

## THE NEW ASPECTS OF RUSSIAN FAMILY LAW

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### I. INTRODUCTION

As a result of the political changes in Russia, a comprehensive revision of the whole field of private law has begun. Part of this process was the 1995 adoption of the new Russian Family Code.<sup>1</sup> Work on the draft began in June 1994,<sup>2</sup> and the Code came into force on March 1, 1996. At the same time, Russia adopted the first part of its new Civil Code.<sup>3</sup> Certain aspects of the new Russian Family Code may be of interest to the western public because the Code tries to solve several recent problems that are also issues in many Western countries. Among other items, the Family Code contains new provisions regarding artificial insemination, surrogate motherhood, and genetic testing.<sup>4</sup> Furthermore, there is a new chapter on children's rights based on the United Nations Convention on the Rights of the Child of 1990 (Child Convention).<sup>5</sup>

The new Russian Family Code may be of interest to western lawyers because the Code's drafters consistently intended to switch to a rights-based approach rather than a paternalistic approach. Furthermore, the drafters at-

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1. CODE FAM. [C. FAM.] (Russ.). See *Semeiniy Kodeks Rossiiskoy Federatsii*, (1995) (Russ.). *Sobranie Zakonodatel'stva Rossiiskoy Federatsii* 1996 No. 1, item 15. For English translation, see WILLIAM E. BUTLER & JANE E. HENDERSON, *RUSSIAN LEGAL TEXTS: THE FOUNDATION OF A RULE-OF-LAW STATE AND A MARKET ECONOMY* 517-93 (Simmons and Hill Publishing 1998).

2. The drafting commission was formed by *Komitet Po Delam Zhenshchin, Sem'i i Molodezhi Gosudarstvennoy Dumy Rossiiskoy Federatsii* [the Committee on Women, Family, and Youth Affairs of the State Duma of the Russian Federation] and consisted of six family law scholars.

3. CODE CIVIL [C. CIV.] (Russ.) [hereinafter 1994 C. CIV.] This first part was adopted on October 21, 1994 and came into force on January 1, 1995. See *Sobranie Zakonodatel'stva Rossiiskoy Federatsii*, No. 32 item 3302 (1994) (Russ.). For English translation of the Civil Code, see 21 *REVIEW OF CENTRAL AND EASTERN EUROPEAN LAW* 245-430 (1995).

4. See C. FAM. art. 51(4).

5. See 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].

tempted to limit the amount of state interference in family matters.<sup>6</sup> The new Family Code may be more uniquely interesting than the new Russian Civil Code because, even before its revision, Russian family law was, in some aspects, more modern than the laws in many other European countries. In contrast to the Family Code, Russian civil law, due to the peculiarities of Russian post-revolutionary history, was outdated and undeveloped. The new Russian Civil Code was drafted to overcome these peculiarities.

Russian family law has a modern character because the global revision of family law that has developed over the last seventy-five years in most European countries was already complete in Russia by 1918.<sup>7</sup> By that time, all feudal and ecclesiastical rules of the Russian Empire were replaced by secular rules that were very modern for that time. Those modernized rules introduced civil marriage and civil no-fault based divorce. Moreover, the rules gave women equal rights in family relations and, among other things, provided equal rights to illegitimate children. The liberal period under these modernized rules was followed by a period of severe reaction, starting in 1944.<sup>8</sup> This period lasted until 1969, when progressive development continued, and the Code on Marriage and Family was adopted.<sup>9</sup>

## II. WHY IS THE NEW RUSSIAN FAMILY CODE A SEPARATE CODE?

Before the Russian Revolution of 1917, family law was considered to be a part of civil law. Accordingly, family legislation was also part of civil legislation.<sup>10</sup> In 1918, immediately after the Revolution, the first separate Russian Family Code was adopted. At that time, Russia had hardly any civil law

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6. The antagonism of paternalism and individual rights in the area of family law is still an issue in Western Europe. The extent of this antagonism is illustrated by the so-called Critical Theory of Family Law as elaborated in Britain in the Eighties. See Michael D.A. Freeman, *Towards a Critical Theory of Family Law*, CURRENT LEGAL PROBLEMS 153 (1985); KATHERINE O'DONOVAN, *SEXUAL DIVISIONS IN LAW* (Weidenfeld & Nicholson eds., 1985).

7. See Kodeks Zakonov ob Aktah Grazhdanskogo Sostoiiania, Brachnom, Semeinom i Opekunskom Prave, No. 76, item 818 *SU RSFSR* 1918 (1918). This revision was almost finished in 1918 when the first Russian Family Code, the Code of Statutes on Civil Acts, Marriage, Family, and Custody Law, was adopted.

8. See Ukaz Prezidiuma Verhovnogo Soveta SSSR, *Ved. SSSP* 1944 No. 37 (1944) (Russ.) [hereinafter Ukaz Prezidiuma]. In 1944, Russian family law was turned 180 degrees. The infamous Ukaz [Decree] of July 8, 1944 radically revoked several important previous innovations of family law. Informal marriage lost legal status. The recognition of children born out of wedlock, the establishment of paternity by the courts, and even the maintenance of claims on behalf of a natural child were all rendered no longer possible. Even pre-revolutionary legislation had been less harsh in this respect. Divorce proceedings became complicated and expensive; only following the second hearing were the courts entitled to grant a divorce when they found that a marriage had irreversibly broken down.

9. See Kodeks Zakonov o Brake i Sem'ie RSFSR, *Ved. RSFSR*, 1969, No. 32, item 1086 (1969) (Russ.).

10. See Svod Zakonov Rossiiskoy Imperii (Russ.). This is a Collection of Statutes of the Russian Empire where family law statutes were placed together with other civil statutes in the second part of volume X.

acts to be regulated. The new Russian government abolished all pre-revolutionary civil acts. Practically all property was nationalized, and almost all civil transactions were forbidden. Administrative distribution replaced civil transactional turnovers. Civil law was proudly proclaimed dead, and no one intended to revive it. Family relations, however, still needed to be regulated. Wanting to roll back the influence of the Church in this sphere, the new Soviet State was eager to replace pre-revolutionary family law. The Soviet State's desire to limit the Church's influence made it completely logical to adopt an exclusive family law code. Furthermore, this desire explains why the separation of civil and family law was not discussed at the time. Actually, family law did not separate from the Civil Code; it merely continued to exist while civil law was all but abolished.

Initially, the separation was only a matter of legislation. Family law was still considered to be part of civil law. This changed only when ideology penetrated legal theory. The concept of family law as an independent branch of law was based on the assumption that "socialist" family law was totally different from "capitalist" family law. "Capitalist" family law was deemed to be part of civil law because, in a capitalist society, property relations were thought to constitute the largest and most important part of family life. Marriage was even defined as a civil contract. At the same time, the "socialist" family was supposed to consist of mainly cost-free personal relations devoid of any material considerations.<sup>11</sup> The concept of independence of family law became predominant in the fifties and remained almost untouched until the time of the drafting of the new Family Code. Contemporary supporters of the independence of family law are essentially advocating the same arguments in favor of the fundamental difference between family and civil relations, omitting only the most notorious ideological clichés.

With family law separate from civil law, the courts encountered enormous problems because civil legislation was deemed inapplicable to family relations.<sup>12</sup> In practice, this doctrine was never fully implemented because family law lacked important provisions and concepts, such as the concept of contract and the rules on the fulfillment of obligations. In reality, courts applied civil legislation in family cases but did not expressly refer to the Civil Code.

Persistently resistant to a merger, the majority of Russian family law experts made it unfeasible to incorporate family law into the new Civil Code. Hence, the new Civil Code does not have a special provision on the application of civil law to family relations, but it does contain a general definition of the relations governed by civil law.<sup>13</sup> Civil law governs property

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11. See S.I. Paevich, *Brachnoe i Semeinoe Pravo*, in OSNOVY SOVETSKOGO PRAVA 420 (Dmitrii Mazherovskii ed., 1927).

12. Article 2 of the previous Civil Code stated that family relations were regulated exclusively by family law rules and civil law rules could be applied only when family law rules explicitly refer to them. See C. CIV. art. 2 (1964) (Russ.).

13. See 1994 C. CIV. art. 2(1).

and, among other matters, the personal non-property relations connected to property.<sup>14</sup> These relationships rely on equality, autonomy of will, and property independence of the participants of those relations.<sup>15</sup> Family relations fit all these features. Therefore, it is not improper to conclude that civil law also governs family relations.

The drafters of the Family Code went one step further. According to Article 4 of the Family Code, civil law is applicable to all family relations that remain undetermined by provisions of family law “as far as this is not inconsistent with the nature of family relations.”<sup>16</sup> Hence, civil law rules can be as widely applied to family relations as reasonably possible.

As suggested in the commentary to the Family Code,<sup>17</sup> the application of civil law rules to family relations can be approached as a correlation between general rules (the Civil Code) and specific rules (the Family Code). Certain provisions of the Civil Code and the Family Code on marriage property illustrate this concept. For instance, Article 256 of the Civil Code contains general provisions relating to legal and contractual regimes<sup>18</sup> while certain chapters of the Family Code regulate, in detail, the legal regime of matrimonial property and the entry into, the content, dissolution, and annulment of marriage contracts.<sup>19</sup>

### III. NEW SUBSTANTIVE LAW: SOME IMPORTANT CHANGES

#### A. Marriage and Divorce Law

In pre-revolutionary Russia civil marriage and divorce did not exist. The population was subordinated to the ecclesiastical rules of different religions. Civil marriage was not introduced until 1917.<sup>20</sup> After that time, only civil solemnized marriages had legal consequences.

In 1926, long-term cohabitation without marriage acquired virtually the same legal status as formal marriage.<sup>21</sup> This change was perceived as the first step towards the final “dying out of marriage” which, according to the fashionable theory of that time, was supposed to occur in a communist society.

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14. *See id.*

15. *See id.*

16. *Id.* art. 4(1).

17. *See* KOMMENTARIJ K SEMEINOMU KODEKSU ROSSIJSKOJ FEDERATSII 33-35 (Irina. M. Kuznetsova ed., Moscow, 2000). The commentary was written by the members of the draft team. The author was a member of the draft team.

18. *See* 1994 C. CIV. art. 256.

19. *See* C. FAM. chs. 7-8.

20. *See* O Grazhdanskom Brake, Detiah i Vedenii Knig Aktov Grazhdanskogo Sostoiiania, *SU SSSR* 1917 No 1, item 160 (1917) (Russ.) (Decree of the Russian Central Executive Committee and the Council of Ministers of the RSFSR).

21. *See* Kodeks Zakonov o Brake, Sem'e, i Opeke, *SU RSFSR* 1926 No 82, item 611 (1926) (Russ.).

In 1944, informal marriage lost its legal significance.<sup>22</sup> Furthermore, informal marriage was not recognized by the subsequent Code on Marriage and Family of 1969.

Regrettably, the new Family Code brought no change to this area. Despite the growing popularity of informal marriage, cohabitants do not acquire any spousal rights with respect to property division in separation, alimony, or inheritance cases. Due to the restrictive provisions of Article 244(3) of the Civil Code,<sup>23</sup> cohabitants cannot unilaterally elect to hold their property as community property.

Marriage is possible only for persons of opposite gender. This rule precludes informal same-gender unions from being accorded marital status. The general belief is that this approach will not change significantly in the foreseeable future.

Under the new Family Code, a valid marriage requires the consent of both spouses who must be at or above the age of majority. In Russia, majority is reached at the age of eighteen, however, for marriage, the requirement is variable up to two years.<sup>24</sup> The new Family Code includes other legal impediments to marriage. These include the existence of another registered marriage, relationships between people related by a prohibited degree of blood, and court-declared legal incapacity due to a mental disorder.<sup>25</sup> Moreover, the new Family Code prohibits marriage between a parent and an adopted child; however, if the adoption is terminated, the marriage can be solemnized.

As mentioned, the Russian Empire had no secular rules on divorce prior to the Revolution. As a result, divorce was not open to all religious convictions. Civil divorce procedure only became possible in 1917.<sup>26</sup> The irreversible breakdown of marriage was the only possible legal ground for divorce. When both spouses mutually agreed to divorce, they could register it in the Department of Registration of Civil Acts.<sup>27</sup> If one spouse did not consent, the divorce-seeking spouse had to resort to a procedure before the court.

In 1926, divorce procedure was simplified even more. At that point, a person's mere unilateral intent was sufficient to terminate the marriage. In 1944, however, divorce became very difficult again. Spouses had to present sufficient evidence of the irreversible breakdown of their marriage. Furthermore, the court could dismiss a divorce petition even if both spouses favored divorce. These measures were intended to protect the stability of the family.

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22. See Ukaz Prezidiuma, *supra* note 8.

23. See 1994 C. CIV. art. 244(3) (According to this article, community property can be created only by statute or by an explicit statutory authorization, and not on the basis of the general freedom of contract.).

24. See C. FAM. art. 13(2).

25. See *id.* art. 14.

26. See O Rastorzhenii Braka, *SU SSSR* 1917 No. 10, item 154 (1917) (Russ.).

27. See Kodeks Zakonov ob Aktah Grazhdanskogo Sostoianiiia, Brachnom, Semeinom i Opekynskom Prave, arts. 85-99, *SU RSFSR* 1918 No. 76 item 818 (1918) (Russ.).

In practice, they only achieved an increase in de-facto divorces and de-facto remarriages.

The Family Code of 1969 once again made divorce more feasible. Although the irreversible breakdown of marriage remained the general ground for divorce, spouses were not obliged to present any proof of such breakdown in the administrative procedure. Irreversible breakdown was presupposed. In the court procedure, however, irreversible breakdown of marriage still had to be proven. As before, the court could dismiss a divorce petition, even against the wishes of both spouses, if the judge considered the reasons for divorce insufficient. This was an example of pure paternalism. The State claimed the right to keep the spouses in their marriage against their will, sacrificing their interests to the transpersonal goal of protecting the stability of the family.<sup>28</sup>

The new Family Code rejects the transpersonal and paternalistic view that a judge can decide better than spouses themselves which reasons are sufficient for dissolution of their marriage. The new Code seeks to diminish State intervention in the private lives of spouses as much as possible. Although the administrative procedure remains almost the same, the court procedure changed significantly. Under Article 22 of the Family Code, the court should "dissolve the marriage without disclosing the reasons for divorce."<sup>29</sup> In addition, a judge can no longer suspend divorce, refuse to grant it, or even examine the motivation for divorce.<sup>30</sup> In fact, the courts are now competent to hear cases only in two limited situations: first, where there are minor children involved, and second, where there is no mutual consent to divorce.

In the first case, although the spouses agree to divorce, the matter still goes before the court to ensure that the interests of the minor children are protected. The court must approve any arrangements involving children.

The second situation where a court hearing is required is when one of the spouses wants the marriage to continue. According to Article 22 of the Family Code, "marriage has to be dissolved if it is proven that further family life of the spouses is not possible."<sup>31</sup> As before, divorce requires proof of the irreversible breakdown of the marriage. However, this requirement is satisfied in a quite different way. The court cannot oblige the spouses to disclose their reasons for or against divorce. If the spouses do not want to discuss their private life in court, the judge's only recourse, according to Article 22(2), is to postpone divorce for up to three months to give them time to rec-

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28. It is notable that, in spite of all the dramatic changes that took place in Russian divorce legislation, the available data on the number of divorces shows almost no fluctuations. The divorce rate in 1938-39 was 4.8 per thousand. In 1958-59 it was the same. While the Ukaz [decree] of 1944 was in force, it actually increased to 5.3 per thousand instead. See H. Willekens & S. Scherbov, *Demographic Trends in Russia in Population and Family*, in *THE LOW COUNTRIES (H. Van Den Brekel & F. Deven eds., 1994)*; 2 *SELECTED CURRENT ISSUES, EUROPEAN STUDIES OF POPULATION* 199 (1995).

29. C. FAM. art. 22.

30. See *id.*

31. *Id.*

oncile.<sup>32</sup> This provision is intended to ensure that parties undertake serious contemplation before divorce, while preventing quick divorces due to minor quarrels. After the three-month postponement, the court must dissolve the marriage if one spouse still insists on divorce.<sup>33</sup>

After examining Article 22(2), one can conclude that the consistent intent of one of the spouses to terminate the marriage constitutes sufficient proof of an irretrievable breakdown. Therefore, under the new Code, the breakdown of a marriage is determined by subjective criteria rather than the old objective standard. Under the old standard, the moving party had to convince the judge; now, the criteria can be satisfied if one spouse remains convinced that the marriage must end.

### *B. Marital Property*

According to pre-revolutionary law, a husband and wife owned their own property separately. Furthermore, a married woman could enter into any civil transaction and freely dispose of her assets. After the Russian Revolution, the marital property regime initially stayed the same, and the property of spouses remained totally separate. In 1926, a limited form of community property, where all property acquired during marriage was considered community property, replaced the separate property regime.<sup>34</sup> This limited form of community property has remained applicable and essentially unchanged up to the present day.<sup>35</sup>

Contrary to other parts of family law, property law was far from liberal. All the rules that governed marital property were mandatory. Therefore, spouses were not permitted to enter into contracts that could adopt different marital property regimes even if the alternative regime was more suitable to their individual needs. When a market economy was implemented, the obvious disadvantages of this completely inflexible system became more and more apparent. Many complicated problems arose when a growing number of citizens engaged in private business activity. These problems made the introduction of marriage contracts one of the most urgent issues at the time of drafting of the Civil and the Family Codes.

For the first time in Russian legislative history, general provisions on marital property were placed in the Civil Code.<sup>36</sup> The Family Code contains more detailed rules of marital property and provides specific regulations based on the particulars of family relations.

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32. *See id.*

33. *See id.* art. 22(2) ("marriage shall be dissolved if attempts to reconcile spouses fail and one of the spouses insists on divorce.").

34. *See* DMITRII M. GENKIN ET AL., *ISTORIJA SOVETSKOGO GRAZHDANSKOGO PRAVA 1917-1947* 433-40, (Yuridicheskaja Literatura, Moscow, 1949).

35. *See* MARIA V. ANTOKOLSKAIA, *SEMEINOIE PRAVO* 143-49 (1999).

36. *See* 1994 C. CIV. art. 256.

The legal regime of matrimonial property is one of limited community property. According to Article 256(2) of the Civil Code and Articles 33 and 34 of the Family Code, property acquired by the spouses during marriage is considered to be a common asset.<sup>37</sup> This property is jointly owned. Property that is not community property consists of pre-marital property, as well as property acquired during marriage by gift, inheritance, or some other cost-free transaction, and items of individual use (except jewelry and other luxuries). Article 38(4) of the Family Code authorizes the judge to grant the status of separate property to assets that were acquired after separation of the spouses but before all the divorce formalities were fulfilled.<sup>38</sup>

Community property is possessed, enjoyed, and disposed of with the mutual consent of the spouses.<sup>39</sup> If one of the spouses enters into a transaction relating to community property, the other spouse's consent is presumed. The transaction is voidable if, in reality, the other spouse did not consent and the aggrieved spouse challenges the transaction in court. In order to protect bona fide third parties, the court will only invalidate the transaction when it is proven that the third party knew, or should have known, about the plaintiff spouse's lack of consent.<sup>40</sup> The most valuable marital assets are provided with special protection. In accordance with Article 35(3) of the Family Code, when a transaction requires a notary form or involves marital real property, the authenticated and notarized consent of both spouses is required.<sup>41</sup> If one spouse enters into such a transaction without the proper consent, the aggrieved spouse has one year to challenge the transaction.<sup>42</sup>

Community assets can be divided upon divorce or during the marriage. When marital property is not divided until after the marriage is dissolved, the general statutory limitation term of three years applies. Spouses can enter into agreements to divide their property, or, if the parties cannot agree, the court can order the division. In case of division by agreement, spouses can divide property as they wish. If no agreement is reached and the matter must be litigated, the shares of the spouses are considered equal, irrespective of how much a particular spouse contributed to the acquisition of the property. A spouse is entitled to an equal share even if he or she did not contribute to the property acquisition at all. This is true if the non-acquiring spouse was unemployed, running the household, rearing children, going to school, or because of sickness or other serious reasons. When the reasons for non-contribution to the acquisition of property are not considered "serious" enough, the share of the non-contributing spouse can be decreased.<sup>43</sup>

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37. *See id.* *See also* C. FAM. arts. 33-34.

38. *See* C. FAM. art. 38(4).

39. *See id.* art. 35(1).

40. *See id.* art. 35(3).

41. *See id.*

42. *See id.*

43. *See id.* art. 30(2) (A reason is not considered "serious" where a spouse refuses to work without sufficient reasons or wastes family assets by gambling or drinking.). *See also*



For the first time in Russian history, the new Family Code allows spouses to create a contractual regime of marital property by entering into a marriage contract. The freedom to enter into a marriage contract is one of the most important innovations of the Family Code, but regrettably, some of the provisions related to it are far from perfect.<sup>44</sup>

A marriage contract can be entered into at any time before or after a marriage is solemnized. A marriage contract requires a notarized and authenticated writing. If a contract was entered into before the celebration of marriage, it comes into force at the time of registration of the marriage.

The Family Code allows spouses to establish any marital property regime they wish through a marriage contract. A marriage contract can contain various provisions with respect to property rights of the spouses as long as they do not contradict the law. For instance, a contract can regulate support during marriage or after divorce. Furthermore, a marriage contract can determine how property should be distributed, if marital property must be divided, and who will pay compensation. Moreover, marriage contracts can change the status of previously acquired property with a retroactive effect.<sup>45</sup> Despite these progressive features, the new law has a shortcoming in that it does not provide possible contractual regime models. This omission can create numerous problems in a country where notaries and spouses have no experience in entering into marriage contacts.

A spouse's discretion is not unlimited. A marriage contract must satisfy the general requirements concerning form, legal capacity, and undue influence for civil transactions under the Civil Code. Additionally, the Family Code contains specific limitations that affect the peculiarities of a marriage contract.<sup>46</sup> A marriage contract cannot include provisions regarding minor children. Furthermore, marriage contracts cannot restrict the right of a needy or disabled spouse to make an alimony claim.

Following the tradition of most other European countries, a marriage contract cannot govern personal non-property rights and duties.<sup>47</sup> The reason behind this limitation is the problematic enforcement of such provisions. Spouses are, of course, free to make any arrangements they wish about everyday duties, like washing the dishes and putting out the cat, but such arrangements are not legally enforceable.

The most problematic limitation on the contractual freedom of spouses is formulated in Article 42(3) of the Family Code. According to this Article, provisions that "place one of the spouses in an extremely unfavorable posi-

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ANTOKOLSKAIA, *supra* note 35, at 152-53.

44. *See id.* arts. 42- 44.

45. *See C. FAM.* art. 42. An agreement to change the regime of property with a retroactive effect is only possible when the agreement does not infringe upon the interests of creditors.

46. *See id.* art. 42(3).

47. *See id.*

tion” can be declared invalid if the aggrieved spouse challenges the provision.<sup>48</sup>

The problematic character of this limitation is in determining what is an “extremely unfavorable position.”<sup>49</sup> This determination is left to the discretion of a judge, who is directed to consider all the circumstances of the case at hand. This limitation was imposed out of concern for the possible abuse of contractual freedom, facilitated by the special nature of the relations between spouses, typified by feelings of love, trust, emotional attachment, and dependency. An example could be an arrangement by which one of the spouses totally renounces the right to acquire any property during marriage.

The limitations described above constitute the boundaries of contractual freedom of the spouses. In cases where the court determines that Article 42(3) has been violated, the contract becomes void or voidable. A married couple can alter or dissolve a marriage agreement by mutual consent at any time. The requirement of a notary authentication must be fulfilled. Unilateral termination of the contract is not possible, but, in case of substantial change of circumstances, a spouse can petition the court to amend or terminate the contract. Unfortunately, contrary to the initial intention of the drafters, this procedure is governed by the restrictive rules of Article 451 of the Civil Code, which, in reality, makes it almost impossible to alter or dissolve a marriage contract in the event of changed circumstances.<sup>50</sup>

The introduction of marriage contracts made it necessary to create provisions that protect the interests of the creditors of the contracting spouses. According to Article 46, spouses are obliged to inform their creditors about the existence, amendment, or termination of a marriage contract.<sup>51</sup> If they fail to do so, spouses remain liable to their creditors as if the marital property regime remained unchanged. When the creditors are properly informed, and the existence, amendment, or termination of the marriage contract substantially infringes upon their rights, creditors are entitled to make a claim to amend or terminate their own contract with the spouse or spouses, in accordance with the provisions of the Civil Code.

### C. Paternity Determination

In nineteenth-century Russia, illegitimate children were targets of discrimination. Since before the Russian Revolution, this discrimination has slowly diminished; however, it has never been completely overcome. The first Family Code of 1918 granted children born out of wedlock equal rights. The early Code also provided illegitimate children protection in other ways;

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48. *Id.*

49. *Id.*

50. *See* 1994 C. CIV. art. 451.

51. *See* C. FAM. art. 46.

for instance, if a putative father refused to acknowledge paternity, the Code gave the court the power to establish paternity by court decision.

Later, the concern for the interests of the child led to the creation of a law that was notoriously one-sided. According to the Family Code of 1926, a mother who lodged a paternity claim against a putative father did not have to make a showing of proof because the burden of proof shifted to the putative father to disprove paternity. The putative father had more than just the burden of proof to overcome because judges were encouraged to establish paternity whenever possible.<sup>52</sup> In 1944, family law was altered radically, and the liberal paternity standards shifted to the opposite extreme.<sup>53</sup> According to the Act of July 8, 1944, paternity could not be voluntarily established nor could the courts establish paternity by decision.<sup>54</sup> The Code of 1969 restored both institutions and tried to establish a certain balance between the interests of children born out of wedlock and those of putative fathers.<sup>55</sup>

According to the new Family Code, if a child is born within lawful matrimony, the mother's husband is presumed to be its father.<sup>56</sup> The husband, the mother, or the child's natural father can contest this presumption. The decision to allow a begetter of a child to establish a claim of his paternity, for instance, on the basis of a genetic test, is likely unwise, particularly when such a claim is against the will of the mother and her husband.<sup>57</sup> Most often, interference of this sort will not be in the best interests of the child nor the adult parties.

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52. An instruction letter from the Civil Department of the Supreme Court of the RSFSR of June 11, 1929 stated, "every child must have a father in order to be able to claim alimony from him." 14 SUDEBNAIA PRAKTIKA 192 (1929).

53. See Ukaz Prezidiuma, *supra* note 8.

54. See *id.*

55. See Kodeks Zakonov o Brake i Sem'ie RSFSR, *supra* note 9, arts. 47(3), 48.

56. See C. FAM. art. 48(4).

57. In a situation like this, an irreconcilable conflict between the interests of a mother and her lawful husband, who are caring for a child and enjoying a "family life" with the child, on the one hand, and the interests of the child's biological father, who typically does not have any other links with the child except for the genetic ones, on the other hand, will arise. The interests of a mother and her husband to continue family relations with the child undisturbed will coincide with the best interests of the child in having stable family relations. Giving priority to the claim of a biological father would lead to severe disturbance of these relations and have a negative psychological impact on the child. For this reason, such claims should be satisfied only in exceptional cases when a judge is convinced that establishing a parental relationship with the biological father would serve the interest of the child, for instance, when a biological father appears to be a much more suitable influence on the child than the lawful husband of the mother, or when a biological father succeeds in proving that he has more than mere genetic links with the child, either because of cohabiting with the child's mother during a considerable period of time before the birth of the child or by participating in education or maintenance of the child. There is no reason why someone who made a woman pregnant during a "one-night stand" should be given more rights in respect to establishing his paternity than a donor, whose paternity suit is not possible under the provisions of Article 51(3) of the Family Code. See C. FAM. art. 51(3). The only difference between an aforementioned person and a donor is that the former had sexual intercourse with the mother of the child and the latter did not; this does not seem sufficient to justify such a differentiation.

Under the new Family Code, if the parents are not married, the father can acknowledge paternity by filing an application with the mother at the Department of Registration of Civil Acts.<sup>58</sup> The parents do not have to wait for childbirth; they can present the application during pregnancy.

If a putative father denies paternity, the mother, the guardian, or even the child over the age of majority, can file a claim before the court. The putative father can also petition to have his paternity established in court if the mother refuses to acknowledge the Department of Registration of Civil Acts application. According to Article 49, any evidence that undoubtedly proves paternity is sufficient.<sup>59</sup> In difficult cases, the court can rely on genetic expertise.

When in-vitro fertilization or other means of human-assisted reproduction results in childbirth, the female who gave birth to the child is registered as its mother and her husband as its father, provided that the husband gave written consent for the assisted reproduction treatment.<sup>60</sup> The couple is conclusively presumed to be the child's parents and cannot contest parenthood in the future by relying on the fact that the birth was the result of assisted reproduction treatment. The establishment of the paternity or the maternity of the donors, or even the disclosure of their names, is not allowed.<sup>61</sup> This prohibition remains in the Code to protect the social parents and the child itself from disclosure of information about the biological origins of the child. Donors as well want to be certain that they will not be subjected to disturbance and complications.

Although these are valid motives, this is an old-fashioned approach that leaves no room for discretion, and, therefore, is not favorable. Sometimes discretion is necessary to disclose the biological origins of a child for identification and treatment of inherited diseases. Also, the child can have a strong desire to know its biological parents. A better solution would have been to allow the court to order the disclosure of a child's biological origin information if the child presents a claim and a compelling argument for such disclosure.

The most complicated problem in the field of establishment of the parenthood of a child is created by the phenomenon of surrogate motherhood. It was a great advantage for the Russian drafters that they could benefit from the experience of the United States and some European countries when addressing this complicated issue. The new Family Code gives priority to the interests of the surrogate mother, who is given a chance to "change her mind."<sup>62</sup> After the birth of a child, the surrogate mother has two options: she

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58. See C. FAM. art. 48(4).

59. See *id.* art. 49.

60. See *id.*

61. The same protection is provided to the confidentiality of adoption. Any private person or official, who reveals information about adoption against the will of the adoptive parents, can be prosecuted criminally.

62. C. FAM. art. 51(4).

can confirm her consent given before the implantation of the embryo and hand the child over to the couple with whom she contracted, or withhold her consent and register herself as the mother.<sup>63</sup>

Once the mother confirms her consent, it becomes irrevocable, and once the couple is registered as the parents, the registration cannot be challenged in the future. The surrogate mother is given the option to change her mind because childbirth can result in a tremendous psychological impact that arouses the feelings and instincts of motherhood. Moreover, before childbirth, a surrogate mother is only aware of the absence of a genetic link on a rational level, and severe trauma may result if a mother is required to hand a child over after giving birth.

This brief discussion of this part of Russian family law reveals a trend that moves away from defining parenthood as a relationship based on biological links, and a trend towards defining parenthood more as a social relationship. In cases of human-assisted reproduction and paternity recognition by non-biological fathers, the law gives priority to those who intend to create parental relations with the children and declares them lawful parents in spite of the absence of genetic links.

#### *D. Parental Rights*

Russian law prior to the Russian Revolution granted parents strong parental authority, not only with respect to minor children, but also with respect to their adult children.<sup>64</sup> The development of parental rights after the Russian Revolution was rather contradictory. On one hand, both parents acquired equal legal rights with respect to their children. On the other hand, parental functions were considered mainly societal duties.

The rules regulating parental responsibility necessarily contain a significant public element because of the legal position of minors who cannot assert their rights themselves. The new Family Code defines a sphere of private discretion by stating that parents are free to choose how to exercise their parental rights with respect to the upbringing and education of their children.<sup>65</sup> Parental discretion must be based on mutual consent and take into consideration the wishes of the children. Article 65 of the new Family Code limits parental discretion by stating that parents should not cause any harm to the physical, psychological, or moral development of their children.<sup>66</sup> When Article 65 is violated, the State will limit the parents' discretion and utilize special public bodies to exercise control for the well-being of the child.<sup>67</sup>

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63. *See id.*

64. *See Svod Zakonov Grazhdanskikh*, arts. 161-68; 10 SVOD ZAKONOV ROSSIISKOY IMPERII. ZAKONY GRAZHDANSKIE, Part 1 (1916).

65. *See C. FAM.* art. 65(1).

66. *See id.* art. 65.

67. Typically, the Guardianship and Curatorship Department.

Under the new Family Code, both parents are given equal parental authority whether or not they are married, whether or not they are living together with the child, and whether paternity was acknowledged voluntarily or established by court decision.<sup>68</sup> This approach is in line with Article 18 of the Child Convention.<sup>69</sup> Although many people view this rule in a favorable light, in practice, this rule is troublesome because it grants full parental responsibility to some parents who have no desire to establish relations with their child.

The court can determine paternity with genetic testing, but it cannot create and enforce beneficial social relations. As a result, a truly reluctant parent does nothing at best, and at worst, will abuse the parental authority granted to such parent. For instance, a reluctant parent who is forced to assume responsibilities for a child can arbitrarily refuse to give parental consent where it is needed, even for trivial things like taking the child abroad for the holidays. The only way a court can protect a child from such problems is to terminate or restrict the rights of a reluctant parent by court decision. Perhaps the best solution would be not to grant such rights to parents who are reluctant to assume any parental responsibility.

Another problematic situation arises when one of the parents is not living with the child but still wants to take part in the child's upbringing and education. From the legal point of view, both the mother and the father have completely equal rights in these areas. When parents are separated, however, judges place children with the mother in most cases. Although the father enjoys equal rights on paper, in reality, he cannot even exercise his visitation rights without the mother's cooperation. This situation has already generated considerable social tension. Fathers, frustrated because they cannot exercise their parental rights, have founded an organization that strives for equal treatment.<sup>70</sup> In an attempt to tackle this problem, the new Family Code gives the court power to transfer child custody from the mother to the father in cases where the mother grossly disobeys the court and refuses to let the father exercise his rights.<sup>71</sup> It remains, however, very questionable whether the law can solve such problems completely.

### *E. Rights of Minors*

Chapter 11 of the new Family Code contains special rules regarding the rights of minor children.<sup>72</sup> This is a novelty for Russia. Before the new Code, minor children were perceived mainly as passive subjects of parental care.

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68. See C. FAM. art. 61(1).

69. See Child Convention, *supra* note 5, art. 18.

70. A Group for Equal Treatment of Divorced Fathers. The organization is not formally registered and does not have an official name.

71. See C. FAM. art. 66(3).

72. See *id.* ch. 11.

The Child Convention was the inspiration for the new rules.<sup>73</sup> An important right of a child is the right to express his or her opinion. The Russian legislation follows the Child Convention by not mentioning a minimum age for this right. Therefore, a Russian child has the right to express its opinion in regards to any family decision that touches the child's interests as soon as the child is able to formulate an opinion. The child has the same right in any administrative or court procedure. The age of the child is only relevant when it comes to the evaluation of the child's opinion.

The Child Convention considers a child's opinion in light of the child's ability to formulate such an opinion.<sup>74</sup> Article 57 of the Family Code provides that if a child is ten years old, the child's opinion must be considered.<sup>75</sup> A child that has not reached the age of ten also must be given the opportunity to be heard; however, the parents and officials are not obliged to follow the child's opinion. If a child is ten years old and the child's opinion is not followed, those who disregard the child's opinion must sufficiently explain their motivation. When, for example, a child has expressed his wish to stay with the father after divorce, a judge who finds it better for the child to stay with the mother will have to clarify why overruling the child's preference would be in the child's best interest.

Certain decisions cannot be made against the will of a child ten years old or older. A child ten years old or older must consent if the child's first name or family name is to be changed, if adoption is to be established, if adoptive parents are to be registered as natural parents, or if the child is to be placed with foster parents.<sup>76</sup> The child's consent is required in these circumstances because the child's most serious interests are involved. For instance, a child cannot be renamed without its consent because a name is one of the most important features that gives a person an identity. Moreover, the restoration of parental rights, adoption, and placement with foster parents all entail a complete change of the living conditions of the child, which is also why these actions cannot be taken without the child's explicit consent.

A child has the right to keep contact with his or her parents and other family members, particularly in divorce cases. A child can also refuse such contact, forcing us to look at visitation rights from a completely different perspective, from the point of view of the child instead of the disagreeing parents.

The new Family Code also grants children the right to protect themselves against their parents, or others, in cases of abuse.<sup>77</sup> Children of any age can seek protection in the Department of Guardianship and Curatorship at their own initiative. At the age of fourteen, a child is allowed to lodge his

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73. See generally Child Convention, *supra* note 5, which considers a child as a person bearing his own independent rights.

74. See *id.* art. 12.

75. See C. FAM. art. 57.

76. See *id.* arts. 59(4), 132, 134(4), 154(3).

77. See *id.* art. 56(3).

or her own action directly before the court and to initiate a procedure of termination or limitation of parental rights against abusive parents.

#### IV. CONCLUSION

The new Family Code can be viewed as the product of the contradictory history of Russian family law, and, also, as a new link in the chain of European family law. Russian lawyers had a good starting point in the beginning of the twentieth century when family law was modernized. They have dealt with the significant positive and negative experiences that resulted in dramatic changes to legislation and family law approaches. When the new Family Code emerged in the middle of the 1990s, the drafters of the Code were able to build on comparative research and to benefit from the experience of other countries. Because of this, it is expected that the new Russian Family Code can give Western lawyers some food for thought.