

CHANGES IN THE MODERN ERA LEAD TO THE EVOLUTION OF HUNGARIAN FAMILY LAW AND CHILDREN'S RIGHTS

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I. HISTORICAL PERSPECTIVE

The Hungarian Family Law Act of 1952 represented Hungary's initial attempt at a comprehensive codification of Hungarian family law.¹ This Act and its policies were to some extent reflective of the social norms and policies in existence during the 1950s. Some of these policies, however, are no longer appropriate in today's society. Fortunately, the Act approved nearly fifty years ago has been amended on several occasions and reflects many of the modern and mainstream policies of today's world.²

II. RECENT TRENDS: THE TRANSFORMATION PERIOD

Due to the substantial evolution of family relations in the past half-century, many outdated family law regulations have been amended. In fact, some regulations have been amended several times. Such changes in family law have been widespread throughout Eastern and Western Europe. During this "transformation period," the Hungarian Family Act and other Hungarian family laws underwent significant change. In addition to legislative changes, courts have played an important role in the development of family law through the litigation process.

Many areas of Hungarian family law have undergone change. For example, there has been significant change in divorce law. Although the prin-

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1. See FAMILY LAW ACT, Act IV (1952) (Hung.) [hereinafter 1952 FAMILY LAW ACT].

2. For example, some of the amendments to the Act were clearly designed to protect families by ensuring equality between husbands and wives. Additionally, the Act now protects children's rights and interests to a greater extent even though some years prior to the enactment of the Family Act Hungary had already granted rights to children in special circumstances. For example, in 1946, Hungary enacted Act XXIX, which ensured equal rights for both illegitimate and legitimate children. See LEGAL STATUS OF THE CHILD BORN OUT OF MARRIAGE ACT, Act XXIX (1946) (Hung.). Under the Act, when the illegitimate parents were ascertainable, the father would be granted equivalent rights to his child as that of the father of a legitimate child. See *id.*

principle of no fault divorce has not been affected, the rules concerning divorce procedure and divorce by mutual consent have been changed numerous times. Marriage laws, including the legal age of consent to marry, have also been changed. Child custody procedures have been amended several times.

Since 1974, the state has provided financial assistance in cases where child maintenance has temporarily become an irrecoverable debt. Although by 1986 the rights of non-custodial parents had evolved significantly, Hungarian family law remained silent regarding joint custody after divorce until 1995. Furthermore, a significant portion of adoption law has been altered several times since 1960 even though the overall goal of the 1952 adoption legislation and certain regulations have remained unchanged.³

III. THE ROLE OF INTERNATIONAL TREATIES IN HUNGARIAN FAMILY LAW

International treaties have been of major importance to the development of Hungarian family law. In 1957 and 1965, Hungary adopted child support and maintenance provisions from the New York and Hague Conventions, respectively.⁴

In 1986, Hungary adopted the Civil Aspects of International Child Abduction provision of the Hague Convention.⁵ Under this provision, a court must apply the law of the country of the child's last habitual residence.⁶ In an effort to protect Hungarian children in abduction cases, the Civil Law Council of the Hungarian Supreme Court has now clearly and precisely defined "unlawful child-abduction" in Hungary.⁷ This clarity will protect children by preventing courts abroad from misconstruing Hungarian abduction law.

In 1991 and 1993, Hungary adopted provisions both from the New York Convention on the Rights of the Child⁸ and from the European Convention on Human Rights.⁹ From this time on, the main purpose of the changes was to harmonize the Family Act with the Convention on the Rights of the Child by enacting new child protection laws consistent with principles established by the Convention.¹⁰ The central purpose of the Con-

3. The rule that *only* infants may be adopted and that the adoption must first be approved by the public guardianship authority remains unchanged.

4. See Law Decree No. 53 of 1957 (Hung.); Law Decree No. 7 of 1965 (Hung.).

5. See Law Decree No. 14 of 1986 (Hung.).

6. See Hague Conference on Private International Law, Oct. 25, 1980, ch. I, art. 3, 19 I.L.M. 1501 (1980) ("The removal or the retention of a child is to be considered wrongful . . . [when] it is in breach of rights of custody of a person . . . or any other body . . . under the law of the State in which the child was habitually resident immediately before the removal or retention.").

7. See Standpoint of the Civil Law Council of the Supreme Court, No. 284 (Hung.).

8. See Act LXIV of 1991 (Hung.).

9. See Act XXXI of 1993 (Hung.).

10. Although less significant, changes were also made to procedures for paternity testing. The procedural changes to paternity testing were necessary to keep pace with scientific ad-

vention on the Rights of the Child was to protect children under the age of eighteen by providing special safeguards and care.¹¹

IV. CHILDREN'S RIGHTS AND CUSTODY PROCEEDINGS

A. *Children's Opinions Gain Increased Recognition*

The notion that a child is the subject rather than the object of legal disputes concerning the child's future is not a new one. Prior to 1995, the family court considered the child's opinion in cases where the child was greater than twelve years of age and in the legal custody of a guardian.¹² Additionally, children who were over the age of sixteen, under certain circumstances and upon approval of the public guardianship authority were permitted to leave their parents' home.¹³ Further, employed children over the age of fourteen were able to retain salaries they had earned and alone had a right to dispose of such earnings.¹⁴

Following the Convention, Hungarian family law now provides differential treatment to those children who are capable of making decisions concerning their lives.¹⁵ Currently, children, who are deemed capable of making such decisions, shall have an opportunity to express their opinion in custody proceedings. In such cases, the child's opinion may be weighed against the respective desires of the parents.¹⁶ Although these children's opinions are recognized in Hungarian family law, this does not in any way diminish the parents' custodial rights or their responsibility to ensure the proper development of their children. Parents and society have an obligation to prepare children for lives as adults in society. Parental involvement and custody are

vancements in assisted human reproduction.

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

12. See 1952 FAMILY LAW ACT § 105.

13. See *id.* § 77 (2).

14. See *id.* § 80 (1).

15. See Child Convention, *supra* note 11, art. 12. To a greater extent since the 1995 Amendment to the Family Act, Hungary has increasingly recognized the significance of children's rights and has been open to listening to the child's opinion. Hungarian family law recognizes and applies the child's opinion upon a finding that the child is capable of forming a rational opinion about family disputes. Similar to the Family Act, the Child Protection Act and the Decree On Guardianship recognize special rights for mature and mentally developed children. The Decree on Guardianship prescribes the following factors be used to determine whether a child has the capacity to make custody decisions: (1) the child's comprehension of the relevant facts and possible outcome of the case, (2) the child's age, (3) the child's psychological and emotional development, and (4) whether the child can ascertain the consequences of their decision. See GUARDIANSHIP DECREE, No. 149, § 2 (1997) (Hung.) [hereinafter Guardianship Decree].

16. The court, however, is required to consider this opinion in accordance with the age and maturity of the child. See FAMILY LAW ACT § 71 (1) (1995) (Hung.) [hereinafter 1995 FAMILY LAW ACT]. See also Child Convention, *supra* note 11, art. 12.

essential to the proper raising of children, especially in today's society where there is an increasing level of juvenile delinquency and drug addiction.

B. *Children's Rights in Placement Proceedings*

The 1995 Family Act contains procedural safeguards to protect children in custody hearings, especially in child placement cases. In cases where the child's development is not at risk, the Act prohibits the family court from ordering placement of a child who is at least fourteen years of age without the child's consent. Where the child is under the age of fourteen, however, a hearing may be granted to determine whether the child is capable of making a competent decision upon a showing that it is "justified" or upon a direct request from the child.¹⁷ A hearing may be initiated either by the court directly, by the public guardianship authority, or by an expert. These hearings may proceed regardless of whether the parents or legal representatives are present.

Special issues relating to divorce or separation arise and often conflict with provisions of the Act regarding children's rights and custody. For example, parents in an uncontested divorce are required to agree on child custody as a condition precedent to filing for divorce. This requirement directly conflicts with provisions of the Act that allow certain children to decide in which parent's custody they would like to remain.¹⁸ The legislature has attempted to alleviate this conflict by requiring the court to consider the child's opinion concurrently with each parent's corresponding statements.¹⁹ Although the court must consider the child's opinion in divorce proceedings, the child is not obligated to choose which parent should have custody. Requiring a child to choose between parents, especially when the child opposes the divorce, is too great an emotional burden for the child to bear. Instead, the child may simply remain silent as to the custody issue.

C. *The Rise of Joint Custody in Hungary*

Joint custody after divorce has been a regular practice in many western countries as well as in several post-communist countries since the late 1970s and early 1980s. Although prevalent in other countries, the 1986 Family Act Amendment had not incorporated joint custody into the Hungarian legal system despite vigorous advocacy by legal scholars and non-custodial fa-

17. See 1995 FAMILY LAW ACT § 74 (when a hearing is requested directly from the child there is a presumption that the hearing requested is "justified").

18. As previously mentioned, a child fourteen years or older may partake in and request a hearing to determine which parent will be given custody.

19. See 1995 FAMILY LAW ACT § 74. This requirement has allowed parents to meet the procedural requirements for an uncontested divorce while at the same time preserving children's rights afforded by the Act. See *id.*

thers.

The 1995 Family Act Amendment sought to adopt joint custody in an effort to harmonize the Family Act with the Convention on the Rights of the Child. The amended Act, with regards to joint custody, makes a distinction on the basis of the parents' living arrangements. Generally, if the parents have not been living together, the Act requires the parents to sign an agreement if they wish to relinquish joint custody. On the other hand, if the parents are filing for divorce they must expressly agree to joint custody in their divorce petition. Unmarried parents are also entitled to joint custody. The right to joint custody, however, is not absolute. In fact, the parental right to joint custody can be outweighed by the best interests of the child.

In sole custody cases, which are the usual type of custodial arrangement in Hungary, non-custodial parents still have significant rights regarding their children. For example, besides visitation, non-custodial parents have the right to participate in the most important decisions concerning their children's future.²⁰

D. Hungary Has Been Slow to Recognize Non-Traditional Parent-Child Relationships

Under the Convention on the Rights of the Child, states are required to respect children's interests in preserving their family relations.²¹ Today, there is a wide variation in family relationships. The traditional family relationship may no longer be the only norm in light of the high divorce rate in Hungary. Many children now live in reconstituted families formed by remarriage or cohabitation. Hungary, however, has been slow to recognize these extended family relationships. For example, although Hungarian law recognizes the existence of a family relationship between a parent's new spouse and the child, the law fails to recognize a relationship between a parent's new cohabiting partner and a child. In fact, the law refuses to recognize such a relationship even when the child has been raised by the parent and cohabiting partner together.

V. THE RULES OF ADOPTION HAVE CHANGED

A. Domestic Adoption

Although the main goal of adoption, which is to provide new family environments for children whose parents have died or whose parents are unable raise them, has remained unchanged since 1952, the 1997 Family Act Amendment has changed the rules of adoption in some respects. For exam-

20. There is little information as to the efficacy of parents' right to make mutual decisions. It is foreseeable that this joint decision making can be extremely problematic in cases where separated parents are unwilling or unable to co-operate.

21. See Child Convention, *supra* note 11, art. 8.

ple, stricter regulations for adoption were implemented. Now, prior to adopting a child, potential adoptive parents must participate in special procedures to determine their suitability as adoptive parents.²² Such suitability determinations are required for all adoptions, regardless of whether they are conducted by the state or by adoption agencies. In addition to suitability determinations, the Act requires the potential parent take care of the child for one month before the adoption is permitted.²³ Although adoptive parents may have children of their own, adoption is more prevalent among couples and individuals who do not have their own children.

Under Hungarian law, adoption is always a full adoption. Except in some cases of step-parent adoption, once the child has been adopted, all rights between the child and the biological parents are terminated, including the right to make contact. Recently, however, there has been an increasingly strong movement in favor of adopted children's rights to information concerning their biological origin.²⁴

B. The Special Case of International Adoption

The demand for adoption far exceeds the number of available children, especially with respect to infants and toddlers. This shortage has caused serious problems, which the legislature must address. For example, the lack of available children for adoption has led to the international sale and trade of children.²⁵ In fact, in many countries, agencies that seek great profits by arranging adoptions have been established and are flourishing. These agencies undoubtedly convince needy parents to sell their children for small sums of money. This problem was addressed by the Convention on the Rights of the Child.²⁶ Hungary, in accordance with the Convention, also enacted legislation to confront the problem of international child sales.

In Hungary, international adoption is controlled by the state. The 1995 Family Act Amendment prohibits both national and international adoptions that result in improper financial gain. Additionally, the Act only allows international adoption of children who are brought up in state care and cannot be adopted in Hungary.²⁷ The Act does, however, make an exception where

22. See FAMILY LAW ACT § 47(1) (1997) (Hung.) (the suitability determination is based upon the potential parents' circumstances and personality).

23. See *id.* § 48(2). This rule is a unprecedented addition to Hungarian law.

24. Part of this movement resulted from the Convention. Additionally, the Child Protection Act recognizes the right of adopted children to information regarding their origin and their biological family. See CHILD PROTECTION ACT § 7(4) (1997) (Hung.); 1997 FAMILY LAW ACT § 53(A); Guardianship Decree, *supra* note 15, § 53.

25. This international sale of children is not a rare event.

26. See Child Convention, *supra* note 11, art. 21 ("[A]ll appropriate measures [shall be taken] to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved.").

27. See 1995 FAMILY LAW ACT § 49(2) This limitation also conforms with provisions from the Convention on the Rights of the Child. See Child Convention, *supra* note 11, art. 21

step-parents or other relatives from another country would like to adopt the child.²⁸

The Central Authority for the Protection of Families and Children is the government agency that is responsible for regulating international adoptions.²⁹ In order to adopt a Hungarian child, non-citizens must submit an expert opinion demonstrating their suitability to adopt. This opinion must be obtained from the country where the applicant is domiciled. Additionally, non-citizens must disclose financial records. Furthermore, prior written permission must be obtained from their country.³⁰ Finally, if the international adoption occurs with the aid of an adoption agency, the agency must be one authorized to handle adoption cases.³¹

VI. PROTECTING AT-RISK CHILDREN

The Child Protection Act³² deals mainly with the protection of at-risk children, even though it declares some basic rights of all children. This Act, taking into consideration the Convention on the Rights of the Child, attempts to ensure that children grow up with their natural family, if possible.³³ According to the Act, financial problems alone should not separate children from their biological families.³⁴ Instead, it encourages states to provide financial and other assistance to needy families so that they might stay together.³⁵

If separation of a child and family is necessary, then the Act prefers the child be placed in a family environment, as opposed to being placed in institutional care. In order to place children in foster care instead of institutions, there must be foster parents who are willing and capable of caring for the children. These foster parents should be both educated and financially supported. Once in foster care, the foster parent becomes the child's guardian.

The Act also emphasizes a change in institutional care. According to the Act, large institutions should be replaced with smaller more familiar ones where only twelve to forty children live. Unlike the typical bureau-

("[I]nter-country adoption may be considered as an alternative means of child's care, if the child cannot . . . in any suitable manner be cared for in the child's country of origin.").

28. See 1995 FAMILY LAW ACT § 49(2).

29. See Guardianship Decree, *supra* note 15, § 52 (regulating the rules of adoption of foreign children by Hungarian adoptive parents, as well as the international adoption of Hungarian children).

30. See *id.* §§ 49-51. This permission verifies that the foreign country is willing to welcome the child. The Decree, however, does not require that the country ensure citizenship for the child. See *id.*

31. See *id.*

32. See generally CHILD PROTECTION ACT.

33. See Child Convention, *supra* note 11, arts. 7-9.

34. See CHILD PROTECTION ACT § 7.

35. See *id.* These services should be available to families who voluntarily come forward for help and not just to those where the state has already intervened.

cratic hierarchy, the leaders of these new institutional homes for children will become the children's guardians. Additionally, children in state care now have the right to be placed together with other siblings in order to preserve family relationships.

Although a parent's custody is suspended while the child is brought up in foster care or in an institutional home, the parent has a right and an obligation to keep in touch with the child.³⁶ Additionally, the parent has a duty to cooperate, in the interest of the child, with those persons or institutions taking care of the child.³⁷

The public guardianship authorities are responsible for determining whether natural parents, whose children have been in foster care, have subsequently become capable of raising their children.³⁸ When reasonable, the authorities should help the parents become capable so that the family can be reunited.³⁹

VII. CONCLUSION

Social changes in the modern era have led to the evolution of Hungarian family law. This evolution is clearly evident in the area of children's rights. Recently, Hungary has been very receptive to ideas expressed by the Convention on the Rights of the Child. As a result, Hungarian children now enjoy greater rights and protections than before.

36. This requirement does not apply in cases where the child is waiting to be adopted.

37. *See* CHILD PROTECTION ACT § 13(2).

38. *See id.* § 9(1)(b)(h) (the child may initiate the process of reuniting with their natural family, although this does not apply to children who are awaiting adoption).

39. *See id.* § 13(1)(c) (insisting that support be provided so children can more easily be reunited with their natural family).