

CHILDREN'S RIGHTS IN THE HUNGARIAN JUDICIAL PRACTICE

ANDRÁS KÖRÖS*

I. INTRODUCTION

In Hungary, court proceedings and judicial activities have a dramatic effect on family law. The judicial law-making that results from court proceedings has a more significant effect in family law than in other domains of law. This profound effect is attributable to the characteristics of Hungary's family law rules, which are based on general legal notions. For instance, general rules of law include the "complete and irretrievable breakdown of a marriage"¹ required before a divorce will be granted, "the child's better physical, intellectual, and moral development"² with a particular parent, and a necessary study of a child who is eighteen years of age or older in determinations of child maintenance obligations.³ These general rules of law are flexibly defined and applied to the special features of individual cases and to the changing conditions of Hungarian life. The rules have required adaptation to fit the international nature of family law in a time where parents can move to another continent with the children. In addition to increased international travel, the court has wrestled with the application of these general rules of law to the changing social, political and legal systems. The main problem the court faces through all of these changes is how to assert the paramount interest of the child in the judicial proceedings.

* Justice, Supreme Court of the Hungarian Republic.

1. FAMILY LAW ACT, Act IV, § 18(1) (1952) (Hung.) [hereinafter 1952 FAMILY LAW ACT]. The court may dissolve the marriage at the request of either of the spouses, or at the joint request of the spouses, if their married life becomes completely and irretrievably broken down. *See id.*

2. *Id.* § 72(a)(1). The relevant section states that the parents decide where the child should reside. In the absence of their agreement the court decides in favor of the parent who can provide a home where the more favorable physical, intellectual and moral development of the child is provided. *See id.*

3. *See id.* § 60 (The adult child is entitled to parental support if a court determines that support is necessary for the continuation of studies.). *See also id.* § 18.

This essay will first address the state of family law in Hungary in recent years. The subsequent section will address the difficulty the court faces in attempting to assert the paramount interest of the child, while considering the changed socio-political and legal systems. A number of specific court issues will be addressed: namely, child placement, child maintenance (commonly referred to as child support), the child's contact with the non-custodial parent, and the child's use of the family home. The next section will discuss the problems the court has encountered in attempting to implement provisions of the United Nations Convention on the Rights of the Child (Child Convention).⁴

II. RECENT HISTORY OF HUNGARIAN FAMILY LAW

Hungarian family law has been impacted significantly by the role that judicial law-making plays in court proceedings. Hungarian judges have adopted general rules of law that have been codified through legislative enactments. These codifications have been instituted by amendments to the Family Law Acts of 1952, 1974, and 1986.⁵ These codifications of progressive judicial law-making have resulted in divorce that is now recognized by mutual consent and the abolishment of discrimination between parents on the grounds that a parent of one sex is better suited to care for the child in child custody disputes.

Hungarian family law has also been impacted by the incorporation of international family law norms when Hungary ratified the Child Convention⁶ in 1991.⁷ One of the legal rules incorporated into Hungarian family law was the "best interests" of the child standard, which is an indispensable requirement in the course of the court proceedings and decisions concerning the child.⁸ Although a number of general international legal rules were incorporated with the ratification of the Child Convention, Hungarian family law still needed to be modified in certain respects such as adoption, custody, and guardianship and the administrative tasks associated therewith. For example, in 1992, the Constitutional Court modified rights of adopted children to in-

4. See generally Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 9, at 166, U.N. Doc. A/44/49 (1989), 28 I.L.M. 1448 (1989) [hereinafter Child Convention].

5. See FAMILY LAW ACT, Act I (1974) (Hung.) [hereinafter 1974 FAMILY LAW ACT]. This amendment set aside the former provision that gave priority to mothers during the placement of children under the age of six. Furthermore, the amendment has enabled courts to dissolve marriages exclusively in accordance with spousal agreements. These amendments are direct results of numerous judicial decisions. Additionally, ACT IV of 1986 increased the autonomy of the spouses by establishing the new institution of the contract on properties. See FAMILY LAW ACT, Act IV (1986) (Hung.) [hereinafter 1986 FAMILY LAW ACT].

6. See Child Convention, *supra* note 4.

7. See ACT LXIV (1991) (Hung.); see also Chief Justice Solyom, *Opinion of Justice Solyom*, 18 CARDOZO L. REV. 1725, 1743 n.2 (1997).

8. See Child Convention, *supra* note 4, art. 3(1) ("In all actions concerning the children . . . the best interests of the child shall be primary consideration.").

clude the right of the child to know his or her genetic descent.⁹ In 1995, the concept of joint parental custody of children was introduced.¹⁰ Furthermore, in 1997, the Hungarian Parliament passed the Child Protection Act, placing mainly guardianship and administrative tasks on new grounds while setting forth some new rules to be applied by courts.¹¹

Since these small changes in the Family Law Act, it has become more difficult for judges to make rulings because the social, political and the legal system have fundamentally changed in Hungary.¹² These changes have had a dramatic effect on the living conditions of families.¹³ While some families are struck by severe impoverishment and inability to find employment, other families have accumulated significant wealth that becomes hidden from the courts for the obvious reasons of avoiding child support and alimony.¹⁴ With these significant social changes comes the difficult judicial task of determining the financial situation of the parents in order to award custody or maintenance (whether alimony or child support). The court has also faced the added socio-political burden of enforcing morals. While the court has applies general rules of family law, it also has had to enforce numerous non-legal (moral) expectations such as matrimonial fidelity, parental sense of responsibility, and respect for the children.¹⁵ The changes in the socio-political system have made the court's job more cumbersome in attempting to make judicial decisions that will take into consideration the economic and moral conditions of the parents.

In addition to the socio-political changes the court has encountered, a number of changes have been made to the legal system in general, which effect the court's decisions in the family law arena. For example, the new Housing Act has made the protection of families more difficult by affirming the rights of the landlord in lawsuits relating to the use of the family home.¹⁶ The provisions of the housing law are not in accordance with the matrimonial property rules. Another example of laws that have impacted the family law arena is the transformation of the laws that govern the great social sup-

9. See FAMILY LAW ACT § 53(a)(1) (1995) (Hung.) ("The adopted child has the right to request information about the particulars of their parents from the public guardianship authority.").

10. See Emilia Weiss, *Changes in the Modern Era Lead to the Evolution of Hungarian Family Law and Children's Rights*, 31 CAL. W. INT'L L.J. 75, 79-80 (2000).

11. See CHILD PROTECTION ACT, Act XXXI (1997) (Hung.).

12. See generally ATTILA ÁGH, THE DECADE OF DEMOCRATIC TRANSITION IN: DECADE-BOOK OF HUNGARY—THE CHANGE OF THE REGIME (1988-1998) (S. Kurtán, P. Sándor, L. Vass, eds., Demokrácia Kutatások Alapítvány, 1998).

13. See *id.*

14. See *id.*

15. See 1952 FAMILY LAW ACT § 24 ("The spouses are supposed to be faithful to each other and they are obliged to support each other."). See also Hungarian Supreme Court Directive 17. The Directive directs courts to emphasize parental responsibility and respect for children. See *id.*

16. See NEW HOUSING ACT, Act LXXVIII (1993) (Hung.); ECONOMIC COMPANY LAW ACT, Act VI (1988) (Hung.).

ply system, which influences the living conditions of families.¹⁷ Judges must consider the benefits received under the social supply system when making decisions in the family law arena.

Judges also face the added burden of dealing with family law issues beyond the Hungarian borders. Since 1990, international borders have become less and less restrictive prompting an increase in marriage between Hungarians and citizens from other countries. When such couples divorce, the Hungarian court is often called upon to settle the support obligation of the separated parents living abroad. The court must also face issues where children are illegally taken abroad by one of the parents.¹⁸ In addition to issues of divorce on an international level, the court must also consider the increasing demand for international adoption and the rights effected during those proceedings.¹⁹ These international family law concerns are being addressed by a number of European countries, which desire uniform laws that are in harmony in each country. Hungary has consequently joined several international agreements, one of which is the European Convention of Human Rights.²⁰ As of result of its participation in the agreement, Hungary must ensure that its family law ruling conform to the judgments of the European Court of Human Rights.²¹ Hungarian courts face an added challenge of applying the new laws that have resulted from these international agreements.

The changes in the political system, the legal system, and Hungary's participation in the international arena raise great challenges for judges who must apply the general rules of Hungarian family law. The significant challenge addressed in this paper involves the difficulty in asserting the paramount interests of the child in Hungarian family law judicial proceedings.

III. THE RIGHTS OF THE CHILD

Hungarian family law judges must consider the paramount interests of the child in determining issues of child placement, child maintenance, con-

17. See ÁGH, *supra* note 12.

18. See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, *FORDHAM L. REV.* 593 (2000).

19. See Lisa M. Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 *EMORY INT'L L. REV.* 283 (1995).

20. See European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (1950-52) (entered into force Sept. 3, 1953) [hereinafter European Convention]. Hungary ratified this treaty in 1993. See ACT XXXI (1993) (Hung.).

21. Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms requires that all contracting states secure the rights and freedoms defined in the Convention for all people within their jurisdiction. See European Convention, *supra* note, art.1. A number of the rights enumerated by the European Convention relate to family law. For instance, Article 8, respect for private and family life, and Article 12, the right to marry, are rights that exist under the Human Rights Convention and are enforceable by the European Court of Human Rights. See *id.* arts. 8 & 12.

tact with the child's non-custodial parent, and the child's use of the family home. The considerations do not take place in a vacuum but rather must also intimately involve the socio-political and legal environment outside the family law arena as well as within an international arena.

A. Placement of the Child

In the absence of mutual consent of the parents, the most disputed and most difficult issue to resolve fairly is the placement of the child. If the parents have reached an agreement during divorce or separation, custody is awarded to the parent with whom the child lives by agreement. When, however, the parents have not reached an agreement, the court must decide where the child should be placed. The court must consider which parent will better provide for the child's physical, intellectual, and moral development.²² The court does not presume that a parent of one sex, for example, the mother, is better suited to care for the child. No presumptions are factored into the court's decision. The difficulty the court faces is deciding between two parents who are equally suited to raise the child and are equally attached to the child as well.

To guide the courts in making child placement decisions, the Hungarian Supreme Court issued a detailed directive on the decision-making criteria in the 1980s.²³ After Hungary joined the Child Convention in 1991, the Directive was amended to reflect the principles of the Child Convention.²⁴ One of the most important principles of the amended Directive was to consider the child's "best interest."²⁵ The court must consider the best interest of the child when attempting to determine the child's placement. The court must consider not only the best interest of the child in the momentary situation but also in the long-term when one parent may be better able to provide for the child's physical, intellectual, and moral development. In considering the child's best interest, the courts have also taken into consideration the views of the child who is of sufficient age and maturity to form an opinion.²⁶ Furthermore, the judge must consider the behavior of the parents toward each other and toward the child.²⁷ If the child's best interest would be endangered

22. See 1952 FAMILY LAW ACT § 72(a)(1).

23. See Hungarian Supreme Court Directive 17 on the Placement of the Child. The Directive supplies a detailed guidance on the standpoints of the placement of the child. It consists of seven chapters: I. Responsibility for children, II. The agreement of the parents on joint custody and the placement of the child, III. The decision of the court on the placement of the child, IV. The placement of the child with a third party, V. The changing of the child's placement, VI. The child's contact with the non-custodial parent, and VII. Demarcation of the lawsuits on the placement of the child, the changing of the child's place and delivery of the child. Hungarian courts are obliged to follow the Directives of the Supreme Court.

24. See Hungarian Supreme Court Directive 24 on the Amendment to Directive 17.

25. *Id.* See also Child Convention, *supra* note 4, art. 3(1).

26. See Bírósági Határozatok [BH.] 480.9/1996.

27. See BH. 225.4/1995; BH. 72.2/1999.

by staying with either of his parents, the court may place the child in a third person's home and care, if the person has asked the court to do so.²⁸

In addition to the court considering the relationship between the parents themselves and their relationship to the child, as well as the child's opinion regarding placement, the court also considers the permanence of the environment and the relationship among siblings as the most important criteria of the placement.²⁹ Obviously, these criteria are factored into the best interest standard. If the best interest of the child would be better served by a subsequent modification of the court's earlier placement decision, the court will make such a modification.

B. Maintenance of the Child

The changed socio-political circumstances in Hungary make the judge's decisions regarding child maintenance more difficult. Changed economic circumstances of Central and Eastern Europe have resulted in significant increases of living and educational expenses and a considerable rise in the rate of unemployment. On the other hand, some parents accumulate considerable wealth, which they later disguise to avoid paying child maintenance or alimony. To solve this problem, the Hungarian judicial practice takes into consideration the actual incomes of the obligor parent instead of that parent's declaration of assets. In addition to considering the parent's real income, the court considers the growing costs of higher education when fixing child allowance.³⁰ The court considers the child's conduct towards the obligor parent when factoring in the costs of higher education during child allowance determinations.

C. The Child's Contact with the Non-Custodial Parent

As for the child's contact with the non-custodial parent, Hungarian family law acknowledged the rights of the child to have contact with the non-custodial parent prior to ratifying the Child Convention. The Child Convention has specific articles that ensure that a child has contact with the non-custodial parent.³¹ Having ratified the Child Convention, Hungarian family law recognizes the child's rights to maintain a personal relationship and to have direct contact with both parents, even if the parent lives in a different country than the child.³² Hungarian family law also recognizes the joint parental responsibility for the upbringing and development of the child.³³

28. See 1952 FAMILY LAW ACT § 72(a).

29. See BH. 225.4/1995; BH. 72.2/1999.

30. See 1952 FAMILY LAW ACT § 60.

31. See Child Convention, *supra* note 4, art. 9(3).

32. See *id.* art. 10(2).

33. See *id.* art. 18.

In spite of these family law regulations, the reality is that the parent who leaves the matrimonial home upon divorce can hardly maintain the same type of parental relationship (contact with and care of the child) as the parent enjoyed while living in the child's home. In many cases, the non-custodial parent's role may be further reduced by the custodial parent who may, to a great extent, or even completely, separate the child from the non-custodial parent.³⁴ The non-custodial parent's role is then relegated to providing child maintenance.

To correct this reality, the Hungarian Family Law Act has, since 1987, ensured joint-decision making rights to the parents on four issues: (1) the child's name, (2) the child's domicile, (3) the child's further education, and (4) the child's career.³⁵ Courts greatly consider the non-custodial parent's rights. When one parent unlawfully prevents the non-custodial parent from maintaining contact with the child or when a parent abducts the child, Hungarian judges seriously question that parent's suitability in raising the child. Unlawfully restricting contact with another parent may lead the court to change placement of the child to the other parent or, in cases where the conduct is less significant, to award damages to the wronged parent.

D. The Child's Use of the Family Home

The impact of the changing economic life conditions of Hungary are felt in family law because acquiring real property, such as the family home, takes a lifetime of hard work for an overwhelming majority of the Hungarian population. In this area, the interest of family protection clashes with those of property ownership. The recognition of this fact, however, cannot be allowed to jeopardize the basic right of the child to be accommodated.³⁶ To assure the consistency of the administration of justice, the Civil Department of the Hungarian Supreme Court issued two comments in 1997.³⁷ These comments concern issues of accommodating the spouse who is ordered to leave the home, which most often has taken many years to acquire, and issues of compensation payable to the spouse who must leave the home, in order that he or she may secure another place to live.³⁸ It is an indispensable demand to ensure the right of the minor child to use the family home after the child's parents have divorced or separated, unless the child has a permanent home elsewhere.

34. For example, the custodial parent may choose to move with the child to a distant place or country, and the non-custodial parent may not have the ability to travel to see the child.

35. See 1986 FAMILY LAW ACT, Act IV.

36. See 1952 FAMILY LAW ACT § 31(b)(2) ("The right of the minor child regarding the use of the home—in accordance with his or her circumstances—should be provided in the previous joint home, unless he or she has a permanent place somewhere else.").

37. See Civil Department of the Hungarian Supreme Court Comments 298-99 (1997) (Hung.).

38. See *id.*

E. Overall Considerations

In considering the child's placement, child maintenance, the child's contact with the non-custodial parent, and the child's use of the family home, the court must provide an opportunity for the child of sufficient age and maturity to express his or her view. If the child's view has been formed with influence of one or both of the parents, the court will not hear it. The child whose view may be heard shall have an opportunity to be heard directly or through a representative or an appropriate body or person (i.e. a psychologist).

IV. CONCLUSION

Despite the fact that judge-made law has a profound effect on Hungarian family law and perhaps more of an effect than in any other area of law, it is not perfect. Hungarian judges have had to adapt their flexible general rules to changing socio-political and legal systems as well as international concerns. With regard to international concerns, Hungary has incorporated the principles of the Child Convention.³⁹ Hungarian judges, however, have had problems in implementing the Child Convention. The implementation is not sufficient. The court's judgments are difficult to enforce because judicial intervention is not enough.

The court's judgments are difficult to enforce for four main reasons. First, parents do not always hand children over to the parent who has been awarded custody by the court. Second, obligor parents hide their wealth from the court to prevent paying the court awarded child support or alimony (i.e. by registering a luxurious car in the name of the parent's business). Third, the parent who is obligated by court order to leave the matrimonial home very often has insufficient income to obtain another place to live. Finally, the court lacks a sufficient mechanism to enforce its judgments.

Hungary's implementation of the Child Convention is insufficient is because there is a lack of a network of state and civil organs to deal with family problems. The judicial proceedings themselves are not always suitable to solve family conflicts. Alternative means may accomplish certain tasks more efficiently. Thus, it is worth considering what tasks should be assigned — prior to, current with, or instead of, judicial proceedings — to the guardianship office, lawyers, other experts specialized in family law, church organizations, and civil organizations. For the interests of the child in a safe and balanced future, families need to be able to resolve family disputes in the most efficient and suitable way.

39. See Child Convention, *supra* note 4; Solyom, *supra* note 7, at 1743 n.2.