.

(2) Where, at any stage of the proceedings on an application made to a court in Scotland for a [Part I order] ¹, it appears to the court—

(a) that proceedings with respect to the matters to which the application relates are continuing outside Scotland or in another court in Scotland; [...] ²

(b) that it would be more appropriate for those matters to be determined in proceedings outside Scotland or in another court in Scotland and that such proceedings are likely to be taken there [; or] ²

[(c) that it should exercise its powers under Article 15 of the Council Regulation (transfer to a court better placed to hear the case),]

[²]

the court may sist the proceedings on that application [ or (as the case may be) exercise its powers under Article 15 of the Council Regulation] ².

Words substituted by Children Act 1989 c. 41 Sch.13 para.62(2)(a) (October 14, 1991: represents law in force as at date shown)

1. Added by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.4(2)(b) (March 1, 2005)

3. Words inserted by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.4(2)(c) (March 1, 2005)

16.— **Tutory and curatory.**

(1) Subject to subsections (2) and (3) below, an application made after the commencement of this Part for an order relating to the [guardianship] ¹ of a [child] ¹ may be entertained by—

(a) the Court of Session if, on the date of the application, the pupil or minor is habitually resident in Scotland,

(b) the sheriff if, on the date of the application, the pupil or minor is habitually resident in the sheriffdom.

(2) Subsection (1) above shall not apply to an application for the appointment or removal of a [judicial factor] ¹ or of a curator bonis or any application made by such factor or curator.
(3) Subsection (1) above is without prejudice to any other ground of jurisdiction on which the Court of Session or the sheriff may entertain an application mentioned therein.

(4) Provision may be made by act of sederunt prescribing, in relation to orders relating to the [guardianship] \(^1\) of a [child] \(^1\), what constitutes an application for the purposes of this Chapter.

Words substituted by Age of Legal Capacity (Scotland) Act 1991 c. 50 Sch.1 para.45 (September 25, 1991: represents law in force as at date shown)

1.

17A. The provisions of this Chapter are subject to Sections 2 and 3 of Chapter II of the Council Regulation.

1. Added by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.4(3) (March 1, 2005)

18.— Interpretation of Chapter III.

(1) In this Chapter—

"child" means a person who has not attained the age of sixteen;

["civil partnership proceedings" means proceedings for dissolution or nullity of a civil partnership or for the separation of the partners in a civil partnership;

] \(^1\)

"matrimonial proceedings" means proceedings for divorce, nullity of marriage or judicial separation.

(2) In this Chapter, "the date of the application" means, where two or more applications are pending, the date of the first of those applications; and, for the purposes of this subsection, an application is pending until a [Part I order] \(^2\) or, in the case of an application mentioned in section 16(1) of this Act, an order relating to the [guardianship of a child] \(^3\), has been granted in pursuance of the application or the court has refused to grant such an order.

Definition inserted by Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005/623 (Scottish SI) art.16 (December 5, 2005)

1. Words substituted by Children Act 1989 c. 41 Sch.13 para.62(2)(a) (October 14, 1991: represents law in force as at date shown)

2. Words substituted by Age of Legal Capacity (Scotland) Act 1991 c. 50 Sch.1 para.46 (September 25, 1991: represents law in force as at date shown)
14.— Jurisdiction and choice of law in relation to certain matters.

(1) The Court of Session shall have jurisdiction to entertain an application for an order relating to the administration of a child's property if the child is habitually resident in, or the property is situated in, Scotland.

(2) A sheriff shall have jurisdiction to entertain such an application if the child is habitually resident in, or the property is situated in, the sheriffdom.

(3) Subject to subsection (4) below, any question arising under this Part of this Act—

(a) concerning—

(i) parental responsibilities or parental rights; or

(ii) the responsibilities or rights of a guardian,

in relation to a child shall, in so far as it is not also a question such as is mentioned in paragraph (b) below, be determined by the law of the place of the child's habitual residence at the time when the question arises;

(b) concerning the immediate protection of a child shall be determined by the law of the place where the child is when the question arises; and

(c) as to whether a person is validly appointed or constituted guardian of a child's shall be determined by the law of the place of the child's habitual residence on the date when the appointment was made (the date of death of the testator being taken to be the date of appointment where an appointment was made by will), or the event constituting the guardianship occurred.

(4) Nothing in any provision of law in accordance with which, under subsection (3) above, a question which arises in relation to an application for, or the making of, an order under subsection (1) of section 11 of this Act falls to be determined, shall affect the application of subsection (7) of that section.

1. Added by European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005/42 (Scottish SI) reg.5(2) (March 1, 2005)
Application and interpretation of this Part

62.67. (1) This Part applies to the registration and enforcement of a judgment under the Council Regulation.

(2) In this Part, unless the context otherwise requires -
- “judgment” includes an authentic instrument or enforceable agreement; and
- “Member State” has the same meaning as in Article 2(3) of the Council Regulation.

Disapplication of certain rules to this Part

62.68. The following rules shall not apply to an application under this Part:–
- 4.1(1) (printed form for petition),
- 14.4 (form of petitions),
- 14.5 (first order in petitions),
- 14.6 (period of notice for lodging answers),
- 14.7 (intimation and service of petitions),
- 14.9 (unopposed petitions).

Enforcement of judgments from another Member State

62.69. (1) An application under Article 28 of the Council Regulation (enforceable judgments) shall be made by petition in Form 62.69.

(2) There shall be produced with the petition-
- (a) an authentic copy of the judgment to be registered;
- (b) a certificate under Article 39 of the Council Regulation (standard forms of certificate);
- (c) where judgment has been given in absence (that is to say, in default of appearance)-
  - (i) the original or a certified copy of the document which establishes that the party against whom judgment was given in absence was served with the document initiating proceedings or with an equivalent; or
  - (ii) a document indicating that the party against whom the judgment was given in absence has accepted the judgment unequivocally;
- (d) where applicable, a document showing that the applicant is in receipt of legal aid in the country in which the judgment was given;
- (e) an affidavit stating-
  - (i) an address within the jurisdiction of the court for service on or intimation to the petitioner;
  - (ii) the name and address of the petitioner and his interest in the judgment;
(iii) the name and date of birth of each child in respect of whom the judgment was made, the present whereabouts or suspected whereabouts of that child and the name of any person with whom he is alleged to be;
(iv) the name and address of any other person with an interest in the judgment;
(v) whether the judgment is already registered and, if so, where it is registered;
(vi) details of any order known to the petitioner which affects a child in respect of whom the judgment was made and fulfils the conditions necessary for its recognition in Scotland.

(3) Where the petitioner does not produce a document required by paragraph (2)(b) to (e), the court may -
(a) fix a period within which that document is to be lodged;
(b) accept an equivalent document; or
(c) dispense with the requirement to produce the document.

Warrant for registration under the Council Regulation
62.70.- (1) The court shall, on being satisfied that the petition complies with the requirements of the Council Regulation, pronounce an interlocutor-
(a) granting warrant for the registration of the judgment; and
(b) where necessary, granting decree in accordance with Scots law.
(2) The interlocutor pronounced under paragraph (1) shall specify-
(a) the period within which an appeal mentioned in rule 62.74 (appeals under the Council Regulation) against the interlocutor may be made; and
(b) that the petitioner–
(i) may register the judgment under rule 62.72 (registration under the Council Regulation); and
(ii) may not proceed to execution until the expiry of the period for lodging such appeal or its disposal.

Intimation to the petitioner
62.71. Where the court pronounces an interlocutor under rule 62.70(1) the Deputy Principal Clerk shall intimate such interlocutor to the petitioner by sending to his address for service in Scotland a certified copy of the interlocutor by registered post or the first class recorded delivery service.

Registration under the Council Regulation
62.72.- (1) Where the court pronounces an interlocutor under rule 62.70(1) granting warrant for registration, the Deputy Principal Clerk shall enter the judgment in the register of judgments, authentic instruments and court settlements kept in the Petition Department.
(2) On presentation by the petitioner to the Keeper of the Registers of–
(a) a certified copy of the interlocutor under rule 62.70(1) granting warrant for registration,
(b) an authentic copy of the judgment and any translation of it, and
(c) any certificate of currency conversion under rule 62.2(1)(b) for any order concerning costs and expenses of proceedings under the Council Regulation;
they shall be registered in the register of judgments of the Books of Council and Session.
(3) On registration under paragraph (2), the Keeper of the Registers of Scotland shall issue an extract of the registered document with a warrant for execution.

Service of warrant for registration under the Council Regulation
62.73. The petitioner shall serve a copy of the interlocutor under rule 62.70(1) granting warrant for registration of a judgment and notice in Form 62.73 on the person against whom enforcement is sought.

Appeals under the Council Regulation
62.74.- (1) An appeal under Article 33 (appeals against the enforcement decision) of the Council Regulation shall be made by motion–
(a) to the Lord Ordinary; and
(b) where the appeal is against the granting of warrant for registration under rule 62.70(1) within one month of service under rule 62.73 (service of warrant for registration under the Council Regulation) or within two months of such service where service was executed on a person domiciled in another Member State.

(2) Where the respondent in any such appeal is domiciled furth of the United Kingdom–
(a) in relation to an appeal against the granting of warrant for registration under rule 62.70(1), intimation of the motion shall be made to the address for service of the respondent in Scotland;
(b) in relation to an appeal against a refusal to grant warrant for registration under rule 62.70(1), intimation of the motion shall be made in accordance with rule 16.2 (service furth of United Kingdom) or rule 16.5 (service where address of the person is not known), as the case may be.

Reclaiming under the Council Regulation

62.75. Any party dissatisfied with the interlocutor of the Lord Ordinary in any appeal mentioned in rule 62.74 (appeals under the Council Regulation) may reclaim on a point of law against that interlocutor.

Recognition of judgments from another Member State

62.76.-(1) For the purpose of Article 21 of the Council Regulation (recognition of a judgment), an interlocutor pronounced under rule 62.70(1) (warrant for registration under the Council Regulation) shall imply recognition of the judgment so dealt with.

(2) In an application under Article 21(3) of the Council Regulation for recognition of a judgment, rules 62.67 to 62.75 shall apply to such an application as they apply to an application under Article 28 of the Council Regulation (declarator of enforceability).

(3) In an application under Article 21(3) of the Council Regulation for non-recognition of a judgment, the rules under this part shall apply to such an application as they apply to an application under Article 28 of the Council Regulation (declarator of enforceability) subject to the following provisions–
(a) where the application relies on grounds under Article 22(b) or 23(c) of the Council Regulation (judgment given in default of appearance) for the judgment not to be recognised, it shall not be necessary to produce documents required by rule 62.69(2)(c)(document establishing service or acceptance of judgment); and
(b) rule 62.69(2)(b) (certificate under Article 39 of the Council Regulation) shall not apply.

Cancellation of registration under the Council Regulation

62.77. Where an interlocutor under rule 62.70(1) (warrant for registration under the Council Regulation) is recalled and registration under rule 62.72(2) (registration under the Council Regulation) is ordered to be cancelled after an appeal under Article 33 of the Council Regulation (appeal against decision on enforceability) a certificate to that effect by the Deputy Principal Clerk shall be sufficient warrant to the Keeper of the Registers to cancel the registration and return the judgment, certificate or other documents to the person who applied for registration.

Enforcement in another Member State of Court of Session judgments etc.

62.78.-(1) Where a person seeks to apply under the Council Regulation for recognition or enforcement in another Member State of a judgment given by the court, he shall apply by letter to the Deputy Principal Clerk for–
(a) a certificate under Article 39 of the Council Regulation (certificates concerning judgments in matrimonial matters or on matters of parental responsibility);
(b) a certified copy of the judgment; and
(c) if required, a certified copy of the opinion of the court.

(2) The Deputy Principal Clerk shall not issue a certificate under paragraph (1)(a) above unless there is produced to him an execution of service of the judgment on the person against whom it is sought to be enforced.
(3) Where a judgment granting rights of access delivered by the Court of Session acquires a cross-border character after the judgment has been delivered and a party seeks to enforce the judgment in another Member State, he shall apply by letter to the Deputy Principal Clerk for—

(a) a certificate under Article 41 of the Council Regulation (certificate concerning rights of access); and
(b) a certified copy of the judgment.

Rectification of certificates under Articles 41 and 42 of the Council Regulation

62.79. Where a party seeks rectification of a certificate issued under Article 41 or 42 of the Council Regulation (certificate concerning rights of access or return of a child) he shall apply by letter to the Deputy Principal Clerk stating the details of the certificate that are to be rectified.

Practical arrangements for the exercise of rights of access

62.80.- (1) An application by a party having an enforceable judgment granting a right of access, that has been certified under Article 41 of the Council Regulation or registered for enforcement, seeking an order making practical arrangements for organising the exercise of rights of access under Article 48 of the Council Regulation, shall be made by petition.
(2) There shall be produced with the petition—
(a) an authentic copy of the judgment;
(b) any certificate under Article 41 of the Council Regulation;
(c) any extract of the registered judgment with a warrant for execution; and
(d) where applicable, a document showing that the applicant is in receipt of legal aid in the country where the judgment was given.
RULES OF THE COURT OF SESSION, CH 62
(RECOGNITION, REGISTRATION AND ENFORCEMENT OF FOREIGN JUDGMENTS, ETC)

PART XIV (PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN)

Application and interpretation of this Part

62.97.-(1) This Part applies to the registration and enforcement of a measure under Article 24 or Article 26 of the 1996 Convention.
(2) In this Part-

“the 1996 Convention” means the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19th October 1996;
“Contracting State” means a state party to the 1996 Convention.

Enforcement, recognition or non-recognition of measures from a Contracting State

62.98.-(1) An application-
(a) under Article 24 of the 1996 Convention for recognition or non-recognition of a measure taken in a Contracting State other than the United Kingdom; or
(b) under Article 26 of the 1996 Convention for enforcement of a measure taken in a Contracting State other than the United Kingdom,
shall be made by petition in Form 62.98
(2) The petition shall include averments on the matters outlined at Article 23(2) of the 1996 Convention (grounds for refusal of recognition).
(3) There shall be produced with the petition an authentic copy of any judgment or other document which outlines the measure to be registered.
(4) The court shall, on being satisfied that the petition complies with the requirements of the 1996 Convention, pronounce an interlocutor-
(a) granting warrant for the registration of the measure; and
(b) where necessary, granting decree in accordance with Scots law.
(5) The interlocutor pronounced under paragraph (4) shall specify the petition may register the measure under rule 62.100 (registration under the 1996 Convention).

Intimation to the petitioner

62.99. Where the court pronounces an interlocutor under rule 62.98(4) the Deputy Principal Clerk shall intimate such interlocutor to the petitioner, by sending to his address for service in Scotland a certified copy of the interlocutor by registered post or the first class recorded delivery service.

Registration under the 1996 Convention

62.100.-(1) Where the court pronounces an interlocutor under rule 62.98(4) granting warrant for registration, the Deputy Principal Clerk shall enter the measure in the register of judgments, authentic instruments and court settlements kept in the Petition Department.
(2) On presentation by the petitioner to the Keeper of the Registers of-
(a) a certified copy of the interlocutor under rule 62.98(4) granting warrant for registration,
(b) an authentic copy of any judgment or other document which outlines the measure to be registered and any translation of such a document,
they shall be registered in the register of judgments in the Books of Council and Session.
(3) On registration under paragraph (2), the Keeper of the Registers shall issue an extract of the registered document with a warrant for execution.
Service of warrant for registration under the 1996 Convention

62.101. The petitioner shall serve a copy of the interlocutor under rule 62.98(4) granting warrant for registration of a judgment and notice in Form 62.101 on the person against whom enforcement is sought.
RULES OF THE COURT OF SESSION, CH 70
(APPLICATIONS UNDER THE CHILD ABDUCTION AND CUSTODY ACT 1985)

PART I

GENERAL PROVISIONS

Interpretation of this Chapter

70.1 In this Chapter-
"the Act of 1985" means the Child Abduction and Custody Act 1985;
"the European Convention" means the convention defined in section 12(1) of the Act of 1985 and as set out in Schedule 2 to the Act of 1985;
"the Hague Convention" means the convention defined in section 1(1) of the Act of 1985 and as set out in Schedule 1 to the Act of 1985;
"relevant authority" means-
(a) in the United Kingdom, a sheriff court, a children's hearing within the meaning of Part III of the Social Work (Scotland) Act 1968, the High Court, a county court or magistrates' court in England and Wales, the High Court, a county court or magistrates' court in Northern Ireland, or the Secretary of State, as the case may be; or
(b) in a relevant territory, the appropriate authority or court within that territory;
"relevant territory" means a territory outside the United Kingdom to which the Act of 1985 extends by virtue of an Order in Council made under section 28(1) of that Act or in relation to which provision is made by an Order in Council under section 28(2) of that Act.

Translations of documents

70.2 Where any document lodged in process in a cause to which this Chapter applies is in a language other than English, there shall be lodged with that document a translation into English certified as correct by the translator; and the certificate shall include his full name, address and qualifications.

Applications for certified copy or extract

70.3-(1) An application for a certified copy or extract of a decree or any other interlocutor relating to a child, in respect of whom the applicant wishes to apply under the Hague Convention or the European Convention in another Contracting State, shall be made by letter to the Deputy Principal Clerk.
(2) A certified copy or extract issued on an application under paragraph (1) shall be supplied free of charge.

Disclosure of information

70.4 Where the court pronounces an interlocutor under section 24A of the Act of 1985(c) (order to a person to disclose information to the court as to a child's whereabouts), it may order that person to appear before it or to lodge an affidavit.

PART II

INTERNATIONAL CHILD ABDUCTION (THE HAGUE CONVENTION)

Form of applications under this Part

70.5-(1) Subject to rule 70.16 (warrant for intimation on a child), an application for the return of a child under the Hague Convention shall be made by petition and-
(a) shall include averments in relation to-
(i) the identity of the petitioner and the person alleged to have removed or retained the child;
(ii) the identity of the child and his date of birth;
(iii) the whereabouts or suspected whereabouts of the child;
(iv) the date on which the child is alleged to have been wrongfully removed or retained;
(v) the grounds on which the petition is based; and
(vi) any civil cause in dependence before any other court or authority in respect of the child, or any proceedings mentioned in section 9 of the Act of 1985 relating to the merits of the rights of custody of the child in or before a relevant authority;
(b) there shall be produced with the petition and lodged as a production a certified or authorised copy of any relevant decision or agreement; and
(c) there shall be lodged with the petition the evidence by affidavits of any witnesses and any documentary evidence, whether originals or copies initially, in support of the petition.

(2) An application for organising or protecting rights of access granted by any court of a contracting party to the Hague Convention, or for securing respect for the conditions to which the exercise of such rights of access is subject shall be made by petition and-
(a) shall include averments in relation to-
(i) the identity of the petitioner;
(ii) the identity of the child and his date of birth;
(iii) the parents or guardians of the child;
(iv) the whereabouts of the child;
(v) the factual and legal grounds on which access is sought; and
(vi) any civil cause in dependence before any other court or authority in respect of the child, or any proceedings mentioned in section 9 of the Act of 1985 relating to the merits of the rights of custody of the child in or before a relevant authority;
(b) there shall be produced with the petition and lodged as a production a certified copy of any relevant decision or agreement; and
(c) there shall be lodged with the petition the evidence by affidavits of any witnesses and any documentary evidence, whether originals or copies initially, in support of the petition.

(3) An application under section 8 of the Act of 1985 (application for declarator that removal or retention of child was wrongful) shall be made by petition and-
(a) shall include averments in relation to-
(i) the identity of the petitioner and of the person who is alleged to have removed or retained the child;
(ii) the identity of the child and his date of birth;
(iii) the whereabouts or suspected whereabouts of the child;
(iv) the date on which the child is alleged to have been wrongfully removed or retained;
(v) the proceedings which gave custody to the petitioner; and
(vi) the proceedings under the Hague Convention in relation to which the petition is necessary; (b) there shall be produced with the petition any relevant document; and
(c) there shall be lodged with the petition the evidence by affidavits of any witnesses and any documentary evidence, whether originals or copies initially, in support of the petition.

Period of notice, service of causes and hearings under this Part

70.6.- (1) Subject to rule 14.6(2), the period of notice for lodging answers to a petition to which rule 70.5 applies shall be four days.
(2) Subject to rule 70.16 (intimation of notice on child), such a petition, and a copy of any affidavit and documentary evidence lodged with it, shall be served on-
(a) the person alleged to have brought the child into the United Kingdom;
(b) the person with whom the child is presumed to be;
(c) any parent or guardian of the child if he or she is within the United Kingdom, or a relevant territory and not otherwise a party;
(d) the chief executive of the local authority, and the reporter to the Children’s Panel in the local authority area in which the child resides; and
(e) any other person who may have an interest in the child.
(3) The first order under rule 14.5 (first order in petitions) in a petition to which rule 70.5 applies shall specify a date within seven days after the expiry of the period of notice for a first hearing to determine the further progress of the petition.
(4) A respondent shall lodge in process, and send a copy to the petitioner of, the evidence by affidavits of any witnesses and any documentary evidence, whether originals or copies initially, in support of his answers to the petition at least 3 days before the first hearing fixed under paragraph (3).
(5) Subject to rule 70.17 (views of the child), at the first hearing fixed under paragraph (3), the court-
(a) shall determine to what extent, if any, further evidence by affidavit is required, by whom and in regard to what matters, and by what date any such affidavit should be lodged;
(b) may, on special cause shown, direct that a particular matter should be the subject of oral evidence in lieu of further, or in addition to, affidavit evidence; and
(c) may, if no further evidence is required, determine the petition at the first hearing or, if further evidence is required, shall give directions as to the period within which a second hearing shall be held to determine the petition.
Notice of other proceedings

70.7.-(1) Where a petition is presented under paragraph (1) of rule 70.5 and there are proceedings mentioned in section 9 of the Act of 1985 relating to the merits of the rights of custody of the child depending in or before a relevant authority, the court shall give written intimation of the petition and, in due course of the outcome of the petition, to that relevant authority.

(2) Where the court receives a notice equivalent to that under paragraph (1) from a relevant authority, all proceedings in any cause mentioned in section 9 of the Act of 1985 relating to the merits of the rights of custody of the child shall be stayed by the court until the dismissal of the proceedings in that other court under the Hague Convention; and the Deputy Principal Clerk shall give written intimation to each party of the stay and of any such dismissal.

Transfer of causes

70.8.-(1) At any stage of a cause mentioned in paragraph (1) of rule 70.5, the court may, at its own instance or on the motion of any party, pronounce an interlocutor transmitting the cause to the High Court in England and Wales or Northern Ireland, or the appropriate court of a relevant territory, as the case may be.

(2) Where a cause is transferred under paragraph (1), the Deputy Principal Clerk shall-

(a) transmit the process to the appropriate officer of the High Court in England and Wales or Northern Ireland, or the appropriate court of a relevant territory, as the case may be;

(b) give written intimation of such transfer to each party; and

(c) certify on the interlocutor sheet that such written intimation has been given.

(3) Where a cause is transferred under paragraph (1), the question of expenses shall not be determined by the court, but shall be at the discretion of the court to which the cause is transferred.

(4) Where such a cause is transferred under paragraph (1), the Deputy Principal Clerk shall, on receipt of the order transferring the cause and any documents in the cause, give written intimation to each party of the transfer;

(a) the cause shall be deemed to have been commenced by petition; and

(c) the Deputy Principal Clerk shall, within two sederunt days of the receipt of it, cause it to be put out on the By Order Roll before the Lord Ordinary.

PART IV

APPLICATIONS UNDER THE HAGUE CONVENTION WHERE THE COUNCIL REGULATION APPLIES

Application and interpretation of this Part

70.15.-(1) This Part applies to petitions under rule 70.5(1) (applications for the return of a child) under the Hague Convention where the Council Regulation (E.C.) No. 2201/2003 of 27th November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility applies.

(2) In this Part-


“central authority” means a central authority designated under Article 53 of the Council Regulation;

“the Hague Convention” means the Convention defined in section 1(1) of the Child Abduction and Custody Act 1985 and as set out in Schedule 1 to that Act;

“Member State” has the same meaning as in Article 2(3) of the Council Regulation;

“wrongful removal or retention” has the same meaning as in Article 2(11) of the Council Regulation.

Intimation on child

70.16.-(1) In a petition under rule 70.5(1)(application for the return of a child) where the Council Regulation applies, the petitioner shall insert a warrant for intimation to the child to whom the petition relates, if not a party to the petition.

(2) Where paragraph (1) applies a copy of the petition shall not be intimated to the child but a notice of intimation in Form 49.8-N(c) shall be intimated.
(3) Where a petitioner considers that a warrant for intimation to a child under paragraph (1) is inappropriate, he shall-
(a) apply by motion to dispense with intimation to that child; and
(b) include in the petition averments setting out the reasons why such intimation is inappropriate, and the court may dispense with such intimation or make such other order as it thinks fit.

Views of child

70.17. (1) In an application under rule 70.5(1) (application for the return of a child) where the Council Regulation applies and the child has-
(a) returned Form 49.8 - N (form of notice of intimation to a child), or
(b) otherwise indicated to the court a wish to express views on a matter affecting him,
the court shall not grant any order unless an opportunity has been given for the views of that child to be obtained or heard.
(2) Where a child has indicated his wish to express his views, the court shall order such steps to be taken as it considers appropriate to ascertain the views of that child.
(3) The court shall not grant an order in a petition under rule 70.5(1) (return of a child) affecting a child who has indicated his wish to express his views, unless due weight has been given by the court to the views expressed by that child, having regard to his age and maturity.

Continuations

70.18. In an application under rule 70.5(1) (application for the return of the child), where the Council Regulation applies, the court may allow a continuation of the hearing for a period not exceeding 7 days or to the first suitable court date thereafter but any further continuations shall only be allowed on special cause shown.

Recording of hearings under Article 12 of the Hague Convention

70.19. (1) Any hearing on an application for the return of a child under rule 70.5(1) and Article 12 of the Hague Convention, where the Council Regulation applies, shall be recorded by-
(a) a shorthand writer to whom the oath de fideli administratione officii has been administered on his appointment as a shorthand writer in the Court of Session; or
(b) tape recording or other mechanical means approved by the Lord President.
(2) The record of the hearing shall include-
(a) any objection taken to a question or to the line of evidence;
(b) any submission made in relation to such an objection; and
(c) the ruling of the court in relation to the objection and submission.
(3) A transcript of the record of the hearing shall be made only where an order is made under Article 13 of the Hague Convention refusing to order the return of a child in an application where the Council Regulation applies.
(4) The transcript of the record of the hearing shall be certified as a faithful record of the hearing by-
(a) the shorthand writer or shorthand writers, if more than one, who recorded the hearing; or
(b) where the hearing was recorded by tape recording or other mechanical means, the person who transcribed the record.
(5) The court may make such alterations to the transcript of the record of the hearing as appear to it to be necessary after hearing parties; and, where such alterations are made, the Lord Ordinary shall authenticate the alterations.

Order under Article 13 of the Hague Convention

70.20. Where an order is made under Article 13 of the Hague Convention refusing to order the return of a child in an application under rule 70.5(1) where the Council Regulation applies, the Deputy Principal Clerk shall transmit a copy of the order and a transcript of the proceedings to the central authority of the Member State where the child was habitually resident immediately before the wrongful removal or retention.
Form 49.8-N


Court Ref. No.

PART 1

THIS PART MUST BE COMPLETED BY THE PURSUER’S SOLICITOR IN LANGUAGE THAT A CHILD IS CAPABLE OF UNDERSTANDING

To:  (name and address of child)

The court has been asked by your father [or mother, or (other relative or person as the case may be)] to decide (insert appropriate wording to explain section 11 or Article 12 order[s] sought).

If you want to tell the court your views, you should complete Part 2 of this form and return it to the court in the envelope provided by (insert date). This envelope does not need a stamp.

If you return the form, it will be given to the court. The judge may wish to speak to you, and may ask you to come and see him or her.

IF YOU DO NOT UNDERSTAND THIS FORM OR IF YOU WANT HELP TO COMPLETE IT you may get help from a SOLICITOR or you may contact the SCOTTISH CHILD LAW CENTRE ON the FREE ADVICE TELEPHONE LINE ON 0800 328 8970
PART 2

IF YOU WISH THE COURT TO KNOW YOUR VIEWS ABOUT YOUR FUTURE YOU SHOULD COMPLETE THIS PART OF THE FORM

To: Deputy Principal Clerk of Session Court Ref. No.

From: (insert name of child)

1. Do you want the court to know what your views are about your future?

   [ ] YES   [ ] NO

Please tick

2. Would you like someone else to tell the court what your views are about your future?

   [ ] YES   [ ] NO

Please tick

If YES, please write this person’s name and address below:

   Name:
   Address:

3. Would you like to write to the court to give your views about your future?

   [ ] YES   [ ] NO

Please tick

If YES, please write your views below. You may continue on a separate piece of paper.

Thank you for taking the time to respond. Please now return the form and any separate piece of paper in the envelope provided.
Interpretation

88.1. In this Chapter -

“parental responsibility” has the same meaning as in Article 2(7) of the Council Regulation;
“Member State” has the same meaning as in Article 2(3) of the Council Regulation;
“foreign court” means a court in a Member State other than the United Kingdom.

Transfers of cases involving matters of parental responsibility

88.2. Where the court receives a request under Article 15(1) (request for transfer to court better place to hear the case) or an application under Article 15(2)(c) (application for transfer of case involving parental responsibilities to foreign court) of the Council Regulation, the request or application, as the case may be, shall-

(a) contain a detailed statement on the particular connection the child is considered to have with either Scotland or the Member State of the foreign court;
(b) contain the full name, designation and address of all the parties to the action involving parental responsibilities, including any Scottish agent instructed to represent any of the parties.
(c) in the case of a request under Article 15(1), by accompanied by any order of the foreign court confirming that at least one of the parties has accepted the request;
(d) be accompanied by any other documents considered by the foreign court to be relevant to the action involving parental responsibilities including any papers forming part of the process in the foreign court.

Transfers where proceedings ongoing in the sheriff court

88.3.-(1) Where an application under Article 15(2)(c) of the Council Regulation (application for transfer of case involving parental responsibilities to foreign court) is received and states that proceedings involving the same parties and matters involving parental responsibility are ongoing in a sheriff court, the Deputy Principal Clerk shall, within four days after the application is received, transmit the application to the sheriff clerk of the sheriff court specified in the request.
(2) When transmitting an application under paragraph (1) the Deputy Principal Clerk shall give written intimation of the transmission to-
(a) the parties; and
(b) to the foreign court.
(3) Failure by the Deputy Principal Clerk to comply with paragraph (2) shall not affect the validity of a transfer under paragraph (1).

Translations of documents

88.4. Where any document received under rule 88.2 (transfer of cases involving matters of parental responsibility) is in a language other than English, there shall be lodged with that document a translation into English certified as correct by the translator; and the certificate shall include his full name, address and qualifications.

Requests to accept transfer from a court in another Member State

88.5.-(1) A request to the court to accept jurisdiction of an action involving parental responsibilities under rule 88.2 (request to transfer a case) shall be lodged with a summons in Form 13.2-A(a).
(2) When the summons lodged under paragraph (1) is signetted the pursuer shall request the Keeper of the Rolls to allocate a hearing within 14 days of the signetting, to determine whether the court will accept jurisdiction in the action.
(3) On allocation of the date of the hearing the pursuer shall serve a copy of the summons on the
defender and at the same time intimate the date and time of the hearing on the defender by serving on him a
notice in Form 88.5 (form of notice of intimation of a hearing to determine jurisdiction), not less than 7 days
before the date of the hearing.

(4) The pursuer shall lodge a certificate of intimation in Form 16.2 (certificate of intimation furth of
United Kingdom), 16.3 (certificate of service by messenger-at-arms) or 16.4 (certificate of service by post), as
appropriate, at least 2 days before the date of the hearing.

(5) Where the court orders that it will accept jurisdiction of an action after a hearing under paragraph (2) the Deputy Principal Clerk shall, within seven days, send a copy of the interlocutor to the requesting court.

Application for transfer of case involving parental responsibilities to foreign court.
88.6. Where a an application under Article 15(2) of the Council Regulation (application for transfer of case
involving parental responsibilities to foreign court is received the Deputy Principal Clerk shall-
(a) on receipt of the application and any accompanying docum ents, give written intimation of the
application to each party to the action and to any Scottish agents identified in the application as
being instructed to represent any of the parties; and
(b) within two sederunt days of receipt of the application, cause it to be put out on the By Order Roll
before the Lord Ordinary.

Placement of a child in another Member State
86.7.-(1) where the court requires to obtain the consent of a competent authority in another Member State to the
placement of a child under Article 56 of the Council Regulation it shall send a request in Form 88.7 and any
other documents it considers to be relevant to the Scottish central authority for transmission to the central
authority in the other Member State.
(2) In this rule “central authority” means an authority designated under Article 53 of the Council Regulation.
CHAPTER 33 (FAMILY ACTIONS)

**Procedure in respect of children**

33.19. (1) In a family action, in relation to any matter affecting a child, where that child has-
(a) returned to the sheriff clerk Form F9, or
(b) otherwise indicated to the court a wish to express views on a matter affecting him,
the sheriff shall not grant any order unless an opportunity has been given for the views of that child to be obtained or heard.

(2) Where a child has indicated his wish to express his views, the sheriff shall order such steps to be taken as he considers appropriate to ascertain the views of that child.

(3) The sheriff shall not grant an order in a family action, in relation to any matter affecting a child who has indicated his wish to express his views, unless due weight has been given by the sheriff to the views expressed by that child, having due regard to his age and maturity.

**Recording of views of the child**

33.20. (1) This rule applies where a child expresses a view on a matter affecting him whether expressed personally to the sheriff or to a person appointed by the sheriff for that purpose or provided by the child in writing.

(2) The sheriff, or the person appointed by the sheriff, shall record the views of the child in writing; and the sheriff may direct that such views, and any written views, given by a child shall-
(a) be sealed in an envelope marked "Views of the child-confidential";
(b) be kept in the court process without being recorded in the inventory of process;
(c) be available to a sheriff only;
(d) not be opened by any person other than a sheriff; and
(e) not form a borrowable part of the process

**Appointment of local authority or reporter to report on a child**

33.21. (1) This rule applies where, at any stage of a family action, the sheriff appoints-
(a) a local authority, whether under section 11(1) of the Matrimonial Proceedings (Children) Act 1958 (reports as to arrangements for future care and upbringing of children) or otherwise, or
(b) another person (referred to in this rule as a "reporter"), whether under a provision mentioned in sub-paragraph (a) or otherwise,
to investigate and report to the court on the circumstances of a child and on proposed arrangements for the care and upbringing of the child.

(2) On making an appointment referred to in paragraph (1), the sheriff shall direct that the party who sought the appointment or, where the court makes the appointment of its own motion, the pursuer or minuter, as the case may be, shall-
(a) instruct the local authority or reporter; and
(b) be responsible, in the first instance, for the fees and outlays of the local authority or reporter appointed.

(3) Where a local authority or reporter is appointed-
(a) the party who sought the appointment, or
(b) where the sheriff makes the appointment of his own motion, the pursuer or minuter, as the case may be,
shall, within 7 days after the date of the appointment, intimate the name and address of the local authority or reporter to any local authority to which intimation of the family action has been made.

(4) On completion of a report referred to in paragraph (1), the local authority or reporter, as the case may be, shall send the report, with a copy of it for each party, to the sheriff clerk.

(5) On receipt of such a report, the sheriff clerk shall send a copy of the report to each party.

(6) Where a local authority or reporter has been appointed to investigate and report in respect of a child, an application for a section 11 order in respect of that child shall not be determined until the report of the local authority or reporter, as the case may be, has been lodged.

**Referral to family mediation**

33.22. In any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may, at any stage of the action, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation.

**Child Welfare Hearing**
33.22A (1) Where-
(a) on the lodging of a notice of intention to defend in a family action in which the initial writ seeks or includes a crave for a section 11 order, a defender wishes to oppose any such crave or order, or seeks the same order as that craved by the pursuer,
(b) on the lodging of a notice of intention to defend in a family action, the defender seeks a section 11 order which is not craved by the pursuer, or
(c) in any other circumstances in a family action, the sheriff considers that a Child Welfare Hearing should be fixed and makes an order (whether at his own instance or on the motion of a party) that such a hearing shall be fixed,
the sheriff clerk shall fix a date and time for a Child Welfare Hearing on the first suitable court date occurring not sooner than 21 days after the lodging of such notice of intention to defend, unless the sheriff directs the hearing to be held on an earlier date.
(2) On fixing the date for the Child Welfare Hearing, the sheriff clerk shall intimate the date of the Child Welfare Hearing to the parties in Form F41.
(3) The fixing of the date of the Child Welfare Hearing shall not affect the right of a party to make any other application to the court whether by motion or otherwise.
(4) At the Child Welfare Hearing (which may be held in private), the sheriff shall seek to secure the expeditious resolution of disputes in relation to the child by ascertaining from the parties the matters in dispute and any information relevant to that dispute, and may-
(a) order such steps to be taken, make such order, if any, or order further procedure, as he thinks fit, and
(b) ascertain whether there is or is likely to be a vulnerable witness within the meaning of section 11(1) of the Act of 2004 who is to give evidence at any proof or hearing and whether any order under section 12(1) of the Act of 2004 requires to be made.
(5) All parties (including a child who has indicated his wish to attend) shall, except on cause shown, attend the Child Welfare Hearing personally.
(6) It shall be the duty of the parties to provide the sheriff with sufficient information to enable him to conduct the Child Welfare Hearing.

Applications for orders to disclose whereabouts of children
33.23. (1) An application for an order under section 33(1) of the Family Law Act 1986 (which relates to the disclosure of the whereabouts of a child) shall be made by motion.
(2) Where the sheriff makes an order under section 33(1) of the Family Law Act 1986, he may ordain the person against whom the order has been made to appear before him or to lodge an affidavit.
These Regulations may be cited as the Cross-Border Mediation (EU Directive) Regulations 2011.

Subject to regulations 3 and 4, these Regulations come into force on 20 May 2011.

These Regulations apply only where a mediation in relation to a relevant dispute starts on or after 20 May 2011.

For the purposes of regulation 3, a mediation starts—
    (a) except in relation to regulations 16 to 18, on the date of the agreement to mediate that is entered into by the parties and the mediator; and
    (b) in relation to regulations 16 to 18, on the date mentioned in article 1(3) of the Cross-Border Mediation (Scotland) Regulations 2011.

Part 1 of these Regulations, including this regulation, extends to the whole of the United Kingdom.

Part 2 of these Regulations (Mediation Evidence) extends to England and Wales.
7. The remaining Parts of these Regulations have the same extent as the provisions that they amend.

8. In these Regulations—
   (b) “cross-border dispute” has the meaning given by article 2 of the Mediation Directive;
   (c) “mediation” has the meaning given by article 3(a) of the Mediation Directive;
   (d) “mediation administrator” means a person involved in the administration of the mediation process;
   (e) “mediation evidence” means evidence arising out of or in connection with a mediation process;
   (f) “mediation settlement” means the content of a mediation settlement agreement;
   (g) “mediation settlement agreement” means a written agreement resulting from mediation of a relevant dispute;
   (h) “mediator” has the meaning given by article 3(b) of the Mediation Directive; and
   (i) “relevant dispute” means a cross-border dispute that is subject to the Mediation Directive.

9. Subject to regulation 10, a mediator or a mediation administrator has the right to withhold mediation evidence in civil and commercial judicial proceedings and arbitration.

10. A court may order that a mediator or a mediation administrator must give or disclose mediation evidence where—
    (a) all parties to the mediation agree to the giving or disclosure of the mediation evidence;
(b) the giving or disclosure of the mediation evidence is necessary for
overriding considerations of public policy, in accordance with article 7(1)(a)
of the Mediation Directive; or

(c) the mediation evidence relates to the mediation settlement, and the
giving or disclosure of the mediation settlement is necessary to implement or
enforce the mediation settlement agreement.

**Part 3 Extension of Time Limits in View of Mediation in Certain
Cross-border Disputes - Amendments to Primary Legislation**

Amendments to the Prescription Act 1832
Amendments to the Equal Pay Act 1970
Amendments to the Prescription and Limitation (Scotland) Act 1973 Act
Amendments to the Sex Discrimination Act 1975
Amendments to the Limitation Act 1980
Amendments to the Foreign Limitation Periods Act 1984
Amendments to the Employment Rights Act 1996
Amendments to the Land Registration Act 2002
Amendments to the Equality Act 2010
The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 and all other powers enabling them to do so.

In accordance with paragraph 2(2) of Schedule 2 to that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

1. Section 2(2) was amended by paragraph 15(3) of Schedule 8 to the Scotland Act 1998 (c.46) ("the 1998 Act") (which was amended by section 27(4) of the Legislative and Regulatory Reform Act 2006 (c.51) ("the 2006 Act"); and section 27(1)(a) of the 2006 Act and by Part 1 of the Schedule to the European Union (Amendment) Act 2008 (c.7). The functions conferred upon the Minister of the Crown under section 2(2) of the 1972 Act in so far as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act.

1.—

(1) These Regulations may be cited as the Cross-Border Mediation (Scotland) Regulations 2011 and come into force on 6th April 2011.

(2) They do not apply to disputes in relation to which mediation starts before 6th April 2011.

(3) For the purposes of paragraph (2), mediation starts on the date when all the parties to the dispute agree to participate in the mediation.

2.—

(1) In these Regulations—


"relevant cross-border dispute" means a cross-border dispute to which the Directive applies.

(2) Expressions used in the Directive have the same meaning for the purposes of these Regulations as in the Directive, unless the context otherwise requires.

3.—

(1) A mediator of, or a person involved in the administration of mediation in relation to, a relevant cross-border dispute is not to be compelled in any civil proceedings or arbitration to give evidence, or produce anything, regarding any information arising out of or in connection with that mediation.

(2) Paragraph (1) does not apply—

(a) where all the parties to the mediation agree otherwise; or
(b) in the circumstances set out in paragraph (a) or (b) of Article 7.1 of the Directive.

4. The Prescription and Limitation (Scotland) Act 1973 is amended in accordance with regulations 5 and 6.

5.—

(1) Section 14 (computation of prescriptive periods) is amended as follows.

(2) After subsection (1) insert—

"(1A) The prescriptive period calculated in relation to a relevant cross-border dispute for the purposes of any provision of this Part of this Act is extended where the last day of the period would, apart from this subsection, fall—

(a) in the 8 weeks after the date that a mediation in relation to the dispute ends;

(b) on the date that a mediation in relation to the dispute ends; or

(c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(1B) Where subsection (1A) applies, the prescriptive period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(1C) For the purposes of subsections (1A) and (1B), a mediation ends on the date that any of the following occurs—

(a) all of the parties reach an agreement in resolution of the dispute;

(b) all of the parties agree to end the mediation;

(c) a party withdraws from the mediation, which is the date on which—

(i) a party informs all of the other parties of that party's withdrawal,

(ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party for confirmation of whether the other party has withdrawn, if the other party does not respond in that period, or

(iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after a request to another party for confirmation of whether the other party had withdrawn; or
(d) a period of 14 days expires after the date on which the mediator's tenure ends (by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.”.

(3) In subsection (2)—
   (a) after “In this section” insert—

   “—

; and

(b) after “1971” insert—

“,

“mediation” and “mediator” have the meanings given by Article 3 of the Directive; and

“relevant cross-border dispute” means a cross-border dispute within the meaning given by Article 2 of the Directive—(a) which is about a right or obligation to which a prescriptive period applies by virtue of this Part of this Act; and

(b) to which the Directive applies.”.

Section 14 was amended by section 6(1) and paragraph 6 of Schedule 1 to the Prescription and Limitation (Scotland) Act 1984 (c.45).

6.

After section 19D 1, insert—

“19F Extension of limitation periods: cross-border mediation

(1) The limitation period calculated in relation to a relevant cross-border dispute for the purposes of sections 17, 18, 18A or 18B of this Act is extended where the last day of the period would, apart from this subsection, fall—

   (a) in the 8 weeks after the date that a mediation in relation to the dispute ends;

   (b) on the date that a mediation in relation to the dispute ends; or

   (c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(2) Where subsection (1) applies, the limitation period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(3) For the purpose of this section, mediation in relation to a relevant cross-border dispute ends when any of the following occurs—
(a) all of the parties reach an agreement in resolution of the dispute;

(b) all of the parties agree to end the mediation;

(c) a party withdraws from the mediation, which is the date on which—
   (i) a party informs all of the other parties of that party’s withdrawal,

   (ii) in the case of a mediation involving 2 parties, 14 days expire after a
       request made by one party to the other party for confirmation of
       whether the other party has withdrawn, if the other party does not
       respond in that period, or

   (iii) in the case of a mediation involving more than 2 parties, a party
       informs all of the remaining parties that the party received no response
       in the 14 days after a request to another party for confirmation of
       whether the other party had withdrawn; or

(d) a period of 14 days expires after the date on which the mediator’s tenure
    ends (by reason of death, resignation or otherwise), if a replacement
    mediator has not been appointed.

(4) In this section—
   the Council of 21st May 2008 on certain aspects of mediation in civil and
   commercial matters;
   “mediation” and “mediator” have the meanings given by Article 3 of the
   Directive; and
   “relevant cross-border dispute” means a cross-border dispute within the
   meaning given by Article 2 of the Directive—(a) which is about a matter to
   which a limitation period applies by virtue of sections 17 to 18B; and

   (b) to which the Directive applies.”.

A section 19D was inserted by section 171(3) of the Coroners and Justice Act 2009 (c. 25) and another by section 23(4)
of the Arbitration (Scotland) Act 2010 (asp 1).

7.—

(1) Section 71 of the Civic Government (Scotland) Act 1982 ¹ is amended in
accordance with paragraphs (2) and (3).

(2) In subsection (2), after “‘shall’” insert “‘subject to subsection (3) below’”.

(3) After subsection (2), insert—
   “(3) The one year period calculated in relation to a relevant cross-border dispute
for the purposes of subsection (2) above is extended where it would, apart from
this subsection, expire—
   (a) in the 8 weeks after the date that a mediation in relation to the dispute
ends;

(b) on the date that a mediation in relation to the dispute ends; or

(c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(4) Where subsection (3) applies, the period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(5) For the purpose of this section, mediation in relation to a relevant cross-border dispute ends when any of the following occurs—

(a) all of the parties reach an agreement in resolution of the dispute;

(b) all of the parties agree to end the mediation;

(c) a party withdraws from the mediation, which is the date on which—

(i) i)a party informs all of the other parties of that party’s withdrawal,

(ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party for confirmation of whether the other party has withdrawn, if the other party does not respond in that period, or

(iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after a request to another party for confirmation of whether the other party had withdrawn; or

(d) a period of 14 days expires after the date on which the mediator’s tenure ends (by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.

(6) In this section—


"mediation” and “mediator” have the meanings given by Article 3 of the Directive; and

"relevant cross-border dispute” means a cross-border dispute within the meaning given by Article 2 of the Directive which is about the recovery of property to which this section applies.”.

Section 71 applies to the disposal of lost and abandoned property under Part VI of the 1982 Act, and by virtue of sections 83 and 86E, to the disposal of certain property in possession of persons taken into policy custody. Section 86E was inserted by section 6(4) of the Police (Property) Act 1997 (c.30).
8.—  

(1) The Rent (Scotland) Act 1984 is amended in accordance with paragraphs (2) and (3).

(2) In section 37(3), at the beginning, insert ““Subject to section 37A(1) below””.

(3) After section 37 insert—

“37A.— Extension of time limits for recovery from landlord: cross-border mediation

(1) The two year period calculated in relation to a relevant cross-border dispute for the purposes of section 37(3) above is extended where it would, apart from this subsection, expire—

(a) in the 8 weeks after the date that a mediation in relation to the dispute ends;

(b) on the date that a mediation in relation to the dispute ends; or

(c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(2) Where subsection (1) applies, the period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(3) For the purpose of this section, mediation in relation to a relevant cross-border dispute ends when any of the following occurs—

(a) all of the parties reach an agreement in resolution of the dispute;

(b) all of the parties agree to end the mediation;

(c) a party withdraws from the mediation, which is the date on which—

(i) a party informs all of the other parties of that party's withdrawal,

(ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party for confirmation of whether the other party has withdrawn, if the other party does not respond in that period, or

(iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after a request to another party for confirmation of whether the other party had withdrawn; or

(d) a period of 14 days expires after the date on which the mediator's tenure
ends (by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.

(4) In this section—
"mediation" and "mediator" have the meanings given by Article 3 of the Directive; and
"relevant cross-border dispute" means a cross-border dispute within the meaning given by Article 2 of the Directive which is about an amount referred to in section 37(1) above.”.

9.—

(1) The Family Law (Scotland) Act 2006 is amended in accordance with paragraphs (2) to (4).

(2) In section 28(8), at the beginning, insert “Subject to section 29A,”.

(3) In section 29(6), at the beginning, insert “Subject to section 29A,”.

(4) After section 29 insert—

"29A.— Extension of time limits for applications under sections 28 and 29: cross-border mediation

(1) This section applies to the calculation of—
(a) the one year period for the purposes of section 28(8) in relation to a relevant cross-border dispute; and

(b) the 6 month period for the purposes of section 29(6) in relation to a relevant cross-border dispute.

(2) A period referred to in subsection (1) is extended where it would, apart from this subsection, expire—
(a) in the 8 weeks after the date that a mediation in relation to the dispute ends;

(b) on the date that a mediation in relation to the dispute ends; or

(c) after the date when all of the parties to the dispute agree to participate in a mediation in relation to the dispute but before the date that such mediation ends.

(3) Where subsection (2) applies, the period is extended so that it expires on the date falling 8 weeks after the date on which the mediation ends.

(4) For the purposes of this section, mediation in relation to a relevant cross-
border dispute ends when any of the following occurs—
(a) all of the parties reach an agreement in resolution of the dispute;
(b) all of the parties agree to end the mediation;
(c) a party withdraws from the mediation, which is the date on which—
   (i) a party informs all of the other parties of that party's withdrawal,
   (ii) in the case of a mediation involving 2 parties, 14 days expire after a request made by one party to the other party for confirmation of whether the other party has withdrawn, if the other party does not respond in that period, or
   (iii) in the case of a mediation involving more than 2 parties, a party informs all of the remaining parties that the party received no response in the 14 days after a request to another party for confirmation of whether the other party had withdrawn; or
(d) a period of 14 days expires after the date on which the mediator's tenure ends (by reason of death, resignation or otherwise), if a replacement mediator has not been appointed.

(5) In this section—
"mediation" and "mediator" have the meanings given by Article 3 of the Directive; and
"relevant cross-border dispute" means a cross-border dispute within the meaning given by Article 2 of the Directive which is about—(a) a sum which a court may order to be paid under section 28(2);
(b) a sum which a court may order to be paid under section 29(2); or
(c) property which a court may order to be transferred under section 29(2).

FERGUS EWING
Authorised to sign by the Scottish Ministers
St Andrew's House, Edinburgh
21st March 2011
5.

After regulation 47 insert—

“48.— Cross-border disputes

(1) In this regulation—


“cross-border dispute” has the same meaning given by Article 2 of the Council Directive.

(2) These Regulations are modified to the extent provided in the following sub paragraphs in the case of a person resident outwith the United Kingdom in a Member State to which Article 1 of the Council Directive applies, who applies for legal aid for the purpose of pursuing by way of proceedings a cross-border dispute, namely—

(a) regulation 5 above is modified so as to provide that such an application for legal aid shall be in such form and completed and signed in such manner as is specified in terms of Article 16 of the Council Directive;

(b) paragraphs (1) and (4) of regulation 19 above are modified so as to provide that the Board is not required to notify its decision to grant, or as the case may be, refuse legal aid, or its grounds for refusing legal aid to that person’s solicitor; and

(c) paragraph (2) of regulation 20 above is modified so as to provide that that person, or any solicitor acting for that person, is not required to intimate to any opponent an application for review of a decision by the Board to refuse legal aid.”.
The President of the Family Division and the Hon. Chief Justice of Pakistan in consultation with senior members of the family judiciary of the United Kingdom ("the UK") and the Islamic Republic of Pakistan ("Pakistan"), having met on 15th to 17th January 2003 in the Royal Courts of Justice in London, reach the following consensus:

Whereas:

• Desiring to protect the children of the UK and Pakistan from the harmful effects of wrongful removal or retention from one country to the other;
• Mindful that the UK and Pakistan share a common heritage of law and a commitment to the welfare of children;
• Desiring of promoting judicial cooperation, enhanced relations and the free flow of information between the judiciaries of the UK and Pakistan; and
• Recognising the importance of negotiation, mediation and conciliation in the resolution of family disputes;

It is agreed that:

1. In normal circumstances the welfare of a child is best determined by the courts of the country of the child's habitual/ordinary residence.
2. If a child is removed from the UK to Pakistan, or from Pakistan to the UK, without the consent of the parent with a custody/residence order or a restraint/interdict order from the court of the child's habitual/ordinary residence, the judge of the court of the country to which the child has been removed shall not ordinarily exercise jurisdiction over the child, save in so far as it is necessary for the court to order the return of the child to the country of the child's habitual/ordinary residence.
3. If a child is taken from the UK to Pakistan, or from Pakistan to the UK, by a parent with visitation/access/contact rights with the consent of the parent with a custody/residence order or a restraint/interdict order from the court of the child's habitual/ordinary residence or in consequence of an order from that court permitting the visit, and the child is retained in that country after the end of the visit without the consent or in breach of the court order, the judge of the court of the country in which the child has been retained shall not ordinarily exercise jurisdiction over the child, save in so far as it is necessary for the court to order the return of the child to the country of the child's habitual/ordinary residence.
4. The above principles shall apply without regard to the nationality, culture or religion of the parents or either parent and shall apply to children of mixed marriages.
5. In cases where the habitual/ordinary residence of the child is in dispute the court to which an application is made should decide the issue of habitual/ordinary residence before making any decision on the return or the general welfare of the child, and upon determination of the preliminary issue as to habitual/ordinary residence should then apply the general principles set out above.
6. These applications should be lodged by the applicant, listed by the court and decided expeditiously.
7. It is recommended that the respective governments of the UK and Pakistan give urgent consideration to identifying or establishing an administrative service to facilitate or oversee the resolution of child abduction cases (not covered by the 1980 Hague Convention on the Civil Aspects of International Child Abduction).
8. It is further recommended that the judiciaries, the legal practitioners and the non-governmental organisations in the UK and Pakistan use their best endeavours to advance the objects of this protocol.
9. It is agreed that the UK and Pakistan shall each nominate a judge of the superior court to work in liaison with each other to advance the objects of this protocol.

Dame Elizabeth Butler-Sloss, DBE
President of the Family Division
of the High Court of England and Wales

The Hon. Mr. Justice Sh. Riaz Ahmad
Chief Justice of the Supreme Court
**Supplemental Judicial Guidelines on UK-Pakistan Protocol**

UK-Pakistan Second Judicial Conference - Held at Islamabad on 22nd and 23rd September 2003

**Agreed Guidelines**

1. Raising public awareness of protocol, maintaining awareness and providing continuing education to judiciary and practitioners involved in family-child cases.
2. Securing access to justice to 'left behind' parents including knowledge of their rights and the opportunity to assert them.
3. To that end, instituting a system whereby the Judge in each Province of Pakistan is tasked with over-seeing the formation of a Committee to provide legal assistance to such parents.
4. Recognition of the importance of mediation within the extended family.
5. Recognition of the importance of liaison between Pakistan and the United Kingdom and, in particular, the importance of using the liaison Judges who need to know about all relevant cases which are pending or determined. The role of liaison Judge is to exchange orders by the Courts of respective countries in relation to the cases covered by the protocol for information. In case of breach of any such orders, further information is to be exchanged about those cases for appropriate steps to be taken by them in their respective functions. This role of the liaison Judge shall be given proper publicity.
6. Recognition of the importance of retaining judicial links between Pakistan and the United Kingdom, suggesting that Judges of both the countries should meet from time to time to discuss the working/implementation of the protocol, possibly through at least two Judges from each country meeting every two years. Also keeping in regular contact using, if appropriate, video link.
7. Recognition of the need to address the problems that arise upon relocation after the return of a child to the country of his habitual residence. In particular, recognition of the need to afford respect to any undertakings given to the Judge who ordered return or retention of a child.
8. Recommending the establishment of a Body in each country open to approach by an aggrieved person in United Kingdom - Pakistan seeking legal assistance in cases relating to wrongful and illegal removal of children.

Dame Elizabeth Butler-Sloss, DBE  
President of the Family Division  
of the High Court of England and Wales

The Hon. Mr. Justice Sh. Riaz Ahmad  
Chief Justice of Pakistan  
Supreme Court of Pakistan

The Hon. Lady Anne Smith  
Supreme Court of Scotland

The Hon. Mr. Justice Gillen  
Family Division of the High Court  
of Northern Ireland
National section

SLOVAKIA

Nina Matis
PhD - Candidate at the Paneuropean University in Bratislava
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?
   Substantive applicable law:
   Zákon č. 36/2005 Z. z. o rodine a o zmene a doplnení niektorých zákonov v znení neskorších predpisov – Family Act no. 36/2005 as amended
   Procedural applicable law:
   Conflict of laws rules:
   Zákon č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom v znení neskorších predpisov” – Act on international private and procedural law no. 97/1963 as amended
   There are no reform proposals in the legislative process nowadays.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?
   Proceedings on return of the abducted or detained child are ruled by Article 176 and following of Civil Procedure Code. This special type of proceedings concerns minor children where the swiftness of the dispatch is essential. In cases with an international element the court has to decide within the three month period, according to Article 176 par. 3 of Civil Procedure Code. The court should issue a decision within the six-week period, if it concerns the return of the child proceedings. Appeal against the primary court decision about the return of the child is possible and is decided by the county court.
   If the child has its domicile in the Slovak Republic and was abducted to the foreign country or it was retained there, the court issues a decision that the proposer possesses the parental responsibility. According to this decision, the child’s domicile should not be changed without the proposer’s approval, if it is not replaced by the decision of the court. There is no appeal to this decision, but it is possible to submit a proposal for the new proceedings in the case of new circumstances.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?
   Act No. 97/1963 Article 39 about international private law regulates these cases. The Act acknowledges the jurisdiction of Slovak courts in matters of custody of minors if they are domiciled in the Slovak Republic, or if their domicile is unknown. The jurisdiction of Slovak Courts is given even in matters of custody of minor refugees or children that got to Slovak Republic because of unrests in their home country.
If there is no jurisdiction of Slovak courts in matters of minors’ custody, the Slovak court takes measures necessary to protect the person and property of the minor and notifies the competent court in the state of current domicile of the minor. The court takes these measures according to Slovak substantive law.

The Slovak court possesses the jurisdiction to decide on responsibility of parents towards their child in the matters of divorce, annulment of marriage or in decisions on existence of marriage, if the child’s domicile is in Slovak Republic. Another similar case would be, if at least one of parents has parental responsibility towards the child and both spouses expressly submit to the court and execution of the jurisdiction is in the child’s best interest.

Jurisdiction and venue of the court is based on Article 88 par. 1 c) of Civil Procedure Code. In matters of custody of minors, the local court of minors domicile possesses jurisdiction. The domicile of the minor can be determined by agreement of parents, or by other decisive circumstances.

The jurisdiction of courts in the matters of child abduction or retention is determined separately. The competent courts are County Court Bratislava I for regions of Bratislava, Trnava and Nitra, County Court Banská Bystrica for regions Banská Bystrica, Žilina and Trenčín, and County Court Košice I for regions of Košice and Prešov. The Regional Courts of Bratislava, Banská Bystrica and Košice, respectively are courts of appeal.

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

The Code of Civil Procedure, Article 74 and following, rules the cases, where it is necessary to take temporary protective measures. According to Article 75 in the case of unattended minor and in the cases, when child’s life, health and favourable development are endangered, the court can take ex officio (without any proposal or on proposal of the social authority) a measure that the minor child is attended by a nominee.

The social authority proceeds according to the Act No. 305/2005 Coll., especially Article 27. According to that, the social authority is obliged to submit a proposal to the court and to satisfy the child’s basic needs. A parent or even anyone is entitled to submit a similar proposal for the preliminary measure to the court.

The minor does not need to be represented at this proceeding. It is possible to order the delivery of the child in care of the other parent or in care of the nominee of the court and other issues necessary for protection of the minor’s best interest in proceedings of preliminary measures. Such other measures ordered in preliminary proceedings might be the payment of maintenance to the necessary extent, e.g. or even surrender the passport of the minor child to the authority.

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

Avoiding the contact of the child with the other parent despite the existing judicial decision of rights of access might result in judiciary execution of such decision. The extreme case of judiciary execution is forced transfer of the child to the other
parent at the presence of social worker, bailiff or even police. Such experience is very traumatizing for the child, therefore the courts first try to solve the conflicts between parents by mediation, psychological consultations and by interventions of social authorities.

If the parent refuses to return the child to the country of his/her domicile despite the court decision, forced transfer of the child to the other parent at the presence of a bailiff, police or social authority may result.

Act no. 99/1963, as amended, rules all enforcements of the court. The enforcement procedure is as follows:
If the parent refuses to submit to the court’s decision, the court will send a written request to him. There are all possible consequences in this request.
If this is insufficient, the court may summon both parents, child, social and local authorities to another hearing.
The court may request social and local authorities to cooperate on investigation of causes of refusal of the submission to the decision of the court. The court may ask to verify the causes at the child’s domicile, in the school or at the place of medical healthcare of the child.
If the request is not complied, the court may impose a €200 fine to the parent even repeatedly.
If that is not sufficient, the court may request the competent authority to stop parental allowances and child benefits. These would be paid again, if the parent submits to the court’s decision.
The forced transfer of the child applies in case that all abovementioned measures were worthless.
The judge is authorised to order the authorities and persons to cooperate with the execution of court’s decision. The judge may require the explanations from the person that might clarify important circumstances for the execution of decision.
If necessary, the judge may order any person to stay at particular place or to avoid it for necessary time.
If the judge reasonably assumes, that a child is located in a flat or another closed property, and the possessor of it refuses to enable the transfer of the child, the judge may order to do it forcibly. The court may impose a fine seemly up to €820 to anyone, who does not respect the order of the judge.

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

According to the Family Act, Article 43 par. 1., a minor able to express his (her) opinion with respect to his (her) age and mental development has a right to express it in any matters that concerns him (her).

According to Article 100 par. 3 of the Code of Civil Procedure, the court seeks the minor’s views through a representative or a competitive social authority or directly questioning of the minor himself (herself) even without presence of a parent or any other minor’s representatives or persons responsible for his (her) education. The direct questioning is rather seldom event. Nevertheless, if the court decides to question the minor directly, it chooses an informal approach, out of the hearing room and asks questions in as acceptable manner for the minor as possible.
The court usually seeks the minor’s view via social authority. The social authority seeks the minor’s views and opinion mostly by discussion with a child in family environment with agreement of a parent and a minor or elsewhere. In this case, both parents must be informed in writing and agree with them on date of discussion with a child. In addition, parents must be informed about the significance of preparation of the child for the discussion with the social authority.

During the founding for the minor’s views the social authority supports the minor with his (her) seek for views on the matter. The reach of the effective realization of the minor’s right to express his (her) opinion demands that the child is aware of the issues, choices, possible decisions and their consequences via persons responsible for the questioning of the minor. The minor has to be aware of causes and conditions of seek for his (her) views. Due to the minor’s right for his opinion to be heard and considered, the minor must be informed of the result of the process and how his opinion was taken in account.

7. **Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?**

The Ministry of Justice of Slovak Republic facilitates the application of Regulation Brussels IIbis itself.

Contact:
Ministerstvo spravodlivosti Slovenskej republiky
Address: Župné námestie 13, 813 11 Bratislava,
Fax: +421 2 59 353 600
Web: www.justice.gov.sk

and

The centre for the international legal protection of children and youth
Address: Špitálska 8, P.O. Box 57, 814 99 Bratislava,
Fax: +421 2 20 46 32 58
E-Mail: cipc@cipc.gov.sk
Web: www.cipc.sk

8. **Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?**

There are no other Slovak legal instruments or procedures currently put in place for the application of Regulation Brussels IIbis.
B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?


2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

Zákon č. 327/2005 Z. z. o poskytovaní právnej pomoci osobám v materiálnej núdzi a o zmene a doplnení zákona č. 586/2003 Z. z. o advokácii a o zmene a doplnení zákona č. 455/1991 Zb. o živnostenskom podnikaní (živnostenský zákon) v znení neskorších predpisov v znení zákona č. 8/2005 Z. z. v znení neskorších predpisov – Act No. 327/2005 Coll. on legal aid for persons who are unable to pay for it because of their financial and property situation as amended

Special central institution named Legal Aid Centre – Centrum právnej pomoci, was created. Legal Aid Centre deals with applications in cross-border disputes in civil, commercial, labor and family cases.

3. Is your country a contracting party to any bilateral or international instruments on family law?

International agreements on private international law according to the list on the website of the Ministry of Foreign Affairs of the Slovak Republic:

- Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children
- Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
- Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children
- European Convention on the Exercise of Children’s Rights

Bilateral international agreements on private international law are according to the list on the website of the Ministry of Foreign Affairs of the Slovak Republic concluded with the following States:

Afghanistan, Albania, Algeria, Australia, Bahamas, Belgium, Bosnia and Herzegovina, Bulgaria, Czech Republic, China, Fiji, France, Croatia, Italy, Yemen,
Republic of South Africa, Canada, Kenya, PDR of Korea, Cuba, Cyprus, Lesotho, Hungary, FYROM, New Zealand, Poland, Portugal, Austria, Romania, Russian federation, Greece, Slovenia, Serbia, Syria, Spain, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, Vietnam.

4. **Are there any databases or online tools providing information on family law matters available in your country?**

   - European Judicial Network in Civil and Commercial Matters
     - Information on maintenance obligations: [http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_svk_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_svk_en.htm)
   - European Judicial Atlas in Civil and Commercial Matters
   - The Centre for International Legal Protection of Children and Youth – information only in Slovak language: [http://www.cipc.sk/](http://www.cipc.sk/)

5. **Please provide information on accessing and applying foreign family law in your country.**

According to the provision 53 Act on international private and procedural law no. 97/1963 as amended in order to find out the content of foreign law, the court shall take all necessary measures. This is in accordance with the principle “iura novit curia” which is applied by Slovak courts also in cases with a foreign element that means the party to a dispute is not obliged to submit a content of foreign law to the court. If there is a need, the court should ask the Ministry of Justice of the Slovak Republic for information for this purpose or in case of any doubts, the Ministry of Justice can give a statement on the content of foreign law.
The Slovak Republic is also a party to the European Convention on Information on Foreign Law and to the Additional Protocol to the European Convention on Information on Foreign Law. Competent authorities of the contracting parties to these instruments can ask the Ministry of Justice of the Slovak Republic for information on Slovak law.
II. JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility


Decision of the Supreme Court of the Slovak Republic No. 3 Cdo 332/2009 on the return of the child to the country of child’s habitual residence: http://www.supcourt.gov.sk/data/att/6903_subor.pdf


Decision of the Constitutional Court of the Slovak Republic No. III. ÚS 454/2011 concerned the case No. 4 Cdo 33/2011 on violation of child’s right to be heard and formulate own opinions.

Accessible by web-search engine, direct link not provided. http://portal.concourt.sk/pages/viewpage.action?pagId=1277961
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- Haťapka, M. Ochrana detí proti “medzinárodným únosom” In: Justičná revue, 2002, č. 4, s. 408-417
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Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)

- Fuchsová, J. Výsluch maloletých detí v občianskom súdnom konaní. In: Bulletin Slovenskej advokácie, 2008, č. 7-8, str. 5-7
- Príbelská, P. Vplyv kontradiktórnosti v sporovom konaní na dokazovanie v civilnom procese. In: Justičná revue, č. 3, 2008, s. 394-399

Preliminary ruling system on family matters

There is no accessible specific publication to this topic at this time


Family Mediation

There is no accessible specific publication to this topic at this time

- Palková, R. Mimosúdne riešenie sporov v Slovenskej republike. In: Justičná revue, č. 5, 2008, s.383-393

613
National section

SLOVENIA

Bojana Jovin Hrastnik
State Attorney
I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

**CURRENT SOURCE OF LAW:**

a. substantive law:

   The Marriage and Family Relations Act regulates relations between parents and children. It includes provisions on determining and contesting paternity or maternity, provisions on rights and obligations of parents and children as well as provisions on maintenance.

b. procedural law:

   The Civil Procedure Act
   The Non-litigious Civil Procedure Act
   The Marriage and Family Relations Act

c. conflict of law rules:

   The Private International Law and Procedure Act

**REFORM PROPOSALS:**

See answer to question A 1 for more details on the reform in the field of family law. The Proposal for the Family Act included certain new provisions also in the field of relations between parents and children; these provisions have mainly dealt with procedural aspects.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?

In Slovenia, there are no national legal instruments / procedures put in place for the application of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. According to the case law (decision of the Supreme Court, II Ips 457/2001), the decision on the return of the child is most similar to provisional measures, which are dealt with by the Enforcement and Securing of Civil Claims Act. Therefore, procedural rules of this Act have to be taken into consideration and the Civil Procedure Act applies only in case the Enforcement and Securing of Civil Claims Act does not contain specific rules. An appeal against a decision entailing the return of the child is possible.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

With regard to disputes on custody, the Private International Law and Procedure Act determines:
In case the defendant is not domiciled in Slovenia, jurisdiction lies with the courts of Slovenia if parents are nationals of Slovenia or if the child is a national of Slovenia and is domiciled in Slovenia. If the defendant and the child are nationals of Slovenia and are both domiciled in Slovenia, the jurisdiction of Slovenian courts is exclusive (Article 73). Jurisdiction also lies with the courts of Slovenia if these disputes are being resolved within divorce (or annulment) proceedings or within proceedings, in which paternity or maternity is determined / contested, and which fall within the jurisdiction of the courts of Slovenia (Article 76).

4. **Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?**

The **Enforcement and Securing of Civil Claims Act** lays down the provisional, including protective measures to be adopted in urgent cases.

5. **Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.**

The **Enforcement and Securing of Civil Claims Act** lays down the system of enforcement with regard to custody and access rights (Articles 238a – 238g).

Enforcement proceedings fall within the competence of Local Courts (i.e. 44 courts in Slovenia). The person, to whom the enforcement order relates, is required to perform the act within a certain term. The enforcement order also produces an effect on any other person with whom the child might be at the time of enforcement. With regard to the circumstances of the case, the court may impose a fine in order to secure that the enforcement order is complied with. In case enforcement is not accomplished in this way, the court may decide, if appropriate, to take the child from the person to whom the enforcement order relates. The enforcement acts are performed by an enforcement agent, in the presence of an expert worker, appointed by the court. With regard to the circumstances of the case, the enforcement agent may ask help from police.

6. **Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?**

The **Civil Procedure Act** determines the applicable procedures on the hearing of the child.

Family matters fall within the competence of District Courts (i.e. 11 courts in Slovenia). When deciding on the custody and access rights, the court shall inform the child, who is capable of understanding the meaning of the proceedings and consequences of the decision, on the initiation of the proceedings (Article 410(1)). The court shall also inform the child on his right to express his opinion. Considering the child’s age and other circumstances, the judge invites the child to an informal discussion in the court or outside the court, through the intermediary of the social services or a school social worker. A person, in whom the child has confidence and has been selected by the child, may be present in the informal discussion. This person may help the child express his opinion.
Thus, the law does not determine the precise age at which the child is supposed to understand the meaning of the proceedings and consequences of the decision. The court has to check the child’s abilities in each individual case.

Minutes are taken at the discussion (Article 410(2)). The court may also decide to record the discussion on audio tape. Taking into consideration the best interests of the child, the court may decide that parents are not allowed to have a look at the minutes or to listen to the recording of the discussion.

In disputes on custody and access rights, the child is a party to the proceedings. The court serves the decision to the child, who has reached the age of 15 and has expressed his opinion in the proceedings (Article 410(3)). In such case, the child has the right to appeal against the decision. This provision is connected with the provision that a child, who has reached the age of 15 and is capable of understanding the meaning and legal consequences of his acts, may act in the proceedings autonomously (Article 409(1)). His representative may act in the proceedings only until the child declares he will act autonomously (Article 409(2)). A child under the age of 15 and a child who is not capable of understanding the meaning and legal consequences of his acts has to be represented by a representative (Article 409(3); in such case, the decision is served to the representative). In case the interests of the child and his representative contradict, the court appoints a special representative of the child. The court may act in the same way in any other case, if it estimates that that is necessary with regard to all the circumstances of the case (Article 409(4)).

7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

The Central Authority designated to facilitate the application of Regulation Brussels IIbis is the Ministry of labour, family and social affairs.

Contact details:
Ministrstvo za delo, družino in socialne zadeve
Kotnikova 28
SI - 1000 Ljubljana
Tel. ++386 1 369 77 00
e-mail: gp.mddsz@gov.si

8. Are there any other national legal instruments / procedures put in place for the application of Regulation Brussels IIbis?

There are no national legal instruments / procedures put in place for the application of Regulation Brussels IIbis.
B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

The Mediation in Civil and Commercial Matters Act\textsuperscript{122} transposes the Directive 2008/52/EC to Slovenian law. The Act has been prepared on the basis of the UNCITRAL Model Law on International Commercial Conciliation, taking into consideration also the requirements of the Directive and the experience gained in court-annexed mediation in Slovenian courts. The Act contains only basic principles and rules on mediation procedure and leaves the rest to self-regulation. It applies to all mediation processes, cross-border and internal.

The Act on Alternative Dispute Resolution in Judicial Matters\textsuperscript{123} contains specific provisions on mediation offered by courts to parties in judicial proceedings. It imposes obligation to all first instance courts as well as to courts of appeal to offer mediation to parties in civil, commercial, family and labour disputes. Drawing inspiration from the Article 5/1 of the Directive 2008/52/EC, the Act on ADR in Judicial Matters introduces a special information session on mediation.

2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?

The Free Legal Aid Act\textsuperscript{124} transposes the Directive 2003/8/EC to Slovenian law. It applies to all cases, cross-border and internal and determines the scope of legal aid and the conditions for granting legal aid. The Act refers to all judicial proceedings and alternative dispute resolution proceedings which take place in the Republic of Slovenia. Legal aid may be granted for legal counselling, legal representation and other legal services; it may also be granted with relation to the costs of proceedings. It may also be granted for proceedings before international courts and arbitral tribunals, in case it is not granted under rules of procedure of such courts or arbitral tribunals.

3. Is your country a contracting party to any bilateral or international instruments on family law?

Slovenia is a contracting party to the following international and bilateral instruments, which relate to family law:\textsuperscript{125}

14. Multilateral instruments:

\textsuperscript{122} “Zakon o mediaciji v civilnih in gospodarskih zadevah”; applies from 21 June, 2008; Official Journal of the Republic of Slovenia, Nr. 56/2008; available (in Slovenian) at: http://www.uradni-list.si/1/objava.jsp?urlid=200856&stevilka=2339

\textsuperscript{123} “Zakon o alternativnem reševanju sodnih sporov”; applies from 15 June, 2010; Official Journal of the Republic of Slovenia, Nr. 97/2009; available (in Slovenian) at: http://www.uradni-list.si/1/objava.jsp?urlid=200997&stevilka=4248

\textsuperscript{124} “Zakon o brezplačni pravni pomoči”; applies from 11 September, 2001; Official Journal of the Republic of Slovenia, Nr. 96/2004 (officially consolidated text); available at: http://www.uradni-list.si/1/objava.jsp?urlid=200496&stevilka=4235


\textsuperscript{125} Source: the webpage of the Ministry of Labour, Family and Social Affairs, http://www.mddsz.gov.si/si/zakonodaja_in_dokumenti/veljavni_predpisi/
The Hague Conference on Private International Law:
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

The Council of Europe:
- European Convention on the Exercise of Children’s Rights

The United Nations:
- Convention on the Recovery Abroad of Maintenance, New York, 20 June 1956
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, New York, 10 December 1962

15. Bilateral instruments:
Slovenia is a contracting party to the following bilateral agreements which include provisions on judicial cooperation in civil matters\textsuperscript{126}: Algeria, Austria, Belgium, Bulgaria, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, FYR Macedonia, France, Greece, Hungary, Iraq, Ireland, Italy, Mongolia, Poland, Romania, Russian Federation, Slovakia, Turkey and United Kingdom.

Some of these agreements have been concluded before entering the European Union, with the states, which are now also EU Member States (these agreements have therefore been superseded by EU instruments which relate to the same matters).

4. Are there any databases or online tools providing information on family law matters available in your country?

The following databases are available:

a. The Ministry of Justice and Public Administration:
   http://www.mpju.gov.si/
   - The Ministry of Labour, Family and Social Affairs:
     http://www.mddsz.gov.si/
   - The Courts:
     http://www.sodisce.si/
   - The Association of Centres for Social Work:
     http://www.scsd.si/
   - The European Judicial Network in Civil and Commercial Matters:

\textsuperscript{126} Source: the webpage of the Ministry of Justice and Public Administration, http://www.mpju.gov.si/si/zakonodaja_in_dokumenti/mednarodne_pogodbe_s_podrocia_pravosodja/bilater alni_sporazumi/
5. Please provide information on accessing and applying foreign family law in your country.

The Civil Procedure Act determines that parties have to state facts and provide evidence for their statements (Article 7(1)). The court that has to know the law; it also has the duty to find out the content of foreign law. The Private International Law and Procedure Act determines that the court (or other competent body) has to find out the content of foreign law ex officio (Article 12(1)). The court (or other body) may require information on the content of foreign law from the Ministry of Justice, or, it may check the content of foreign law in another appropriate manner (Article 12(2)). In court proceedings, parties may present authentic instruments or other instruments on the content of foreign law, drawn up by competent foreign body (but parties are not required to do so; Article 12(3)). If it is absolutely impossible to find out the content of foreign law, Slovenian law applies (Article 12(4)).

In practise, courts usually contact the Ministry of Justice when foreign law has to be applied. There are different ways for the ministry to get information on the foreign law. In case the European Convention on Information on Foreign Law applies, information is sought in a manner described in the convention. Bilateral instruments may also include specific provisions on accessing foreign law. In the rest of the cases, diplomatic channels are used to seek information.

The European Judicial Network and the contact points existing within the network are also contacted when appropriate.
III. NATIONAL JURISPRUDENCE

Regulation Brussels IIbis in matters of parental responsibility

Ljubljana Court of Appeal, decision IV Cp 1792/2007 (18 April 2007):
Parental responsibility / jurisdiction
(Regulation Brussels IIbis, Article 2/11. and Article 10)

Ljubljana Court of Appeal, decision IV Cp 3608/2008 (2 October 2008):
Parental responsibility / jurisdiction / lis pendens
(Regulation Brussels IIbis, Articles 3, 8 and 19)

Parental responsibility / jurisdiction / provisional measures
(Regulation Brussels IIbis, Article 20)

In this case, a reference for a preliminary ruling was filed (C-403/09). The Court of Appeal asked for the interpretation of the Article 20 of the Regulation Brussels IIbis.

International child abduction / conditions for the return of the child
(Regulation Brussels IIbis, Articles 10, 11, 15, 28, 31, 47)

In this case, the creditor initiated enforcement proceedings in Slovenia on the basis of a provisional measure of a foreign court. The provisional measure had been recognised in Slovenia; on this basis, the creditor required a return of a child. The Court of Appeal agreed with the debtor's view that the application for the initiation of the enforcement proceedings has to be regarded as an application for the return of the child under the Regulation Brussels IIbis and the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. When deciding on the application for the return of the child, conditions determined in the convention shall be considered. With regard to all the circumstances of the case, the Court decided that conditions for the return of the child were not fulfilled (among other things, the application for the initiation of enforcement proceedings had been filed after the expiration of the period of one year, referred to in Article 12 of the Convention).
III. NATIONAL BIBLIOGRAPHY

**Regulation Brussels IIbis: Parental responsibility matters**

Mežnar, Š. Priznavanje in izvršitev odločb družinskega prava v EU. *Podjetje in delo.* revija za gospodarsko, delovno in socialno pravo, 2005, št. 6, str. 1513-1529.


**Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)**


**Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)**


**Preliminary ruling system on family matters**

*Family Mediation*


Toplak, S. Položaj otrok pri družinski mediaciji. *Pravna praksa*: časopis za pravna vprašanja, 2008, letnik 27, št. 16-17, str. 29.
National section

SPAIN

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

Parental responsibility matters are currently regulated in Spain by several instruments. In cross-border cases, the main source of law is Regulation Brussels IIbis. But together with this EU instrument, other rules from different sources coexist to be applied in the relevant cases.

Among them, several international conventions: The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996; The Hague Convention concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants of 1961; The European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 1980; and a number of bilateral conventions which cover this matter such as the ones concluded with Algeria, Colombia, Switzerland and Tunisia, among others. The Convention concluded with Morocco in 1997 is also noteworthy because it deals particularly with this issue, as well as The Hague Convention on the Civil Aspects of International Child Abduction of 1980.

As regards the Spanish domestic regime –to be applied if no international source is applicable-, Article 9.6 Civil Code of 1889 (Código Civil -CC-) deals with the law governing protective measures towards children and incapables. It distinguishes among these situations:

1. Guardianship and other institutions to protect incapable persons shall be regulated by the national law of that person.
2. Notwithstanding the foregoing, provisional or urgent protection measures shall be governed by the law of his/her habitual residence.
3. Moreover, the formalities to constitute guardianship and other protection institutions in which Spanish judicial or administrative authorities participate shall in any event be performed in accordance with Spanish law.
4. Finally, Spanish law shall govern the adoption of protective and educational measures relating to abandoned minors or incapable persons living in the Spanish territory.

Concerning substantive rules on rights of custody and of access, they are regulated in Articles 92 ff CC –in case the “civil common regime” is applicable in the case at stake; please note that some legal divergences exist depending on the region-. Guardianship is regulated in Articles 215 ff CC. And from the procedural perspective, provisions on matrimonial and minors procedures are established in Articles 769 ff Civil Procedure Act of 2000 (Ley de Enjuiciamiento Civil 1/2000).

There are currently no reform proposals or political decisions for a future reform.

Translations into English of the Spanish Civil Code and of the Spanish Civil Procedure Act are available at:

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (Article 11(3) of Regulation Brussels IIbis)? Does your
national law foresee the possibility of an appeal against a decision entailing the return of the child?

The return of the child following abduction is regulated in provisions from different sources: EU rules (Regulation Brussels IIbis), international conventions -both multilateral and bilateral- and domestic rules. The latter are regulated in Articles 103 and 158 Civil Code (Código Civil –CC-), Articles 224, 225 bis and 622 Criminal Code (Código Penal) and Articles 1901 to 1909 former Civil Procedure Act of 1881 (Ley de Enjuiciamiento Civil de 1881 –LEC 1881-).

The procedure regulated in the Spanish legislation is rather expeditious. Articles 1901 to 1909 LEC 1881 provide for the adoption of decisions and measures in few days (24hs, 3 days, 6 days...) and the procedure shall not exceed 6 weeks in any case (Article 1902 LEC 1881).

On the other hand, national law foresees the possibility of an appeal against a decision entailing the return –or not- of the child. This challenge shall be resolved within 20 days; no extension of this deadline is possible (Article 1908 LEC 1881).

3. **In case no court of a Member State has jurisdiction according to Regulation Brussels IIbis (Article 14 of the Regulation), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?**

Domestic jurisdiction rules can be found in the Spanish Act of the Judiciary of 1985 (Ley Orgánica del Poder Judicial -LOPJ-). In particular, Article 22 LOPJ deals with the grounds of jurisdiction of Spanish courts in civil matters where a special ground of jurisdiction is foreseen in this scope in Article 22.3 LOPJ: Spanish courts are competent to hear cases related with incapacity and protection of incapable persons and minors or their assets in those situations where the habitual residence of the person concerned is located in Spain.

Besides this special rule, Article 22.5 LOPJ contains the possibility for Spanish courts to adopt provisional measures which have to be enforced in our country regarding persons living in Spain or in case their assets are located in Spanish territory.

4. **Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?**

Article 22.5 Spanish Act of the Judiciary of 1985 (Ley Orgánica del Poder Judicial -LOPJ-) contains the possibility for Spanish courts to adopt provisional measures which have to be enforced in our country regarding persons living in Spain or in case their assets are located in Spanish territory.

As regards the domestic regime on the law applicable to protective measures, Article 9.6 Civil Code of 1889 (Código Civil -CC-) states that provisional or urgent protection measures shall be governed by the law of the habitual residence of the child and Spanish law shall govern the adoption of protective and educational measures relating to abandoned minors or incapable persons living in Spanish territory.

From the substantive perspective, provisional measures concerning the material scope of Regulation Brussels IIbis -marital breakdown and parental responsibility- are established in Articles 102 ff CC, where some available measures to protect the
child’s best interests are listed. Under Article 103 CC, upon admission of the claim, the Judge, in the absence of a judicially approved agreement between both spouses shall adopt, after hearing them, a set of measures, including:

1. To determine, in the interests of the children, with which spouse the children subject to the parental authority of both of them are to remain, and to make the appropriate decisions in accordance with the provisions of the Civil Code and, in particular, the manner in which the spouse who does not exercise the custody and care of the children may comply with his/her obligation of watching over them, and the time, form and place in which he/she may communicate with them and have them in his/her company.

2. Exceptionally, children may be entrusted to grandparents, relatives or other persons who consent to it, and, in the absence thereof, to a suitable institution, conferring on the latter the relevant guardianship duties, which they shall exercise under the judge’s authority.

3. Where there should be a risk of abduction of the minor by one of the spouses or by third parties, the necessary measures may be adopted and, in particular, the following:
   a) Prohibition to exit national territory, save with a prior judicial authorisation.
   b) Prohibition to issue a passport to the minor, or removal thereof if it has already been issued.
   c) Submission of any change of domicile of the minor to prior judicial authorisation.

Concerning procedural rules, provisions on matrimonial procedures are established in Articles 769 ff Civil Procedure Act of 2000 (Ley de Enjuiciamiento Civil 1/2000).


5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

Access rights and the return of the child following abduction are regulated in provisions from different sources: EU rules (Regulation Brussels IIbis), international conventions -both multilateral and bilateral- and domestic rules. The latter are regulated in Articles 103 and 158 Civil Code (Código Civil –CC-), Articles 224, 225 bis and 622 Criminal Code (Código Penal -CP-) and Articles 1901 to 1909 former Civil Procedure Act of 1881 (Ley de Enjuiciamiento Civil de 1881 –LEC 1881-).

Focusing on the procedure to follow after child abduction, Article 1901 LEC 1881 states that in those cases where the return of a child is sought under the application of an international convention, this Section shall be applied. Article 1902 LEC 1881 establishes the competence of the Court of First Instance of the judicial district where the child is living. The procedure can be started by the person or entity holding the right of custody or the Central Authority responsible of developing the obligations established in the relevant international convention (a non-judicial procedure can also be started in parallel, besides the judicial procedure, before the Spanish Central Authority, the Subdepartment of International Legal Cooperation - Subdirección de Cooperación Jurídica Internacional of the Ministry of Justice). The
Prosecutor shall intervene in this kind of procedures and the parties may be represented by a lawyer. The procedure shall last 6 weeks.

During this period, the judge at the request of the party or of the Prosecutor may adopt provisional custody measure as provided in the following Section and any other measure he may deem appropriate (Article 1903 LEC 1881).

Within 24 hours since the procedure was started, the person retaining the child shall be served and required to enter an appearance before the court together with the child and manifest whether he/she is going to return the child voluntarily or he/she refuses to do it on the ground of the relevant covenant (Article 1904 LEC 1881). In case he/she does not appear before the court, judicial proceedings shall continue and provisional measures deemed suitable shall be adopted. The interested parties and the Prosecutor will be heard, as well as the child if considered appropriate (Article 1905 LEC 1881).

In case the required person does not appear but accepts a voluntary resolution, the judge will conclude the procedure and order the return of the child and any other decision related with costs incurred (Article 1906 LEC 1881). In case the required person appears but refuses to return the child, every person involved and the Prosecutor will be heard, as well as the child, and the judge may seek reports he may deem relevant.

The judge will decide whether the child has to be returned or not and this decision may be challenged by the parties. Appeal shall be resolved within 20 days with no possible extension (Article 1908 LEC 1881). If the return of the child is ordered, the required person shall cover judicial expenses as well as the costs the applicant may have incurred including trips (Article 1909 LEC 1881).

6. Which are the applicable procedures on the hearing of the child? How and by whom will the child be heard? How is the age and maturity of the child being taken into account?

According to Article 9 of the Spanish Organic Act 1/1996 on the Legal Protection of Minors (Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil) the child is entitled the right to be heard, in the familiar scope as well as in administrative or judicial procedures in which he/she is directly involved and which may lead to a decision affecting his/her personal, familiar or social sphere. In judicial procedures, the intervention of the child shall take into account his/her particular situation and his/her development, taking care to preserve his/her privacy.

It shall be guaranteed that the minor will be able to exercise this right on his/her own or represented by the person he/she has appointed to this aim in case he/she has “enough discernment” (a particular age is not mentioned). However, if this is not possible or not convenient in the child’s best interest, his/her opinion may be heard through his/her legal representatives provided that they are not an interested party or they have not inconsistent interests, or through other persons who may inform objectively about his/her opinion because they carry out a particular profession or they are closely connected to the child.

In those cases where the child requests to be heard directly or through a representative, the refusal to hear him/her shall be motivated and the prosecutor and the involved persons shall be informed of this decision.
7. Which is the Central Authority designated to facilitate the application of Regulation Brussels IIbis (Chapter IV of the Regulation)?

The Spanish Central Authority designated to facilitate the application of the Regulation Brussels IIbis is the Subdepartment of International Legal Cooperation (Subdirección de Cooperación Jurídica Internacional) of the Ministry of Justice. Contact details:

Dirección General de Cooperación Jurídica Internacional del Ministerio de Justicia
Servicio de Convenios
San Bernardo 62
28015 Madrid
Phone number: +34 91 3904437 / +34 91 3904273
Fax: +34 91 3902383
E-mail addresses: carmen.garcia-revuelta@mju.es
e.gonzalez@sb.mju.es

8. Are there any other national legal instruments/ procedures put in place for the application of Regulation Brussels IIbis?

In 2006, the Act 19/2006 of 5 June (Ley 19/2006, de 5 de junio, por el que se amplían los medios de tutela de los derechos de propiedad intelectual e industrial y se establecen normas procesales para facilitar la aplicación de diversos reglamentos comunitarios -BOE No 134 of 6 June 2006-) amended the Civil Procedure Act of 2000 (Ley de Enjuiciamiento Civil 1/2000) through adding two Final Dispositions aimed at “facilitating the application of different European instruments”. It covered in particular Regulation 2201/2003 and Regulation 805/2004 on the European Enforcement Order for uncontested claims.

The Act is available (in Spanish) at: http://www.boe.es/boe/dias/2006/06/06/pdfs/A21230-21238.pdf

B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?

The Directive on mediation in civil and commercial matters of 2008 was firstly implemented in Spain through the Royal Decree-Law 5/2012 of 2012 (in order to put an end to late transposition), which was converted into an Act very recently: Mediation Act 5/2012 of 6 July (MA) (Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles).

It covers domestic and cross-border mediation and provides the same regime for both unless some provisions particularly focused on international mediation. As stated in Article 2 MA, this Act shall be applied to mediation procedures in civil and commercial matters including cross-border conflicts provided that they do not affect
rights and obligations not available for the parties under the relevant applicable law. If no explicit or implicit submission to this Act is made, it shall be applied in case one of the parties at least is domiciled in Spain and the mediation procedure takes place in Spanish territory.

Although it is the first state legislation about mediation in civil and commercial matters ever adopted in Spain, this matter was already regulated by a number of scattered state provisions (in divorce matters, labour mediation, consumer mediation…) and since 2001 by a set of Mediation Acts of regional scope which were adopted as a consequence of the legislative competence of the Comunidades Autónomas in this matter (13 regional Acts out of 17 autonomous regions).

The Mediation Act of 2012 is available (in Spanish) at:

2. **How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?**

In 2005, the Spanish Act 1/1996 on Free Legal Aid (Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita) was amended by the Act 16/2005 (Ley 16/2005, de 18 de julio, por la que se modifica la Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita) in order to transpose the Directive No 2003/8/EC and regulate the particularities of cross-border disputes in civil and commercial matters within the European Union.

Traditionally, the right to free legal aid was granted in Spain to foreigners residing in our country lawfully but the Spanish Constitutional Court ruled the unconstitutionality of this requirement and it is currently granted to foreigners living in Spain regardless of their administrative situation.

However, in cross-border disputes (as defined in the Directive: a cross-border dispute is one where the party applying for legal aid in the context of this Directive is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced –Article 2.1-) free legal aid is only granted to third-country nationals residing lawfully in a Member State as established in the Directive.

The Act 16/2005 amending the Act on Free Legal Aid to transpose the Directive is available (in Spanish) at:

3. **Is your country a contracting party to any bilateral or international instruments on family law?**

1. Multilateral conventions
   a) Hague Conference on Private International Law
      - Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants
      - Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

631
- Convention of 29 May 1993 on Protection of Children and Co-operation in
  Respect of Intercountry Adoption
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition,
  Enforcement and Co-operation in Respect of Parental Responsibility and
  Measures for the Protection of Children
b) Council of Europe
- European Convention of 29 May 1980 on Recognition and Enforcement of
  Decisions concerning Custody of Children and on Restoration of Custody of
  Children
- European Convention of 27 November 2008 on the Adoption of Children
c) International Commission on Civil Status (CIEC)
- Convention of 4 September 1958 on International Exchange of Information
  relating to Civil Status
- Convention of 4 September 1958 on Changes of Surnames and Forenames
- Convention of 14 September 1961 Extending the competence of Authorities
  Empowered to Receive Declarations Acknowledging Natural Children
- Convention of 12 September 1962 on the Establishment of Maternal Descent of
  Natural Children
- Convention of 10 September 1964 to Facilitate the Celebration of Marriages
  Abroad
- Convention of 10 September 1964 on Decisions Concerning the Rectification of
  Civil Status Records
- Convention of 14 September 1966 Relating to the Establishment of Death in
  Certain Cases
- Convention of 8 September 1976 on the Issue of Multilingual Extracts from Civil
  Status Records
- Convention of 15 September 1977 on the Exception of Certain Records and
  Documents
- Convention of 5 September 1980 on the Law Applicable to Surnames and
  Forenames
  to Marry
- Convention of 8 September 1982 on the Issue of a Certificate of Differing
  Surnames
- Convention of 14 September 1999 on the Issue of a Certificate of Nationality
- Convention of 12 September 2000 on the Recognition of Decisions Recording a
  Sex Reassignment

2. Bilateral conventions

Spain has concluded bilateral agreements in civil matters with many countries
although they cover different matters and they deal with different issues. Some of
them have a broader material scope whereas others focus on one matter (adoption,
maintenance...). Moreover, some of them cover international jurisdiction and/or
applicable law and/or recognition and enforcement of foreign decisions, but many
cover only recognition and enforcement of foreign decisions or judicial cooperation
including service of documents and taking of evidence.

Some including judicial cooperation in civil matters: Algeria, Austria, Bolivia, Brazil,
Bulgaria, China, Colombia, Czech Republic, Dominican Republic, El Salvador, France,
Germany, Israel, Italy, Mauritania, Mexico, Morocco, Philippines, Portugal, Romania, Russian Federation, Saudi Arabia, Switzerland, Thailand, Tunisia, Vietnam.

4. **Are there any databases or online tools providing information on family law matters available in your country?**

European Judicial Network in civil and commercial matters
http://ec.europa.eu/civiljustice/homepage/homepage_spa_en.htm
- Divorce
http://ec.europa.eu/civiljustice/divorce/divorce_spa_en.htm
- Parental responsibility
http://ec.europa.eu/civiljustice/parental_resp/parental_resp_spa_en.htm
- Maintenance claims
http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_spa_en.htm

European Judicial Atlas in Civil Matters
- Parental responsibility
- Maintenance obligations

Legislation translated into English (Ministry of Justice)

Pórtico Legal (family section)
http://www.porticolegal.com/int/int_Familia.html

Noticias jurídicas
http://noticias.juridicas.com/

5. **Please provide information on accessing and applying foreign family law in your country.**

Despite the mandatory nature of choice-of-law rules (Article 12.6 Civil Code), foreign law, when applicable, must be evidenced by the parties as established in Articles 281.2 and 282 Civil Procedure Act of 2000 (LEC).

- Article 281.2 LEC: “Object and need of proof. 1. [...] 2. Custom and foreign law shall also be object of proof. [...] Foreign law shall be proved as regards its content and validity; the court may make use of all means of inquiry deemed necessary for its implementation”. Therefore, the parties must prove both the content and the validity of foreign law, and in practice it has also been required to evidence how it is implemented by the authorities of the country of origin.

- Article 282 LEC: “The evidence shall be examined at the request of the party [...]”.

The role of judges in this regard has been considered as supportive. Case law of the Supreme Court has required a prior diligence of the parties in trying to evidence the relevant foreign law to ground the intervention of judges through the Ministry of Justice. Otherwise, they are not allowed to apply foreign law *ex officio*, and Spanish law is usually applied instead (some courts have also dismissed the claim as a consequence of the lack of proof).

Concerning the available means of proof, the Spanish LEC does not contain any special provision on this issue so that the general rules of Article 299 LEC should be applied. Among the different means listed, documentary evidence stands out from
the rest in practice (Article 299.2 –public documents- and 3 –private documents-
LEC), as well as the use of experts’ opinions (Article 299.4 LEC).

On the other hand, Spain is a party in several international instruments on the
ascertainment of foreign law both multilateral and bilateral. As regards multilateral
conventions, Spain is a party to two of them: European Convention of 7 June 1968
on Information on Foreign Law and Inter-American Convention of 8 May 1979 on
Proof of and Information on Foreign Law. Spain has also concluded a significant
number of bilateral agreements on legal cooperation in civil matters that include
within their scope of application the commitment to provide information on the
content of the respective legal systems, such as the ones negotiated with Bulgaria,
Russian Federation, Mexican United States, Algeria, Brazil, China, Morocco...

Translations into English of the Spanish Civil Code and of the Civil Procedure Act of
2000 are available at:
II. NATIONAL JURISPRUDENCE

In Spain, the number of private international cases heard by Spanish courts is still small if compared with other fields of law. Nevertheless, private international cases have increased in the last years and a significant number of judgments are rendered every year in every judicial instance, from courts of first instance to Supreme Court. It is interesting to mention that the University of Valencia is in charge of making yearly a collection of Spanish case law in this field of law (“Spanish Judicial Decisions in Private International Law”) which is published in English at Spanish Yearbook of International Law:

http://dialnet.unirioja.es/servlet/revista?codigo=1366

Some recent judicial decisions on divorce, maintenance and parental responsibility can be mentioned as examples.

**Regulation Brussels IIbis in matters of parental responsibility**

III. NATIONAL BIBLIOGRAPHY

Regulation Brussels IIbis: Parental responsibility matters


JIMÉNEZ BLANCO, P.: Litigios sobre la custodia y sustracción internacional de menores, Marcial Pons, 2008.


Regulation Brussels IIbis: Cross-border child abduction (also in relation to the 1980 Hague Convention on international child abduction)


Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)


Preliminary ruling system on family matters

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Family Mediation


National section

SWEDEN

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I. NATIONAL LEGISLATION

A. Parental responsibility and child abduction

1. What is the current source of law for parental responsibility matters? Are there any proposals to reform?

Matters concerning parental responsibility are regulated in the Children and Parents Code (1949:381). Of interest are in particular Chapter 6 on custody, residence and contact (the term ‘parental responsibility’ is not used in Swedish law), Chapter 13 on parental care of property belonging to children, Chapter 20 on procedure in cases concerning *inter alia* custody, residence and contact and Chapter 21 on enforcement.

The most recent reform work undertaken concerned the possibility of a parent, with which the child resides, to take necessary decisions concerning the medical care of the child without the consent of the other parent even in cases of joint custody. Those legislative changes went into force in May 2012. Apart from that there are no ‘living’ reform proposals in the area of parental responsibility matters.

2. Which are the most expeditious procedures applicable when the court issues a decision on the return of the child (*Article 11(3) of Regulation Brussels Iibis*)? Does your national law foresee the possibility of an appeal against a decision entailing the return of the child?


An application for a return order is made to the Stockholm District Court and may be appealed to the Svea Court of Appeal. The decision of the Court of Appeal is final and cannot be appealed, see Section 23.

3. In case no court of a Member State has jurisdiction according to Regulation Brussels Iibis (*Article 14 of the Regulation*), which court is competent for hearing a cross-border parental responsibility case, according to domestic jurisdiction rules?

There are three ‘layers’ of rules concerning jurisdiction in cross-border parental responsibility cases. The first layer is the 1931 Nordic Convention, which takes precedence over the Brussels Iibis Regulation (see Article 59). The Nordic rules are implemented through Ordinance (1931:429) on Certain International Legal Relationships in Respect of Marriage, Adoption and Guardianship. The Nordic Convention reflects the position in the Brussels II Regulation before it was amended and basically reiterates Article 3 of old Brussels II.

The second layer is the Brussels Iibis Regulation and if those rules of jurisdiction are not applicable we turn to the third layer, autonomous Swedish law, which in this area is severely underdeveloped.

There is only one written rule on jurisdiction in Swedish law, *viz.* Chapter 3 Section 6 of Act (1904:26 p. 1) on certain international legal relationships concerning
marriage and guardianship, which stipulates that “Questions concerning the custody of children may be tried in a matrimonial case. If the child is present in the realm, such questions shall always be decided according to Swedish law.” The rule is facultative and there is no written rule concerning the case when an application concerning parental responsibility is brought outside of matrimonial proceedings. Case law clearly indicates that there is jurisdiction when the child is habitually resident in Sweden, but then in such a case Brussels IIbis would now be applicable. There is some support in case law for taking jurisdiction based on the habitual residence of a holder of custody or a parent, even when that does not coincide with that of the child, if a judgment from the country of habitual residence would not be recognised in Sweden or if the parties agree to Swedish jurisdiction.

4. Which national legislation lays down the provisional, including protective, measures to be adopted in urgent cases, in order to protect the child’s best interests (Article 20 of Regulation Brussels IIbis)?

Act (1989:14) on the recognition and enforcement of foreign custody decisions etc. and on the transfer of children, in particular Sections 19 and 20 that read (in translation by the author):

19 § If in a case according to this Act there is a risk that the child is taken outside the country or that the enforcement or transfer in any other way is jeopardised, the court may order that the child shall be taken into the care of the social authorities or taken care of in some other suitable manner. The court can in conjunction with such a decision decide on conditions for and time for contact with the child.

In order to facilitate the transfer of the child, the court may in conjunction with a judgment or decision on enforcement or transfer decide that the child temporarily be taken into the care of the social authorities or in some other suitable manner.

The court may decide that such a decision to take the child into care shall be enforced through the aid of the police.

20 § If an application according to this act has not been brought or there is not sufficient time to await a decision according to Section 19 paragraph 1, the police may immediately take the child into care or take other immediate measures that can be taken without harm to the child. Such measure shall immediately be reported to the court, which without delay shall decide on its continuation.

5. Please describe the system of enforcement followed in your national legal system, in particular with regard to access rights and the return of the child following abduction.

The rules of enforcement of a return order or access right are to be found in Sections 15-21 of the Act (1989:14) on the recognition and enforcement of foreign custody decisions etc. and on the transfer of children. Section 15 provides for expeditious treatment of such cases. In reality the vast majority of cases are decided within six weeks, including appeal. Section 16 allows for mediation in order to achieve the voluntary return of the child. Section 18 provides for the possibility of the court to order a penalty payment in the case of non-compliance or for the
collection of the child with the aid of the police. Should the case concern contact 
only, the court may only order collection with the aid of the police if there is reason 
to fear that enforcement could otherwise not take place (i.e. there is a presumption 
not to use the police). Sections 19 and 20 provide for interim measures (see above). 
As a general rule decisions on the transfer of children are immediately enforceable 
unless the court explicitly rules otherwise, Chapter 21 Section 14 of the Children and 
Parents Code (1949:381).

6. Which are the applicable procedures on the hearing of the child? How and by 
whom will the child be heard? How is the age and maturity of the child being taken 
into account?

Section 17 of the Act (1989:14) on the recognition and enforcement of foreign 
custody decisions etc. provides that the child must be heard unless it is impossible 
with regard to the age and maturity of the child. A child is usually heard by one or 
several specialised officers of the social authorities that write a report to the court. 
In practice it does not happen that children are heard in court or cross-examined by 
attorneys. However, the officers of the social authority may be cross-examined. 
Other witnesses such as teachers may also be heard by the court. There are no strict 
age limits as to when a child has reached an age and maturity when its will should 
be taken into account. This has to be decided on a case-to-case basis and since 2006, 
when child abduction cases were centralised to two divisions of the Stockholm 
District Court there is an increasing awareness that in particular in abduction cases 
the child is prone to be heavily influenced by the abducting parent.

7. Which is the Central Authority designated to facilitate the application of Regulation 
Brussels IIbis (Chapter IV of the Regulation)?

The Ministry for Foreign Affairs, Department for Consular Affairs and Civil Law.

8. Are there any other national legal instruments / procedures put in place for the 
application of Regulation Brussels IIbis?

Act (2008:450) with rules complementing the Brussels II Regulation (replacing Act 
[2001:394] with rules complementing the Brussels II Regulation), available 
inter alia certain procedural rules concerning the exequatur procedure and interim 
measures. Government Ordinance (2005:97) with rules complementing the Brussels 
II Regulation, available 
rules concerning the Swedish central authority. None of the two statutes have been 
translated into English.

In addition, Government Ordinance (2006:467) on the enforcement of judgments on 
parental responsibility, available 
that Chapter 21 of the Parental Code is applicable also to a foreign judgment that 
has been declared enforceable according to the Brussels II Regulation. Chapter 21 of 
the Parental Code concerns the enforcement of judgments, decisions or agreements 
concerning custody, residence or access to children. There is presently no up-to-date 
translation into English of Chapter 21. The Parental Code in Swedish can be found
B. Horizontal issues

1. How is Directive No 2008/52/EC on certain aspects of mediation in civil and commercial matters transposed into domestic law?


2. How is Directive No 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, transposed into domestic law?


3. Is your country a contracting party to any bilateral or international instruments on family law?

Nordic Conventions
- 1931 Nordic Convention Containing Private International Law Rules on Marriage, Adoption and Guardianship,
- 1962 Nordic Convention on the Recovery of Maintenance,
- The 1979 Act on the Recognition of Nordic Decisions on Parentage is based upon an informal agreement between the Nordic countries leading to parallel acts – a Nordic speciality.

Hague Conventions
- 1970 Hague Convention on the Recognition of Divorces and Legal Separations,
- 1980 Hague Convention on the Civil Aspects of International Child Abduction,
- 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions,
- 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children [Bill has been passed by Parliament and Ratification is expected to take place and come into effect by 1 January 2013],


**UN Conventions**
- 1956 UN Convention on the Recovery Abroad of Maintenance,

**Council of Europe Conventions**
- 1975 European Convention on the Legal Status of Children born out of Wedlock
- 1980 European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children,

**EU/EFTA**
- 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

**Bilateral**
- 1936 Convention between Sweden and Switzerland on the Recognition and Enforcement of Judgments in the Area of Civil Law

### 4. Are there any databases or online tools providing information on family law matters available in your country?

**European Judicial Network in Civil and Commercial Matters**
Information on divorce:
Information on maintenance obligations:
[http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_swe_en.htm](http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_swe_en.htm)
Information on parental responsibility:

**European Judicial Atlas in Civil and Commercial Matters**
Matrimonial matters and matters of parental responsibility
Maintenance obligations

**Swedish Government Offices**
Links to English translations of Statutes and Information Brochures in English
[http://www.sweden.gov.se/sb/d/3288/a/19570](http://www.sweden.gov.se/sb/d/3288/a/19570)

### 5. Please provide information on accessing and applying foreign family law in your country.

If the case is dispositive, i.e. such that the parties may agree, the court will largely leave the pleading and proving of foreign law to the parties. The areas of family law that can be considered dispositive are maintenance and matrimonial property regimes. If the case is indispositive, the principle of ‘iuria novit curia’ applies and it is the responsibility of the court to make the parties aware of the possibility of the applicability of foreign law and finding out its content. The areas of family law that can be considered indispositive are marriage and divorce, parentage, adoption and
parental responsibility.

Even in an indispositive case the court may ask the parties to assist in finding out the content of foreign law, Chapter 35 Section 2 of the Code on Procedure (1942:740).

Sweden is a party to the 1968 European Convention on Information on Foreign Law and the 1978 Additional Protocol and the Central Authority is the Ministry of Justice.

Another source of information is the European Judicial Network. The Swedish contact point is a civil servant at the Ministry of Justice.
II. NATIONAL JURISPRUDENCE

Only published judgments have been included in the list; these are judgments with precedential value from the Supreme Court or the Courts of Appeal. There will of course be several other cases in which courts – district courts or courts of appeal – have applied the Regulations. Sometimes such non-precedential cases will be available electronically and sometimes not. For example, there are many cases from the Svea court of appeal applying the exequatur procedure foreseen in the Maintenance Regulation for decisions given in the Member States before the date of application of the Regulation, but none of them have precedential value.

**Regulation Brussels IIbis in matters of parental responsibility**

RH 2006:60 (Svea Court of Appeal, 21.9.2006), available at https://lagen.nu/dom/rh/2006:60 (Article 10(4): burden of proof that insufficient arrangements for the protection of the child have been made on party asking for refusal to return)

RH 2010:85 (Svea Court of Appeal, 15.6.2010), available at https://lagen.nu/dom/rh/2010:85 (Articles 8 and 10: Swedish jurisdiction when no claim for return was made within a year of knowledge of child’s residence in Sweden)
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Participation of the child in judicial family proceedings (hearing of the child, taking of evidence, etc.)

- E. Ryrstedt, Barnets rätt att komma till tals I frågor om vårdnad, boende eller umgänge, Juridisk Tidskrift, 2005/06 s. 303-348.
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