

PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING PARENTAL RESPONSIBILITIES

PREAMBLE

Recognising that, notwithstanding the existing diversities of national family law systems, there is nevertheless a growing convergence of laws;

Recognising that the free movement of persons within Europe is hindered by the remaining differences;

Desiring to contribute to common European values regarding the child's rights and welfare;

Desiring to contribute to the harmonisation of family law in Europe and to further facilitate the free movement of persons within Europe;

The Commission on European Family Law recommends the following Principles:

CHAPTER I: DEFINITIONS

Principle 3:1 Concept of parental responsibilities

Parental responsibilities are a collection of rights and duties aimed at promoting and safeguarding the welfare of the child. They encompass in particular:

- (a) care, protection and education;
- (b) maintenance of personal relationships;
- (c) determination of residence;
- (d) administration of property, and
- (e) legal representation.

Principle 3:2 Holder of parental responsibilities

(1) A holder of parental responsibilities is any person having the rights and duties listed in Principle 3:1 either in whole or in part.

(2) Subject to the following Principles, holders of parental responsibilities are:

- (a) the child's parents, as well as
- (b) persons other than the child's parents having parental responsibilities in addition to or instead of the parents.

CHAPTER II: RIGHTS OF THE CHILD

Principle 3:3 Best interests of the child

In all matters concerning parental responsibilities the best interests of the child should be the primary consideration.

Principle 3:4 Autonomy of the child

The child's autonomy should be respected in accordance with the developing ability and need of the child to act independently.

Principle 3:5 Non-discrimination of the child

Children should not be discriminated on grounds such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, sexual orientation, disability, property, birth or other status, irrespective of whether these grounds refer to the child or to the holders of parental responsibilities.

Principle 3:6 Child's right to be heard

Having regard to the child's age and maturity, the child should have the right to be informed, consulted and to express his or her opinion in all matters concerning the child, with due weight given to the views expressed by him or her.

Principle 3:7 Conflict of interests

The interests of the child should be protected whenever they may be in conflict with the interests of the holders of parental responsibilities.

CHAPTER III: PARENTAL RESPONSIBILITIES OF PARENTS AND THIRD PERSONS

Principle 3:8 Parents

Parents, whose legal parentage has been established, should have parental responsibilities for the child.

Principle 3:9 Third persons

Parental responsibilities may in whole or in part also be attributed to a person other than a parent.

Principle 3:10 Effect of dissolution and separation

Parental responsibilities should neither be affected by the dissolution or annulment of the marriage or other formal relationship nor by the legal or factual separation between the parents.

CHAPTER IV: EXERCISE OF PARENTAL RESPONSIBILITIES

SECTION A: PARENTS

Principle 3:11 Joint exercise

Parents having parental responsibilities should have an equal right and duty to exercise such responsibilities and whenever possible they should exercise them jointly.

Principle 3:12 Daily matters, important and urgent decisions

(1) Parents having joint parental responsibilities should have the right to act alone with respect to daily matters.

(2) Important decisions concerning matters such as education, medical treatment, the child's residence, or the administration of his or her property should be taken jointly. In urgent cases a parent should have the right to act alone. The other parent should be informed without undue delay.

Principle 3:13 Agreement on exercise

(1) Subject to the best interests of the child, parents having joint parental responsibilities may agree on the exercise of parental responsibilities.

(2) The competent authority may scrutinize the agreement.

Principle 3:14 Disagreement on exercise

(1) Where parents having joint parental responsibilities cannot agree on an important matter they may apply to the competent authority.

(2) The competent authority should promote agreement between the parents.

(3) Where agreement cannot be reached the competent authority should divide the exercise of parental responsibilities between the parents or decide the dispute. Nigel: do we have to insert a comma after reached?

Principle 3:15 Sole exercise upon agreement or decision

Subject to the best interests of the child a parent may exercise parental responsibilities alone

- (a) upon agreement between the parents according to Principle 3:13, or
- (b) upon a decision of the competent authority.

Principle 3:16 Sole exercise by one parent

If only one parent has parental responsibilities he or she should exercise them alone.

SECTION B: THIRD PERSONS

Principle 3:17 Exercise in addition to or instead of the parents

A person other than a parent may exercise some or all parental responsibilities in addition to or instead of the parents.

Principle 3:18 Decisions in daily matters

The parent's partner living with the child may take part in decisions with respect to daily matters unless the other parent having parental responsibilities objects.

CHAPTER V: CONTENT OF PARENTAL RESPONSIBILITIES

SECTION A: THE CHILD'S PERSON AND PROPERTY

Principle 3:19 Care, protection and education

- (1) The holders of parental responsibilities should provide the child with care, protection and education in accordance with the child's distinctive character and developmental needs.
- (2) The child should not be subjected to corporal punishment or any other humiliating treatment.

Principle 3:20 Residence

- (1) If parental responsibilities are exercised jointly the holders of parental responsibilities who are living apart should agree upon with whom the child resides.
- (2) The child may reside on an alternate basis with the holders of parental responsibilities upon either an agreement approved by a competent authority or a decision by a competent authority. The competent authority should take into consideration factors such as:
 - (a) the age and opinion of the child;
 - (b) the ability and willingness of the holders of parental responsibilities to cooperate with each other in matters concerning the child, as well as their personal situation;

(c) the distance between the residences of the holders of the parental responsibilities and to the child's school.

Principle 3:21 Relocation

(1) If parental responsibilities are exercised jointly and one of the holders of parental responsibilities wishes to change the child's residence within or outside the jurisdiction, he or she should inform the other holder of parental responsibilities thereof in advance.

(2) If the other holder of parental responsibilities objects to the change of the child's residence, each of them may apply to the competent authority for a decision.

(3) The competent authority should take into consideration factors such as:

(a) the age and opinion of the child;

(b) the right of the child to maintain personal relationships with the other holders of parental responsibilities;

(c) the ability and willingness of the holders of parental responsibilities to cooperate with each other;

(d) the personal situation of the holders of personal responsibilities;

(e) the geographical distance and accessibility;

(f) the free movement of persons.

Principle 3:22 Administration of the child's property

(1) The holders of parental responsibilities should administer the child's property with due care and diligence in order to preserve and where possible increase the value of the property.

(2) In administering the child's property the holders of parental responsibilities should not make gifts unless the gifts are deemed to be made under a moral obligation.

(3) The income derived from the child's property which is not needed for the proper management of the property or for the maintenance and education of the child may, where necessary, be used for the needs of the family.

Principle 3:23 Restrictions

(1) The holders of parental responsibilities should not administer property acquired by a child through a testamentary disposition or a gift, if the testator or the donor so instructed.

(2) Similarly the earnings by the child should not be administered by the holders of parental responsibilities unless the child is not of sufficient age and maturity to decide himself or herself.

(3) Where transactions can have significant financial consequences for the child the authorisation of the competent authority should be necessary.

Principle 3:24 Legal representation

- (1) The holders of parental responsibilities should legally represent the child in matters concerning the child's person or property.
- (2) Legal representation should not take place where there is a conflict of interest between the child and the holders of parental responsibilities.
- (3) Having regard to the child's age and maturity, the child should have the right to self-representation in legal proceedings concerning himself or herself.

SECTION B: MAINTENANCE OF PERSONAL RELATIONSHIPS

Principle 3:25 Contact with parents and other persons

- (1) The child and the parents should have the right to obtain and maintain regular contact with each other.
- (2) Contact should be established between the child and his or her close relatives.
- (3) Contact may be established between the child and persons with whom the child has close personal relations.

Principle 3:26 Content of contact

- (1) Contact comprises the child staying for a limited period of time with or meeting a parent or person other than a parent with whom he or she is not usually living; and any form of communication between the child and such person.
- (2) Such contact should be in the best interests of the child.

Principle 3:27 Agreement

- (1) Subject to the best interests of the child, the parents and the other persons identified under Principle 3:25(2) and (3) may agree on contact.
- (2) The competent authority may scrutinize the agreement.

Principle 3:28 Restrictions

Contact may be restricted, terminated or made subject to conditions by the competent authority if the best interests of the child so require.

Principle 3:29 Information to parents

A parent should have the right to be informed about matters concerning the personal situation of the child.

CHAPTER VI: TERMINATION OF PARENTAL RESPONSIBILITIES

Principle 3:30 Termination

- (1) Parental responsibilities should be terminated in the case of the child:
 - (a) reaching majority;
 - (b) entering into a marriage or registered partnership;
 - (c) being adopted;
 - (d) dying.
- (2) If a parent's partner adopts the child of the parent the parental responsibilities in relation to the other parent should be terminated.

Principle 3:31 Death of the parents

- (1) If parents have joint parental responsibilities and one of them dies the parental responsibilities should belong to the surviving parent.
- (2) If a parent having sole parental responsibilities dies, responsibilities should be attributed to the surviving parent or a third person upon a decision by the competent authority.
- (3) On the death of both parents, of whom at least one parent had parental responsibilities, the competent authority should take protective measures in respect of the person and the property of the child.

CHAPTER VII: DISCHARGE AND RESTORATION OF PARENTAL RESPONSIBILITIES

Principle 3:32 Discharge of parental responsibilities

The competent authority should discharge the holder of parental responsibilities, wholly or in part, where his or her behaviour or neglect causes a serious risk to the person or the property of the child

Principle 3:33 Request for discharge of parental responsibilities

- (1) The discharge of parental responsibilities may be requested by:
 - (a) any parent having parental responsibilities;
 - (b) the child, and
 - (c) any institution protecting the interests of the child.
- (2) The competent authority may also order the discharge of parental responsibilities of its own motion.

Principle 3:34 Restoration of parental responsibilities

Having regard to the best interests of the child, the competent authority may restore parental responsibilities if the circumstances that led to the discharge no longer exist.

CHAPTER VIII: PROCEDURE

Principle 3:35 Competent authority

(1) All decisions on parental responsibilities should be taken by the competent authority which can either be a judicial or an administrative body.

(2) Where necessary, the competent authority should appoint any suitable person or body to investigate the child's circumstances.

Principle 3:36 Alternative dispute resolution

In all disputes regarding parental responsibilities alternative dispute resolution mechanisms should be available.

Principle 3:37 Hearing of the child

(1) Subject to Principle 3:6, the competent authority should hear the child in all proceedings concerning parental responsibilities but if it decides not to hear the child it should give specific reasons.

(2) The hearing of the child should take place either directly before the competent authority or indirectly before a person or body appointed by the competent authority.

(3) The child should be heard in a manner appropriate to his or her age and maturity.

Principle 3:38 Appointment of a special representative for the child

In proceedings concerning parental responsibilities in which there could either be a serious conflict of interests between the child and the holders of parental responsibilities or in which the welfare of the child is otherwise at risk, the competent authority should appoint a special representative for the child.

Principle 3:39 Enforcement

(1) Failing voluntary compliance, a decision by the competent authority and an enforceable agreement concerning parental responsibilities should be enforced without delay.

(2) Enforcement should not take place if it is manifestly contrary to the best interests of the child.