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**CROSS BORDER DIVORCE AND CHILD CUSTODY:
COMPARATIVE ANALYSIS OF ESTONIA AND FRANCE**

Bachelor's thesis

Programme HAJB08/17, spesizlisation: International and European Union Law

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Tallinn 2021

I hereby declare that I have compiled the paper independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously been presented for grading.

The document length is 8976 words from the introduction to the end of conclusion.

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ABSTRACT

The European Union (EU) takes a limited part in family law matters. The reason for that is that every Member State (MS) has its own rules and regulations regarding separation, divorce, maintenance of spouses and children, custody and guardianship and other family law matters. The main role of the EU is to make sure that the decisions that are made in one MS are carried out in another one. The aim of the paper is to scrutinize the family law practices of Estonia and France through the prism of cross border divorces and child custody. By means of analysis and comparison of legal issues and challenges families can face, which may arise during the process of cross border divorce and respectively the question of who of the parents is entitled to the custody of the child. This paper shows the gaps in legal acts and in their enforcements to protect the rights of the child, mother and father in deciding the custody in the cross border divorce cases. The research question discussed is how a cross border divorce effect the child's custody, meaning, how the child is treated after divorce, and what type of custody is granted to the parents.

Keywords: cross border divorce, cross border child custody, Estonia, France.

INTRODUCTION

Family law touches on the very essence of people's daily lives, as no other area of law does. Every person in his life in one way or another becomes a subject of family law. The major differences between the national legal systems of the EU countries prevent the acquisition of a truly common European identity in the form of European citizenship and the formation of a comprehensive European legal space.¹ Specific problems of the legal regulation of the cross border family include the different legal systems of States, as well as problems related to the distances and movements of family members, whose authorization is usually within the purview of law enforcement agencies.²

Such legal problems include, for example, questions:

- Determining the court's jurisdiction when applying for divorce;
- Which state's legislation should be applied to resolve family disputes;
- Fulfillment of child support obligations with a foreign element;
- The realization and protection of rights such as the right to communicate and the right to live with a child

The EU has no specific competence to make laws in relation to divorce, maintenance or parental responsibility. Therefore, it cannot create laws that set out the terms and conditions under which the divorce may be granted or outline the responsibilities of spouses to pay maintenance or how any custodial decisions on access to children should be made. Nonetheless, the EU does have the capacity to promote judicial cooperation in civil matters, those matters do in fact have cross border implications. European Union composed a number of regulations dealing with judicial cooperation in civil matters.³ Primarily, these regulations are based on the principle of mutual recognition. The principle of mutual recognition is - that the decisions that have been lawfully made in one Member State should be recognized and enforced in another member state, therefore, all the necessary procedures for doing so should be as straightforward as possible.⁴

Naturally, every state, nation, country has its own unique national heritage, on which the rules of family law are based. The complexity of legal regulation lies in the fact that family relationships

¹ Fiorini, A. (2012). Which Legal Basis for Family Law. The Way Forward. *European Parliament Manuscript, 2012.*

² Christoph C. Paul, Sybille Kiesewetter (Ed.) (2014). *Cross-border Family Mediation. International Parental Abduction, Custody and Access Cases*, Wolfgang Metzner Verlag.

³ Cafaggi, F. (Ed.) (2017). *Judicial Cooperation in European Private Law*. Edward Elgar.

⁴ Stikāne, L (2019). What Effect Does European Private International Law on Cross-border Divorce Have on National Family Laws and International Obligations of the Member States? *Athens Journal of Law*, Volume 5, Issue 4, 435-456.

involving foreigners are linked to two and sometimes several States and, accordingly, to two or more legal systems, often in different ways, to the issues of marriage and the family. The family law of each European country has its own national characteristics. On the one hand, it allows European peoples to preserve their family traditions and culture, and on the other hand, it makes it much more difficult to fully exercise the rights of individuals in family legal relations in families with a foreign element when changing their nationality or country of residence.⁵

Consequently, for quite a long time it was believed that family law could not be unified for all EU member states, as there was a factor of cultural restrictions. However, both the lack of uniformity in private law has made it difficult for the free movement of goods, services and capital to develop, and the lack of unified family law has made it difficult for people to move freely and create a family.⁶ After all, people cannot predict the legal consequences of their family acts and actions when moving from one EU country to another, as well as, when entering into a relationship that will further create a family with a person who is a citizen of another EU state. It is fair to note that the authority of the European Union is rather consequential. Even though the Union has only the jurisdiction to make laws in fields where the treaties are outlining the power of the EU to do so, meaning no new laws or promotion of guidelines on how the divorce shall proceed. The EU still is eligible to promote judicial cooperation, which is crucial. Even though not all divorces reach court, but the ones that do can be influenced by the principle of mutual recognition set out by the European Union.

However, despite the ever-changing views of society on the institution of the family and its form, the fundamental norms of its legal regulation remain unshakable. Many legal concepts such as marriage considered a sacrament, the indissolubility of marriage or the exclusion of illegitimate children from family members have been developed for a long time by canonical law. With changes in society's mentality and ideological pluralism, these concepts are becoming more difficult to apply, but they persist. In addition, it is obvious that a number of reforms of family legislation, carried out in one country, take root in society, sooner or later other states as well will opt for such reforms. The legal documents that are going to be applied in this research are the Regulation 2201/2003 (The new Brussels II Regulation), Regulation 1259/2010 (the Rome III Regulation), as well as the Family Law

⁵ Oláh, L. Sz. *Changing families in the European Union: trends and policy Implications*. Analytical paper, prepared for the United Nations Expert Group Meeting, "Family policy development: achievements and challenges", New York, May 14-15, 2015.

⁶ Boele-Woelki, K. (Ed.) (2003) *Perspective for the Unification and Harmonisation of Family Law in Europe*. Intersentia.

Act of Estonia, French Civil Code (FCC), French Code Of Civil Procedure (FCCP) and Convention on the Rights of the Children.

The main research question discussed in this paper is how a cross border divorce effect the child's custody, meaning, how the child is treated after the divorce, and who of the parents will have the custody over the child. The aim of this thesis is the comparative analysis of the Republic of Estonia and France regarding their legal approach on the respective issues of cross border divorce and child custody. The comparative analysis will be conducted on questions of legal consequences of a cross border divorce, conditions of legal separations, maintenance, division of obligations between spouses, and the questions of obtaining cross border child custody and the legal responsibilities that parents have to undertake in case of a cross border custody battle. The research tasks will be carried out in a qualitative method, through legal literature review. This type of a research will allow for a legal conclusion on the questions set by the paper.

1. EUROPEAN UNION ON DIVORCE

The EU takes a limited part in family law matters. The reason for that is every member state has its own rules and regulations regarding separation, divorce, maintenance of spouses and children, custody and guardianship and other family law matters.⁷ The main role of the EU is to make sure that the decisions that are made in one Member State are carried out in another one. As a result, EU has no rules which govern who of two sides (parents) entitled to have custody over the child (including a number of aspects such as the question of joint/sole custody, administration of child property, child abduction etc. that can somehow affect the process of obtaining a cross border child custody when going through a divorce), but it has rules that make sure that a decision made in one member state will be properly implemented in another one.⁸

The European Union countries have made the strongest progress in unifying family legislation. In general, European family law is focused on the formation of uniform rules for determining the jurisdiction of the authorized bodies of different states to resolve cross border disputes complicated by the European element.⁹ Parallel, however, perhaps not always noticeable, is the creation of unified procedural and material family law. Concepts are fixed: permanent residence, family and personal life, registered partnership, etc. We can also state that if a number of family law reforms carried out in one EU country take root in society, sooner or later other states will make such reforms. The consistent unification of the law governing family relations with cross border effects, which is now observed within the EU, has already proved effective.¹⁰

The accumulated experience of EU cooperation in cross border civil affairs shows that European legal acts and mechanisms can be more effectively implemented for the benefit of citizens and society, if there is more: understanding and mutual trust between practicing lawyers in different EU countries,

⁷ Antokolskaia, M. (2006). *Harmonisation of Family Law in Europe: a Historical Perspective. A Tale of Two Millennia*. Antwerpen: Intersentia.

⁸ Baker, M. (2008). Lingering concerns about child custody and support. *Policy Quarterly*, Volume 4, Number 1.

⁹ Viarengo, I., Villata, F. C. (2020). *Planning the future of cross border families: a path through coordination*. Oxford UK, New York NY: Hart Publishing Bloomsbury Publishing Plc.

¹⁰ Messanvi, N. (2019). Cross-border divorce, legal separation and maintenance in the European Union. The end of the discrepancy in the choice of the applicable law? *Research Gate*.

knowledge of EU law and developed legal instruments of cooperation, a consistent understanding of EU law (necessary to ensure proper and uniform application in national cases).¹¹

There are different types of divorces in the EU Member States:

- **Summary Divorce**

A summary or simple divorce is an uncontested, no-fault divorces, where there is no conflict between the spouses. This type of divorce is usually applicable to couples that have been married for five or less years and have no joint properties together or just a few assets, nor do they have children. In order to undergo the procedure of a summary divorce effectively both spouses have to agree on it. This type of divorce is rather affordable and requires the least amount of paperwork to be filled in at your local court clerk's office, therefore, it may not involve a lawyer at all. A summary divorce may be granted within 30 days of filling.¹²

- **Contested and Uncontested Divorce**

Contested divorce is rather well-known, it includes the two parties being in conflict with each other over the assets. Therefore, contested divorce is for couples that on their own have a high net worth and considerable assets and liabilities, and a lot at stake in the proceedings. Contested divorces take a lot of time to be finalised because they usually take long court proceedings, and are expensive. In case if both parties are not able to settle all the separation factors the judge will have to decide all that for the separating couple. That in a way the major complicated factor of contested divorces, they generally have to be settled before court.

Uncontested divorce in the sense of court proceedings is the least tense. The reason for that is that, both spouses establish all the aspects of your separation before you start the paperwork and the proceedings. Those aspects may include issues on custody and parenting time, child support if required spouse support and respectively the division of property. After all the in advance settlement

¹¹ Douglas, G. (2018). *Obligation and Commitment in Family Law*. Hart Publishing 2018.

¹² Pandolfi, P. (2015). *The Different Kinds of Divorces*. DivorceNet, 2021. Retrieved from <https://www.divorcenet.com/resources/divorce/the-different-kinds-divorce.htm>, 12 April, 2021.

of all the aspects of the separation the couple may start filling in the separation agreement individually. When all the documents are ready the couple may file for divorce with the court. Normally, the courts without fail check these types of cases rather rapidly, therefore, the divorce can be granted in a rather short period of time.¹³

- **Default Divorce**

A default divorce happens when one of the spouses filed for divorce and the other spouse does not respond, in other words this divorce is *in absentia* (in the absence) usually the absence is in the sense that the other spouse cannot be found. The spouse that is filling for divorce needs to fill in the necessary documents and present it before the court. The judge will grant the divorce “by default” without the need for the other spouse to appear before the court.¹⁴

- **Fault and No-Fault Divorce**

The fault and no-fault divorce type is referred to as the reasons on which you are basing your divorce. Typically, the reasons for a fault divorce include one spouse accusing the other one for some kind of wrongdoing, such as adultery or misconduct. It is important to mention that if you intend to accuse your spouse of misconduct the divorce can become rather controversial. In a no-fault divorce, one of the parties may state that the relationship has suffered “irremediable breakdown” of the relationship, or the couple has “irrecoverable differences”. A no-fault divorce is a rather common type nowadays.

- **Mediated Divorce**

Mediated divorce, a divorce through the process of “alternative dispute resolution” ADR methods. A couple applies this type of divorce if it need additional assistance in attempting to resolve the differences.¹⁵ The process involves a third person, the mediator, who sits down with the couple and attempts to settle the issues of the divorce. It is important to note that the mediator has no decision

¹³ *Ibid.*, 12.

¹⁴ *Ibid.*, 12.

¹⁵ Mosten, S. F., Scully, P. E. (2015). *The complete Guide to Mediation: How to Effectively Represent Your Clients and Expand Your Family Law Practice, Second Edition*. ABA Book Publishing.

making power over the issues, he only helps the two parties to hear each other's parts of the issue, the judge is the one who will later on make the final divorce judgment. In case of the mediation being successful it will end with the preparation of a property settlement agreement.

- **Collaborative Divorce**

Collaborative divorce is another ADR option. It implies working with lawyers who are competent precisely in this method. Each of the spouses has their own lawyers, the lawyers in their turn have to cooperate with each other. The main point of such cooperation is to settle the issues between the two parties without introducing the court into the picture. All the participants of the collaborative divorce should agree that if the divorce does not settle through the collaborative process, the couple's original attorneys will withdraw and the spouses will have to hire different attorneys to take the case to court. The reason for that is to make sure that all participants, including the attorneys, are acting in good faith, with nothing to gain from deviating away from the goal of settlement.¹⁶

- **Divorce Arbitration**

When a divorcing couple wants to resolve contentious issues without applying to the court but cannot come to an agreement on their own, they may retreat to arbitration. It is similar to a trial due to the arbitrator being an attorney or a retired judge, he is the one who will make a decision on the presented marital issues.

When a couple decides to terminate their relationship and undergo the divorce procedure, they should be rather attentive when choosing the type of divorce that suits their case. It should be noted that despite the chosen way of going about the termination of the relationship both parties have to act accordingly to the rules set out by one or other divorce type. In addition to that if the couple has minor

¹⁶ Scharff, K., Henrick. R. L. (2010). *Navigating Emotional Currents in Collaborative Divorce: A guide to Enlightened Team Practices*. ABA Book Publishing

children, it can be suggested that they should not be involved in the proceeding due to the fact that such manipulations can be damaging for them.¹⁷

Even though, the EU Member States do not have one unified rule that governs the family law matters, the MS have advanced in unifying the legislation that governs family law. This consolidation of legislation focuses on formation of common rules determining the jurisdiction of the authorized bodies of different states which will resolve cross border disputes complicated by the fact that the two disputing countries are both Member States with different laws. Moreover, this unification shows that cooperation between Member States in cross border disputes proves to be successfully carried out for the benefit of citizens in this case families.

1.1 Divorce separation and annulment

Regulation 2201/2003 (the new Brussels II Regulation) sets out rules on jurisdiction as well as the recognition and enforcement of judges in matrimonial matters particularly in cases that occur on or after 1 March 2005. The matrimonial matters outlined in the regulation consist of divorce, annulment and legal separation, however, the causes for divorce and the property consequences of marriage are not outlined.¹⁸

The fact that the cause for divorce and the property division are not outlined in this regulation is confusing, because a document that already consists of such matters as divorce, annulment and separation, it would have been useful to include the matters that follow the separation of a couple.

Regulation 2201/2003 does not provide one universal rule about jurisdiction in matrimonial matters, it states that a person can take a matrimonial plea in the court of a member state where one or both of the parties are or were habitually resident or the Member State of the common nationality of the parties or their common domicile. The stated above means that there is a possibility of taking legal action in a number of states. The regulation points out that as soon as legal proceedings have started in a

¹⁷ Pandolfi, P. (2015). *The Different Kinds of Divorces, supra nota.*

¹⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ L 338*, 23/12/2003 P. 0001 – 0029.

particular Member State, other states have the right to refuse the jurisdiction. The Regulation does not provide the question of which law is applicable, that is a matter of the Member State that has jurisdiction.¹⁹

The jurisdiction of the Regulation is limited, because it does not provide a general solution when it comes to matrimonial matters. However, this Regulation is flexible because it allows the issue to be taken to the courts of a number of Member States, under the rule that the couple has or had the domicile, nationality or habitual residence in that Member State.

1.2 The law applicable to international divorces

Regulation 2201/2003 does not regulate what law is applicable for divorce when divorce is filed. Regulation 1259/2010 (the Rome III Regulation) is implementing cooperation in the area of law applicable to divorce and legal separation, currently applicable in 17 Member states (including France and Estonia).²⁰ The Rome III Regulation grants international couples (in the Member States where the Regulation applies) to agree beforehand on which law will execute their legal separation or divorce.²¹ That is possible as long as the law that the parties have agreed on is the law of a Member State that the parties have a stronger connection to. If the parties of the legal separation or the divorce are not able to decide on the law of which Member State will execute their case, the judge can decide for them.²²

The very essence of this Regulation is the ability of the spouses who are about to divorce to settle the choice of law.²³ This aspect of the Regulation allows the parting spouses to omit the unnecessary quarrelling of the already challenging procedure.

¹⁹ Shúilleabháin, M., N. (2010). Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective in International and Comparative Law Quarterly. *British Institute of International and Comparative Law*. 59 (4), 1021-1053.

²⁰ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ L 343*, 29.12.2010, p. 10–16.

²¹ Corneloup, S. (2020). *The Rome III Regulation: a commentary on the law applicable to divorce and legal separation*. Cheltenham UK Northampton MA: Edward Elgar Publishing.

²² Župan, M. (2014-2020). *Applicable law: introduction to Regulation Rome III*. Justice Programme of the European Union. Retrieved from https://www.eracomm.eu/interactive_language_training/kiosk/pdf/116DT30/Zupan_Rome_III.pdf, 4 April, 2021

²³ Wautelet, P., R. (2018). What's Wrong with Article 22? The Unsolved Mysteries of Choice of Law for Matrimonial Property, *Available at SSRN*.

1.3 Recognition of decisions

The Regulation states that a decision that has been made on a matrimonial matter in one state must be enforced and recognised in the other Member State with no specific procedure. There is no need to go to court in order to recognise the decision, however, any of both parties who is not in agreement with the decision has the right to ask the court of the other Member State not to admit the decision. The decision will not be recognised by the court if:

- If the recognition of the decision is contrary to public policy
- If the decision is opposite the other decision
- If during the procedure there were shortcomings- if one party failed to present their part of the case and did not show up the proceeding

The court has the right not to hear an appeal against the decision.²⁴

When it comes to the recognition of the decision on the matrimonial matter this Regulation states a distinctive way of how to go about the issue. The resolution that has been made on a matrimonial matter has to be enforced and be recognized by the other Member State by default. The favorable aspects of such rule is that despite the place where the divorce proceeding has taken place, the couple in this case the separated couple can be sure that the other Member State will not have an issue enforcing the other court's decision.

²⁴ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ L 338*, 23/12/2003 P. 0001 – 0029.

2. CROSS BORDER DIVORCE AND THE RULES ON ACQUIRING ONE

When a person decides to move abroad and the reason for that important life change is marriage to a foreigner, a lot has to be taken into account, and not only the feeling but all the legal implications that follow. Those implications include the impact that the law of the new country will have on the persons marriage as well as what is the procedure of divorce if two partners will decide to separate.²⁵ At once this could sound as a rather pragmatic decision to be preparing for divorce, however, sometimes when a person guided by feeling the legal part of the matters does not really come to mind at first. However, when two people have lived together for some time certain differences may appear, these include: cultural differences, parenting styles and a major one, lack of communication. All those factors if not fixed may damage the marriage and will lead to separation. In that case, the legitimate reason for divorce will differ from country to country. In case a person marries an EU Member State citizen, the rights when divorcing will differ according to which country a person moves to. Mainly the areas of difference for international divorces incorporate rights and obligations of married couples, such as their roles as parents, jointly owned properties or one took their partners marital name. If the marriage was a religious or a civil one, this factor is important too, because some states will regard a religious marriage to be equal to a civil one and others will not.²⁶

Surely, as for any type of divorce there are certain rules that have to be followed when requesting a cross border divorce. If both parties are from countries within the EU, the divorce or legal separation can be requested in the country where both of the parties live or used to live, or in the country where one of the parties lives (for at least 6 months) or either spouse's country of birth. If the request for divorce is applied in more than one Member States, it will be filled in, in the country which deals with the request first. Whether or not the divorce proceedings will start fully depends on if the reason for divorce is valid enough in the country that accepts the couple's request. If not attainable, it is possible

²⁵ Crain, J. (2021). With Cross-Border Divorces, Breaking Up Is Harder to Do. *BNY MELLON*.

²⁶ Crain, J. (2017). Cross-Border Divorces: Where Breaking Up Is Harder to Do, *American Journal, of Family Law*, Volume 31, Number 1.

to move the process to another country, given that either one of the countries is the origin of one of the parties, or where the couple lives if they have been resident there for over 6 months.²⁷

To sum up, the importance of reasonably assessing the relationship that you are about to make legal is important whether it's a cross border divorce or not. The aftermath of a cross order divorce is a rather difficult procedure that sometimes may include a couple of different legal systems even though the parties may both come from EU Member States, the issue of on which ground the divorce proceedings will take is still challenging. Therefore, the weighted decision has to be made before entering such a union.

²⁷Willmott, C. (2021). Guide to International Divorce. *Clarke Willmott LLP, 2021*. Retrieved from <https://www.clarkewillmott.com/blog/guide-to-international-divorce/>, 12 April, 2021.

3. EUROPEAN UNION ON CUSTODY

The process that established custodial arrangements for children of divorce is crucial both for the children and parents.²⁸ Each European Union country has different legislations on questions on child custody in case of cross border divorce. Each national law regulates the common issues that rise with the custody, such as, respectively child custody, what type of custody will be granted to the parents, decision making powers over the child's education and administration of the child's properties and how to overall act in the best interest of the child to make sure that his rights are fully protected and not infringed in any way.²⁹ Nonetheless, despite the differences in national laws, every EU Member State recognizes same child's rights to a personal and direct contact with both parents, despite living in different countries. Therefore, the right stated above makes sure that the place of child's residence must be decided before the proceedings begin, as well as, with whom the child will remain after the divorced is finalized.³⁰

There are different types of custody in the EU Member States:

- **Physical Custody**

Physical custody is a type of custody when a parent is able to have the child live with him or her. Joint physical custody is a good way to go if parents live close to each other, which will make sure that the child is less stressed and has a well conducted routine. When the child lives mostly with one parent, that parent is called the "custodial" parent, he or she has sole or primary physical custody over the child. The other parent has visitation rights or parenting time with the child, he or she is called the "noncustodial" parent.

- **Legal Custody**

²⁸ Kelly, B. J. (1994). The Determination of Child Custody, *The Future of Children*, Volume 4 (1), pp. 121-142.

²⁹ Bergamini, E., Ragni, C., Deana, F. (2019). *Fundamental rights and best interest of the child in transnational families*. Cambridge England: Antwerp Chicago by Intersentia.

³⁰ Beaumont, P., Walker, L., Holliday, J. (2016). Conflict of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU. *Journal of Private International Law*, Volume 12, Issue 2.

Legal custody of the child means that the parent has the right and obligation to make decisions about how the child is going to be brought up. That includes making decisions about the child's religious beliefs, medical care as well as the schooling. In some cases the courts grant joint legal custody in that case the decision making powers are shared between the parents.

- **Sole Custody**

A parent can have either a sole custody or sole physical custody of a child. Typically courts will not doubt on awarding sole custody to one parent if the other parent was seen as unfit for such a role. That may happen due to the other parent being an alcohol or a drug user or an abuser. However, even in the case of sole custody, parents are able to share joint legal custody. In that case the noncustodial parent is able to have a visitation schedule.

- **Joint Custody**

This type of custody is related to parents who do not live together but have joint custody (also known as shared custody) in cases when they share the decision making responsibilities for and/or physical control and custody of their child. This type of custody can occur if the parents are divorced, separated, or no longer co-live.³¹

The issue or rather the question of who of the parents gets the custody is sensitive by default. The peculiarity of this question is in conjunction with the benefits that the child will have depending on the type of custody that his or her parents will choose. It is with noting, that despite the type of guardianship over the child, it will nonetheless be stressful for him or her. In order to minimize the negative impact on the sociological health of the child the parents should be including the child's desire (if he or she is able to express one) when deciding on which way to go with the custodial issues.

³¹Reuters, T. (2021). *Types of Child Custody*. FindLaw. Retrieved from <https://www.findlaw.com/family/child-custody/types-of-child-custody.html>, 12 April, 2021.

3.1 Parental responsibility

Regulation 2201/2003 (The new Brussels II Regulation) sets out the rules on jurisdiction and the recognition and enforcement of judgments of parental responsibility for children. The scope of the application of this Regulation is rather wide:

- The parents need not to be married
- The ones who hold the parental responsibility need not be the biological parents of the child in question
- It is not confined to court judgments as it applies to agreements between parents if such agreements are enforceable in the country where they were made.

What the Regulation 2201/2003 covers:

- Jurisdiction – what country should hear the case
- Recognition and enforcement – how decisions made in one country are to be recognised and enforced in another
- Co-operation between central authorities
- Specific rules on child abduction and access rights

Parental responsibility includes right of custody and right of access, guardianship and the placement of a child in a foster family or in institutional care.

The Regulation shall not be applied to cases which involve:

- Establishing and questioning maternity and paternity
- Judgments in relation to adoption
- The child's first and last names
- Age of majority
- Trusts and inheritance

The Regulation also applies to some measures in relation to the child's property if they are related to the protection of the child.³²

The Regulation 2201/2003 is broadly inclusive when it comes to parental responsibility and all the aspects that are in conjunction with it, meaning, the status of the child's parents, what law shall be applied, recognition of the adopted decision as well as the possible cooperation of states. The rule is that the court which has the required jurisdiction in matters of parental responsibility is the court of the country where the child has its habitual residence. In general, if the matter is before the court in one country, that country will continue to have the jurisdiction over the case even if the child has lawfully changed the country of residence. However, it is possible to transfer the case's proceedings to the new country of the child's residence only if necessary conditions are followed and what's most important that the change is in the best interest of the child. The question of parental can be decided in the court which has jurisdiction on the matrimonial matter or the case can be brought up before the court of a country with which the child has a closer connection to. If there are issues with establishing the habitual residence of the child, then the Member State in which the child is present has jurisdiction to execute the case.³³ In some circumstances, the court that has jurisdiction may transfer the case to a different court. That can only be done if the different court is better positioned to hear the case, which can only be done if the interests of the child are met. Such a change may appear if the habitual residence of the child has changed. Nonetheless, there are time limits on this procedure, in case if the child's habitual residence changes because of a wrongful removal or retention, jurisdiction may alter only under especially strict rules. The Regulation also has rules on what is the procedure in case the proceedings are to start in more than one Member State.³⁴

³² Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ L 338*, 23/12/2003 P. 0001 – 0029.

³³ Shuilleabháin, M. N. (2010). *Cross-border divorce law: Brussels II bis*. New, York, USA: Oxford University Press.

³⁴ Carpaneto, L. (2016). *Cross-border placement of children in the European Union*. European Parliament Manuscript, 2016.

3.2 Recognition of decisions

Judgments appointed in one Member State must be recognized and approved in another Member State. The court in another Member State can refuse to recognize the order if:

- The decision is clearly contrary to that Member State's public policy
- The child was not granted an opportunity to be heard before the court
- The judgment was given in the absence of a person who was not presented with the documents establishing the proceedings in appropriate time and in such manner as to permit them to properly prepare for their defense
- One party claims that the judgment violates their parental responsibility and was not given the opportunity to be heard³⁵

In case of appealing to a court in another Member State for recognition and enforcement, you are given the right for legal aid there in case you were given in your own state. There is a different option, you can receive help from the Central Authority in the country where you are seeking recognition and enforcement. When it comes to child abduction it is not required to seek recognition from the court. In addition, the Brussels II Regulation establishes a system of cooperation between Central Authorities of the Member States. The obligation of these authorities is to promote communication between the courts of the corresponding countries and must promote agreements between parents by using mediation or some other dispute resolution tool.

In relation to the recognition of a decision made by one court the Regulation outlines that it should be automatically recognized in another Member State. However, there are certain reasons why a Member State may refuse the recognition of the decision. In case of decline a person is able to appeal under this Regulation, which makes it very convenient giving the legal circumstances. In addition, the document prompts cooperation between the national authorities of the States.³⁶

³⁵ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ L 338*, 23/12/2003 P. 0001 – 0029.

³⁶ Fiorini, A. (2010). Harmonizing the Law Applicable to Divorce and Legal Separation– Enhanced Cooperation as the Way Forward? *In International and Comparative Law Quarterly*, Volume 59, Issue 4, 1143-1158.

3.3 Child abduction

Child abduction is an unauthorized removal or retention of a minor from a parent or a person who is legally responsible for the child. The process of child abduction can be committed by the parents of the abducted child or other family members as well as by those who are not directly related to the child such as friends or acquaintances. In cases when a person has legal custody over a child and the child is abducted to a different Member State, the person has the possibility of applying to that Member State for the return of the child. Only in restricted cases the return of the child can be denied by the court of the Member State to which the child has been abducted to, the obvious restriction is the possible risk for the safe return of the child to the other Member State. However, in most cases the courts issue a prompt return of the child.³⁷

3.4 Access

Access is a legal term for both the parent and the child to have the right to spend time together. Access rights are straightly enforceable in other Member States. Thus, there is no need to go to court to state that the rights are enforceable, only if the court not only issued the orders but also the required certificate. The issued certificate ensures that procedural safeguards have been followed, meaning that all the parties had the right to be heard before the court. The certificate is an insurance that the judgment is also taken into account by a different Member State.

The main objective of the jurisdictional scope of this Regulation is that it is completely favorable toward the child. Meaning, that the court proceedings on the issue of custody will take place only where the child is habitually resident or if the child has changed the country of residence. These aspects are very important to note, the fact that this document has jurisdictional flexibility signifies that the child rights are going to be protected.

³⁷ Liefwaard. T., Sloth-Nielsen. J. (2016). *The United Nations Convention on the Rights of the Child: Taking Stock After 25 Years and Looking Ahead*. Brill/Nijhoff.

4. COMPARATIVE ANALYSIS OF ESTONIA AND FRANCE

4.1 Estonia on divorce and custody

In the Republic of Estonia family matters including divorce and the questions of custody are governed by the Family Law Act. When seeking divorce in Estonia the person is met with several options, as set by Article 64 (1, 2) of the Act,³⁸ a vital statistics office may grant divorce by a mutual agreement between the spouses based of a joint written petition. Divorce may be granted by a notary entering into agreement on law applicable to divorce. As in the case with divorce through the vital statistics office, notary grants divorce upon an agreement between spouses on the basis of a joint written application. Finally, if the spouses cannot come to a mutual agreement or one of the spouses acts against the other one, the case has to be brought before the court as stated in Article 65, Family Law Act.³⁹

In regards to concerns regarding jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, Estonia applies the Regulation (EC) 2201/2003 (Brussels II Regulation). Concerning which choice of law the court shall apply in a divorce proceeding between spouses who do not live in this Member State (Estonia) or who are of different nationalities, the legislation of the country where the spouses have the common place of residence. In cases the place of residence of the spouses is different but the citizenship is the same, the common legal consequences of the marriage are determined by the legislation of the country of which the spouses are citizens of. Thus, if the place of residence and the citizenship of the spouses is different, the general legal implications of the marriage are established on the basis of the law of the country of the spouses last common residence, under the condition that one of the spouses resided in that country.

³⁸ Family Law Act, Passed 18.11.2009, RT I 2009, 60, 395. Entry into force 01. 07. 2010

³⁹ *Ibid.*, 25.

However, if under any circumstance the general rule applied to the divorce cannot be established, the law of the country to which the spouses are closely linked to, will be applied.⁴⁰

If divorce is not possible or not allowed under the law mentioned above, Estonian law is applied, under the requirement that one of the spouses resides in Estonia, holds an Estonian citizenship, or at some point in life was an Estonian resident, or at the time of the marriage held an Estonian citizenship.

In Estonia, the relationship between the child and the parents is governed by the Family Law Act and the Convention of the Rights of the Children. For the period of time when a child is not able to make decisions on his own, the parents are acting as his guardians. When acting as a guardian for the child, the parent has the obligation and the right to take care for the child's personality, the right to manage the child's property as well as make decisions on the matters that concern the child. Articles 116, 117 and 118 of the Family Law Act point out that the custody should be shared between the two parents even if the parents are not married, therefore they have equal rights when deciding on matters concerning the child's wellbeing.⁴¹ The statement above allows the author to suggest that, the legal consequence of divorce for the child would be not as stressful, due to the fact that Estonian law makes it clear that the custodial responsibilities have to be split between the two spouses, therefore, the time spent with the child has to be equally shared. That in turn creates less stress for the child.

However, not all the time divorced parents agree on all the aspects of the child's upbringing as well as his maintenance and the state of custody. In that case, the Act prescribes that such concerns to be brought up before court, the court may grant the powers of decision to one parent as provided by Article 119. Further, the Act establishes the financial support of the child and his needs. The Articles 100, 101 and 102, outline that the maintenance is provided by making periodic payments of money, the support shall be paid in advance for each calendar month, and the support shall not be less than half of the minimum monthly wage established by the Government of the Republic of Estonia. In certain cases the court may order support as a fixed amount.⁴²

In regards to the effects of the divorce on the child the Family Law Act is fixed on the idea of the well-being of the child. Therefore, the divorce in itself in a legal sense is structured in a way that both

⁴⁰ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ L 338*, 23/12/2003 P. 0001 – 0029.

⁴¹ *Ibid.*, 26.

⁴² *Ibid.*, 26.

parents shall spend time with the child, as well support the child, and make sure that his well-being is out of danger. In case, of any endangering of the child's well-being the Article 134 of the Family Law Act has to be applied. ⁴³

4.2 France on divorce and custody

Unlike many other countries, divorce in France occurs only in court, it is associated with a special protection of the well-being of the family as a unit of society. Under the French Law the Family Judge (*Juge aux affaires familiales*) is the principal judge in family matters ⁴⁴ as stated in Article 228 of FCC- the judge has jurisdiction to decree a divorce, whatever the ground for it may be. It is possible to dissolve the French marriage on the following exhaustive grounds that are set outlined in the Article 229 of FCC - mutual consent of spouses, recognition of the separation of ties in marriage, the final completion of the marriage and the guilt of one of the parties to the marriage. Marriage is dissolved officially, after the court's decision comes into force and the parties have not exercised their right to appeal. ⁴⁵ There are four types of divorce in France, depending on the above grounds for dissolution of marriage: by mutual consent, accepted (participants in the process agree to the dissolution of marriage, but there are many nuances on the division of joint property), hostile (the purpose of one side to accuse the other of the breakdown of the family and the termination of family relations), with the final disorder in the family. ⁴⁶

In regards to concerns regarding jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, France applies the Regulation (EC) 2201/2003 (Brussels II Regulation). However in some cases (those cases may be deemed specific) the choice of jurisdiction by French courts may be determined based on the doctrine of French national privilege. That doctrine is established on the French nationality of the defendant or the applicant, under the Articles 14 and 15 of the FCC. ⁴⁷

⁴³ *Ibid.*, 26.

⁴⁴ Stoljar, S. (1989). A History of French Law of Divorce-I. *International Journal Of law, Policy and the Family*, 3(2), 137-159

⁴⁵ French Civil Code

⁴⁶ Press and Information Division, The French Embassy. Women and divorce in France. *International Journal of Family Therapy* 3, 62-82 (1981).

⁴⁷ *Ibid.*, 27.

There are cases when not a French but a different jurisdiction may be favored by one of the spouses. In that case French courts apply the first in time- greater in right (*prior tempore*) rule.⁴⁸ If two equally competent courts were approached on the same dispute, the case should be heard by the judge who convened the first. In other words, jurisdiction in international private law is often determined by the speed with which a claim is filed. If a person wants his case to be heard by a French court (or the court of a different choice), he needs to have time to file an application before your spouse. With that being said, foreign nationals will not be treated with great difference. The French court will apply a foreign law only if that law has been appointed by the applicable conflict of law rules. In most cases the composition and provisions of a foreign law will determined by a certificate of custom drafted by a foreign lawyer, combined with an accredited translation. If the applicable law depends on the subject matter in question, the applicable law in France regarding cross border divorce will be determined by the Regulation (EU) 1259/2010 that implements enhanced co-operation in the area of the law applicable to divorce and legal separation (Rome III Regulation). If the Rome III Regulation does not apply, that means that the divorce will be governed by French Law as stated by the Article 309 of the FCC- divorce and judicial separation are governed by French law: where both spouses are of French nationality; where both spouses have their domicile on French territory; where no foreign law considers it should govern whereas French courts have jurisdiction over a divorce or judicial separation case.⁴⁹

In relation to matters concerning child custody, welfare of children and parental responsibility French Law is rather inclusive and meticulous, due to the fact, that, the well-being of the child is of great importance.⁵⁰ The documents that apply to this matter are FCC and (FCCP). As in the case with divorce, the power to exercise questions regarding a child is exercised by the Family Judge. Nonetheless, in specific cases the Children's Judge (*Juge des enfants*) executes a specific jurisdiction over minor children in danger. When a child reaches the age when he is able to represent himself at the court, the judge must hear the child.⁵¹ In cases when both Judges have to present at the court hearing, they execute different subject- matter jurisdiction during the hearing. Jurisdictions regarding matters of parental responsibility lies with the courts of the Member States where the child has the

⁴⁸ Fellmeth, A., X, Horwitz, M. (2009). *Guide to Latin in International Law*. Oxford University Press, USA.

⁴⁹ *Ibid.*, 28.

⁵⁰ Bell, S. J., Boyron, S., Whittaker, S., Bell, P. A. (2008). *Principles of French Law*. Oxford New York: Oxford University Press.

⁵¹ Bermann, A. G., Picard, E. (2008). *Introduction to French Law, First Edition*. Kluwer Law International; First Edition.

habitual residence during the time the court is summoned. The Court of Justice of the European Union (CJEU) states, that, the habitual residence is where a person's habitual centre of interest is found. In instances where there has to be made an exception, Article 14 of the recast Brussels IIa provides the answer- a defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seized.⁵² In order to grand jurisdiction for the French courts in this instance, Article 1070 of FCCP and /or Articles 14 and 15 of the FCC can be applied.⁵³

Child support is another subject that is covered by the FCC. Parents are obliged to take care of their children, to engage in their upbringing, according to French law child support does not stop when the child reaches the age of eighteen. On the contrary, it is payed until the child is able to cover his/her life expenses as cover in Article 373-2-5, FCC.⁵⁴ In some cases, it is necessary to take care even after children have overcome this age, for example, due to the disease of the child. As mentioned above, there are two special institutions in France: a Family Judge and a Children's. They have a wide range of powers to protect the rights and interests of the child (depriving one of the parents of parental rights, establishing the order of communication with children, direct control over the performance of parents' duties). The FCC also breaks down the various ways in which the child support can be paid.

When it comes to the effects of the divorce on the child the Article 373-2, FCC,⁵⁵ explicitly states that-the separation of the parents has no influence on the rules of devolution of the exercise of parental authority. Each of the father and mother shall maintain personal relations with the child and respect the bonds of the latter with the other parent. Regarding the question of who will get the child after the divorce, French court judges prefer to grant joint custody over the child, for example, the child should spend equal amounts of time with both of the parents. Nonetheless, this rule has an exceptions, in cases of abuse or negligence, the Judge may grant exclusive and sole custody to one of the parents as it is in the best interest of the child.

⁵² Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ L 338*, 23/12/2003 P. 0001 – 0029.

⁵³ French Code of Civil Procedure

⁵⁴ *Ibid.*, 29.

⁵⁵ *Ibid.*, 29.

CONCLUSION

The Member States have advanced in unifying family law legislation. As a result, European Union Family Law is centered on the formation of uniform rules that determine the jurisdiction of the authorized bodies of different states to resolve cross-border disputes complicated by the European element. The composed experience of the EU cooperation in cross border civil affairs proves the European legal acts and mechanisms to be more effective when enforced for the benefit of citizens and society. If this partnership will continue to flourish, the outcome of that will be better understanding and mutual trust between practicing lawyers in different EU countries, knowledge of EU law and developed legal instruments of cooperation, a consistent understanding of EU law. That is crucial for making sure for a proper and uniform application of legislation in national cases.

Respectively, every European Union Member State has various legislation that conducts the question of child custody, specifically in case of cross border child custody. Despite the dissimilarities in national laws, every MS recognizes the same child's rights. That similarity ensures that despite the changes a child is treated the same in every MS, and the legal system works toward benefiting the child and his needs.

The main research question discussed in this paper is how a cross border divorce effect the child's custody, meaning, how the child is treated after the divorce, and who of the parents will have the custody over the child. The aim of this thesis is the comparative analysis of the Republic of Estonia and France regarding their legal approach on the respective issues of cross border divorce and child custody. The comparative analysis that was conducted on questions of legal consequences of a cross border divorce, conditions of legal separations, maintenance, division of obligations between spouses, and the questions of obtaining cross border child custody and the legal responsibilities that parents have to undertake in case of a cross border custody battle. Research shows that both Estonia and France have multiple similarities regarding to whom of the parents grant the custody of the child. Both agree that the preferable choice would be joint custody. Such choice is explained by the importance of maintaining a stable environment for the child to grow in. The most apparent difference between Estonia and France is in the choice of where to get a divorce and who will perform the legal part. France has only one way, which is divorce through court, it is because of a special protection of the well-being of the family as a unit of society. Under the French Law the Family Judge (*Juge aux*

affaires familiales) is the principal judge in family matters. In Estonia the couple who is willing to divorce has somewhat of a freedom of choice. Only if the divorcing couple has difficulties in splitting their belongings, or choosing the type of custody, the couple has to appeal to court. Besides that, the divorce may be granted by vital statistics office and by a notary entering into agreement on law applicable to divorce. In order, to avoid any future conflict of laws, which may arise from a cross border matrimonial and custodial dispute, a close cooperation between the Member States has to be promoted by the European Union.

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