Family Law. A Challenge for Europe?

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I. Two Cases by Way of Introduction

1. The Garcia Avello Case

1.1 The Facts

Carlos Garcia Avello, a Spanish national, and his Belgian wife, Isabelle Weber, reside in Belgium and have two children. The children have dual nationality. Belgian law requires children to take the surname of their father. On their birth certificates, therefore, the children were registered with the name Garcia Avello. In line with Spanish custom the parents requested the Belgian King to change the surname of their children from Garcia Avello to Garcia Weber. They argued that the current name of the children could lead Spanish people to believe that the children are in fact his siblings and that there is no connection with the mother of the children. Practical difficulties could arise from the children effectively having differing surnames in Belgium and in Spain.

The application was denied as contrary to Belgian practice. Mr Garcia Avello challenged that refusal before the Belgian Conseil d'Etat, the highest administrative court. That court referred a question to the Court of Justice of the EC as to whether the refusal was contrary to Community law, in particular the principles relating to the citizenship of the European Union and the freedom of movement.
1.2 The Preliminary Ruling

Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.

2. The Pla and Puncernau Case

2.1 The Facts

Excerpt from the judgment:

"In 1949 Mrs Carolina Pujol Oller, the widow of Francesc Pla Guash, died leaving three children: Francesc-Xavier, Carolina and Sara. She had made a will before a notary in 1939. Under the seventh clause of her will she settled her estate on her son, Francesc-Xavier, as tenant for life. Should he be unable to inherit, the estate was to pass to his sister, Carolina, and if she was also unable to inherit, it was to pass to Sara's son, Josep Antoni Serra Pla.

The testatrix indicated that Francesc-Xavier, the beneficiary and life tenant under her will, was to transfer the estate to a son or grandson of a lawful and canonical marriage. To that effect she had inserted the following clause in her will: "The future heir to the estate must leave it to a son or grandson of a lawful and canonical marriage ..." ("El qui arribi a ésser hereu haurà forçosament de transmetre l'herència a un fill o nét de legitim i canònic matrimoni ...")

Should those conditions not be met, the testatrix had stipulated that the children and grandchildren of the remaindermen under the settlement would be entitled to her estate.

The beneficiary under the will, Francesc-Xavier, contracted canonical marriage to the second applicant, Roser Puncernau Pedro. By deed drawn up on 11 November 1969 before a notary in La Coruña (Spain), they adopted a child, Antoni, in accordance with the procedure for full adoption. They subsequently adopted a second child.

In 1995 Francesc-Xavier Pla Pujol made a will in which he left 300,506 euros (EUR) to his son, Antoni (the first applicant), and EUR 180,303 to his daughter. He named his wife, Roser (the second applicant), sole heir to the remainder of his estate. In a codicil of 3 July 1995 Francesc-Xavier Pla Pujol left the assets he had inherited under his mother's will to his wife for life and to his adopted son, Antoni, as remainderman. The assets in question consisted of real estate. On 12 November 1996 Francesc-Xavier Pla Pujol died. The codicil was opened on 27 November 1996.

Accordingly, the only potential heirs to the estate under the will are the applicants, Antoni Pla Puncernau and his mother, and two sisters, Carolina and Immaculada Serra Areny, who are the great-grandchildren of the testatrix.

The applicants lodged an empara appeal with the Constitutional Court against the decisions of the High Court of Justice. They alleged a violation of Article 13(3) (principle of children's equality before the law regardless of filiation) and Article 10 (right to judicial protection and a fair trial) of the Andorran Constitution. In a decision of 13 October 2000 the Constitutional Court declared their appeal inadmissible for the following reasons:

"... It seems clear that the judgment of the High Court of Justice is limited to clarifying and determining, that is, interpreting, a specific point concerning the testatrix's intention, as expressed in her will in the form of a family settlement in favour of a child or grandson of a lawful and canonical marriage.

The High Court of Justice does not at any point suggest that there is general discrimination against or inequality between children according to whether they are biological or adopted. Such an assertion would evidently amount to a flagrant breach of Article 13(3) of the Constitution and would also be contrary to the prevailing legal opinion according to which legal systems must always be interpreted, which is that all children are equal, irrespective of their origin. However, as submitted in substance by State Counsel, "discrimination against adopted children as compared to biological children does not in the instant case derive from an act of the public authorities, that is, from the judgment of the Civil Division of the High Court of Justice, but from the intention of the testatrix or settlor regarding who should inherit under her will" in accordance with the principle of freedom to make testamentary dispositions, which is a concrete manifestation of the general principle of civil liberty.

In its judgment the High Court of Justice confined itself to interpreting a testamentary disposition. It did so from the legal standpoint that it considered adequate and in accordance with its unfettered discretion, seeing that the
interpretation of legal instruments is a question of fact which, as such, is reserved to the jurisdiction of the ordinary courts.

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2.2 The Judgment

Excerpt:

"59. Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention (see Larkos v. Cyprus [GC], no. 29515/95, §§ 30-31, ECHR 1999-1).

60. In the present case the High Court of Justice's interpretation of the testamentary disposition in question had the effect of depriving the first applicant of his right to inherit under his grandmother's estate and benefiting his cousin's daughters in this regard. Furthermore, the setting aside of the codicil of 3 July 1995 also resulted in the second applicant losing her right to the life tenancy of the estate assets left her by her late husband.

Since the testamentary disposition, as worded by Carolina Pujol, made no distinction between biological and adopted children it was not necessary to interpret it in that way. Such an interpretation therefore amounts to the judicial deprivation of an adopted child's inheritance rights.

61. The Court reiterates that a distinction is discriminatory for the purposes of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, inter alia, Fretté v. France, no. 36515/97, § 34, ECHR 2002-I). In the present case the Court does not discern any legitimate aim pursued by the decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based. In the Court's view, where a child is adopted (under the full adoption procedure moreover) the child is in the same legal position as a biological child of his or her parents in all respects: relations and consequences connected with his family life and the resulting property rights. The Court has stated on many occasions that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention.

Furthermore, there is nothing to suggest that reasons of public policy required the degree of protection afforded by the Andorran appellate court to the appellants to prevail over that afforded to the applicant.

62. The Court reiterates that the Convention, which is a dynamic text and entails positive obligations for States, is a living instrument, to be interpreted in the light of present-day conditions and that great importance is attached today in the member States of the Council of Europe to the question of equality between children born in and children born out of wedlock as regards their civil rights (see Mazurek § 30). Thus, even supposing that the testamentary disposition in question did require an interpretation by the domestic courts, that interpretation could not be made exclusively in the light of the social conditions existing when the will was made or at the time of the testatrix's death, namely in 1939 and 1949, particularly where a period of fifty-seven years had elapsed between the date when the will was made and the date on which the estate passed to the heirs. Where such a long period has elapsed, during which profound social, economic and legal changes have occurred, the courts cannot ignore these new realities. The same is true with regard to wills: any interpretation, if interpretation there must be, should endeavour to ascertain the testator's intention and render the will effective, while bearing in mind that "the testator cannot be presumed to have meant what he did not say" and without overlooking the importance of interpreting the testamentary disposition in the manner that most closely corresponds to domestic law and to the Convention as interpreted in the Court's case-law.

63. Having regard to the foregoing, the Court considers that there has been a violation of Article 14 read in conjunction with Article 8."

II. The Increasing Influence of European Law on Family Law

1. Case Law

1.1 Court of Justice
At the European Union level, the European Court of Justice has served as an impetus to harmonisation of law by linking certain aspects of family law to the freedom of movement. These decisions are important, as they contribute to the reduction of discriminations and administrative impediments, but the Court cannot be expected to greatly contribute to a real breakthrough in the field of harmonisation of law. However the Garcia Avello case shows how far reaching the implications of EC law can be.

1.2 European Court of Human Rights

The European Court of Human Rights has served as a catalyst for harmonisation though its decisions and judgments, which have given a rough sketch of European Family Law. The right to respect for private and family life as laid down in Art. 8 E.C.H.R. has been of an enormous importance.

During last years there is no consistence between the judgments of the Court. In quite a lot of cases the Court is not maintaining his pioneering role and allows the Member States a large margin of appreciation as in the Fretté case (26.02.2002). Here the Court stated that the Convention was not violated by the refusal of an adoption on the grounds of the adoptant's homosexuality. The appreciation of the interest of the child is left to the Member State. In other cases the Court is severe and leaves no margin at all as in the Pla and Puncernau case.

2. Legislation

2.1 European Union

The European Union has no competence in family law. The transfer of judicial co-operation in civil matters from the third to the first pillar by the Treaty of Amsterdam has no implication for substantial family law but has accelerated the process of unification of international family law.

With the adoption of the Charter of Fundamental Rights (2000) the Union has acknowledged the importance of the family.

The presidency conclusions of the Laeken European Council (2001) mentioned the harmonisation of family law as part of the efforts to resolve the problems arising from differences between the European legal systems.

The European Constitution (2004) will activate those efforts in the field of private international law, but will also have an importance in the field of material law.

2.2 Council of Europe

The Council of Europe has met an important goal with its European Convention for the Protection of Human Rights and Fundamental Freedoms and certain other conventions, but other major initiatives should not be expected. Rather than promoting unification of law by international conventions, the Council is seeking to stimulate harmonisation through recommendations of the Consultative Assembly and resolutions of the European Ministers of Justice as well as through scientific meetings.

III. Harmonisation: A Challenge for Europe!

Family law will in the long run - and this run could be shorter as we expect now- be part of the activities of the European legislator. This legislator will not be the Council of Europe but the European Union. The cited cases prove that the time is not ripe for an institutional unification of substantive family law. At first a phase of spontaneous approximation of law is necessary. This approximation will be a task for research and education.