FONDATION ROBERT SCHUMAN

POLICY PAPER

European issues
n°677
July 18th 2023

How to make legal life easier for European citizens ?

Laurence LEGUIL

Being born and growing up, settling down, often starting a family, welcoming a child, sometimes separating, growing old and saying goodbye to loved ones: this has been the human journey since the dawn of time. The notary accompanies the citizen through these key stages. Because their clientele is so varied, notaries are increasingly having to deal with complex cases: a family member lives or has married in another Member State; a property is located abroad; a will has been filed with a solicitor in another country because it was drawn up when the person was expatriated, etc.

Although these situations are not part of the everyday life of Europe's 53,000 notaries, they are becoming less and less marginal and mean that we need to find innovative solutions to resolve new difficulties: accessing a foreign law, addressing administrative procedures in other Member States, unrecognised legal situations, etc.

It should be recognised that since the Tampere European Summit in 1999, which established the area of Freedom, Security and Justice, European civil law has evolved considerably, making the task of judges and legal practitioners much easier. However, European citizens still face a number of very real difficulties.

Notaries are there to provide solutions. We have identified a number of issues: family life, the transfer of assets, support for vulnerable adults and the circulation of public documents.

1) IMPROVING EUROPEAN FAMILY LIFE

Questions of parenthood have always been discussed, in hushed tones, in notaries' offices. A few confidential details help to understand the path adopted by certain estates. The issues are different from those of the post-war years of 14-18, when hundreds of thousands of children were orphaned by their fathers — today's parents no longer have the same expectations when it comes to establishing parenthood. In the context of new forms of family, there is a real demand for European recognition of parentage. Forms of union have also changed. Marriage no longer represents the obvious type of conjugal union (on average, just over 3 marriages per year per 1,000 inhabitants in the European Union) and divorce has never been so prevalent, with an average of 1.9 divorces per year per 1,000 inhabitants in the European Union. The question of a European family record book has now emerged.

A) Towards European recognition of parenthood

In 1957, in the Europe of the six founding countries, with its strong Napoleonic heritage, parentage was not particularly debated.

The advent of medically assisted reproduction techniques in the early 1980s, followed by the opening up of adoption to same-sex married couples in the early 2000s in the Netherlands, then in Spain and Belgium, led to new debate.

What was once universal (the woman who gives birth is the mother) is no longer self-evident, and there are strong East/West divisions between Member States on this fundamental question: what does it mean to be a parent?

This situation is not without implications for children who are sometimes conceived in one

country and then brought up by parents established in another.

On 7 December 2022, when proposals regarding '*equality*' were presented, European Commissioner for Justice Didier Reynders declared: *"All children should have the same rights, regardless of how they were conceived, how they were born and what kind of family they have"*. The package included a proposal for a European regulation on parenthood.
The initiative aims to ensure that parenthood, as established in one EU Member State, is recognised throughout the European Union so that children's rights are maintained in cross-border situations, particularly when their family travels or moves within the European Union.
In France, notaries are well acquainted with medically assisted procreation (MAP). In fact, when MAP is carried out with the intervention of a third-party donor (gamete or embryo donation), the prior consent of the couple or unmarried woman must be obtained by a solicitor. This consent is given under the terms of an authenticated deed, without the presence of third parties.
With this text, the notarial profession has identified a great opportunity to resolve certain situations, to bring serenity where it is absent, essentially when couples who have had access to a MAP process separate or move to another country. However, notaries are calling on the European legislator to be vigilant so as not to create new requirements that could penalise the recognition of certain types of parenthood.

B) Facilitating cross-border divorces

International marriages can lead to international divorces. The law that is applicable and the competent jurisdiction are two parameters that can hold considerable sway over issues such as child custody, alimony and compensatory payments.

The European regulation 1259/2010 of 20 December 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, has ended the "race to court" by allowing spouses, if they so wish, to choose the law that is pertinent to their divorce or legal separation. In the absence of a choice by the parties involved, the regulation determines the applicable law.

From now on, when a solicitor sees an international couple in view of preparing a marriage contract, they will naturally mention the possibility of defining the law applicable to the divorce beforehand. This is a real step forward!

The French law of 2016 on divorce by mutual consent poses a number of application problems in an international and European context. The divorce agreement, which is countersigned by lawyers and filed with a solicitor, can only be partially exchanged within the European Union under the following conditions of the European regulation 'Brussels II ter' of 25 June 2019. However, this regulation will not be revised for at least another ten years. The next revision should take better account of divorces handled by non-judicial authorities, including notaries. The trend in many Member States to move cases from the courts is a reality.
Once a divorce has been granted, new conflicts may arise over time between the two parents of a minor. European notaries are strong believers in mediation as a means of resolving these conflicts. The European Commission also supports the use of this practice; in the past, it subsidised a project of the Council of Notariats of the European Union (CNUE) to reference best practices and promote them among notaries. At the European Parliament, the coordinator for Children's Rights (a post created in 1987, initially called "mediator for children who are victims of cross-border parental child abduction") expressly includes the promotion of this type of mediation in its remit. We believe that there is still considerable room for improvement in the training of mediators and in raising awareness among European citizens of the possibilities offered by this alternative method of dispute resolution. In our view, ambitious budgets should be made available to further develop this practice!

A) Regarding the timely nature of a European Family Record Book?

In 1957, there were only two possible states of life in Europe: celibacy or marriage. Registered partnerships

appeared in the 1990s; in France, the Civil Solidarity Pact was introduced in 1999. In some Member States, they are reserved for same-sex couples, while in others they are open to both sexes. In the end, it has been this group of people who have made the most use of this form of marital framework. To date, all EU Member States except Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia have set up registered partnerships.

For around fifteen years, these partnerships were recognised in very different ways throughout the European Union. It regularly happened that people who were bound together in one Member State were sometimes no longer bound at all in another. Everyone can well imagine the consequences of this lack of recognition in the event of separation or death.

The European regulation on the property consequences of registered partnerships 2016/1104 of 24 June 2016 applies in eighteen Member States. It specifies which national law should apply to disputes concerning the assets of an international couple, and which national courts have jurisdiction to settle such disputes. On the marriage front, things were not always straightforward before 2016 either. Former law students will remember the old rulings of the Court of Cassation on private international law. The slightest foreign element in a marriage could give rise to all sorts of complications concerning the fate of the matrimonial property regime. The European regulation 2016/1103 of 24 June 2016 on the effects of matrimonial property regimes has brought a certain stability: from now on, matrimonial property regimes will no longer change as the spouses move from one State to another. This regulation also applies in eighteen Member States. In particular, it determines which national law should apply to disputes relating to the assets of an international couple and which national courts have jurisdiction to rule on these disputes.

The European notaries was a driving force behind these two regulations of 24 June 2016 at a very early stage. The Council of Notariats of the European Union was in constant dialogue with the departments of the European Commission's Directorate-General for Justice, the European Parliament and the Council. It then supported implementation by providing multilingual legal information on the national laws concerned. In doing so, it has become a key partner of the European e-Justice portal.

For European couples, however, it is possible to go further. The Conseil supérieur du notariat therefore advocates the establishment and interconnection of registers of matrimonial property regimes and registered partnerships by the Member States. These restricted-access registers would make it easier for notaries to find this kind of information when it is held by administrations in Member States other than their own.

Sometimes, neither registered partnerships nor marriage are appropriate in certain circumstances. For example, for couples of retired widowers who each have children and grandchildren of their own, a simplified European cohabitation contract could be established: simple proof of a cohabitation; such a contract could facilitate a number of day-to-day procedures.

The family record book that exists in France is excellent practice that could be extended. It provides an initial proof that you are married, and parent. With the future parentage certificate, proposed by the draft European regulation on filiation of 7 December 2022, the European Commission is taking a step in the right direction. It will allow children to have their parentage recognised in all Member States, which will provide greater security for citizens who come to study with us.

2) FACILITATING THE TRANSFER OF ASSETS WITHIN THE EUROPEAN UNION

The regulation 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and the acceptance and enforcement of authentic acts in matters of succession and the creation of a European certificate of Succession provides common rules on conflict of law and conflict of jurisdiction for the settlement of international estates. It introduces European proof of the status of the heir: the European Certificate of Succession. The regulation is universal in scope and applies in all Member States except Denmark and Ireland.

After eight years in operation, it is clear that the

European Certificate of Succession is rarely used. Practitioners still prefer to use national documents, which they understand better. This is why it would be a good idea for the European Commission to propose a simplified form, as the current one is incredibly long.

The creation of national registers of European succession certificates and their continued interconnection should also be encouraged. This would make it easier to find out whether a certificate has already been issued by another authority. In international successions, families are very often geographically dispersed. This situation sometimes means that notaries have to process parallel inheritance procedures. This would also help to build confidence in the certificate, which is still relatively unknown to notaries and banks alike, who are often the recipients of copies of the certificates.

To date, the European Network of Registers of Wills Association (ENWRA) manages the interconnection of three of these registers of European succession certificates and also administers the interconnection of thirteen registers of wills. This interconnection facilitates the retrieval of wills deposited in the safe of a European notary other than the one responsible for settling the estate.

In international successions, it is common for the deceased to have bank accounts and various investments in several States. The heirs are not always aware of these, especially if the accounts were opened several decades ago. For the notary alone, they are almost impossible to trace. To remedy this situation, one solution could be to set up a European portal so that those responsible for settling estates can easily find the details of financial institutions where the deceased had bank accounts, employee savings accounts and life insurance policies.

Estates are adapting to the times. They increasingly contain a "*digital assets*" component. These assets are difficult for the authorities responsible for settling the estate to identify. At the time of the 2019 European elections, the Council of Notariats of the European Union called for the introduction of European legislation on digital inheritance. The aim would be to ensure that cloud storage and social network operators are more cooperative with heirs and beneficiaries. The issue of crypto assets is one that notaries are questioning; this concern is shared with the tax authorities.

The General Regulation on Data Protection of 27 April 2016 does not contain any specific provisions for the protection or transmission of data relating to deceased persons. When the regulation was being negotiated, the notaries proposed to the European Parliament that a few specific articles be inserted. In the years to come, this regulation will necessarily be revised: this will certainly be the opportunity to reopen debate!

In the coming weeks, the European Commission is due to publish a legislative initiative on virtual worlds. In these worlds, it is possible to buy digital services or products. This raises the question of how they are transmitted. Finally, there is the lack of harmonisation of inheritance tax. In some countries, such as Hungary, there is simply no inheritance tax at all. As a first step, solutions should be found to limit double taxation.

The conclusions of the work of the Conference for the future of Europe highlighted the fact that the unanimity rule in the Council on tax matters could change in the years to come.

2) BETTER PROTECTION OF VULNERABILITIES BEYOND BORDERS

Everyone knows someone in their family or close circle who has been struck down by an illness that deprives them of their full capacity for discernment. At a key point in their life, they are no longer able to take all the necessary steps on their own, or to carry out everyday tasks. A protective measure can be implemented, adapted to the seriousness of the situation. Being under curatorship or guardianship does not prevent you from travelling or moving abroad. The people concerned sometimes spend their retirement in another Member State and may be admitted to a care establishment on the other side of a national border. Completing the administrative formalities can become very complicated because, unfortunately, the protection schemes are not recognised between all the Member States; there

is no European regulation covering this situation. It is the Hague Convention of 13 January 2000 on the international protection of adults that applies in this case and it has not even been ratified by half the Member States! This situation is therefore unsatisfactory. The European Parliament, through two own-initiative reports in 2008 and 2017, asked the European Commission to propose legislation.

On 31 May 2023, the European Commission finally presented two proposals for legislation: a proposal for a regulation that aims to strengthen the protection of vulnerable adults in a cross-border situation, as well as a draft Council decision that aims for all Member States to be members of the Convention of The Hague of 13 January 2000.

The proposed regulation on vulnerable adults aims to make it easier to determine the competent courts and the applicable law, to recognise protection measures or to accept authentic instruments from another Member State, such as future protection mandates, and to enforce them. The initiative moves in the direction of greater digitisation of procedures, in particular through the creation of national registers of protection measures and their interconnection, something that the notaries have been advocating for many years. Finally, the introduction of a European certificate will make it easier for representatives to prove their powers in another EU Member State.

The details of the future European digital wallet are currently being negotiated in Brussels. This digital wallet will be based on information contained in the chip of our identity card (for those who have one) and in a dedicated smartphone application. It will be the single lock for all kinds of private and public digital services. We are very grateful that the European Parliament has taken up our proposal to include, as a minimum attribute in the wallet, the status of a protected adult and the name of the trusted third party (tutor, curator, proxy) who could act on the person's behalf, and we urge the Council to include this idea in the final agreement. This solution would help to combat the all-too-common practice of benevolent identity theft (using a loved one's login details to carry out procedures on their behalf) by providing a transparent solution for agents, guardians and curators who interact on the Internet. Above all, this will prevent adults who no longer have the right to carry out certain banking transactions from still being able to do so online.

4 FACILITATING THE CIRCULATION OF PUBLIC DOCUMENTS

Within the European Union, continuing to have recourse to legalisation and apostille procedures seems a rather outdated practice: they generate delays and costs that could be avoided. For the notaries, signatures should carry a presumption of conformity given the principle of mutual trust within the European Union. The notaries have always argued for their abolition. And European legislation is moving in this direction, with sector after sector providing for the abolition of legalisation and all similar procedures. This is particularly true of the directive on the circulation of public documents, which abolished these formalities for all civil status documents. This advance not only makes the work of professionals more fluid, but also makes life easier for citizens.

This is particularly true of the French Republic, which has abolished these formalities for all civil status documents. This advance not only makes the work of professionals more fluid, but also makes life easier for citizens.

Notaries are also noticing developments in *exequatur*, the process whereby a document can be enforced in another Member State. Long and sometimes costly, this procedure can delay or even prevent the enforcement of a deed in another country, sometimes leaving citizens in difficult situations. Aware of this difficulty, the European Union has taken action and we have gone from having to go through this procedure to obtain the effectiveness of almost all foreign decisions/documents to a lighter *exequatur* with the Brussels Regulation I and finally to its total abolition, notably with the European Enforcement Order. The notarial profession can only welcome this step forward, for which it has campaigned for so long. Admittedly, there are still a number of obstacles to the full effectiveness of documents and their total freedom of movement within the European area, but the European Union is on the right track and notaries support it in its drive to make life easier for citizens.

***

There is no doubt that considerable progress has been made in making it easier for European citizens to exercise their rights. As legal practitioners serving families, Europe's notaries are all aware of this and are grateful for what has been achieved. However, the considerable delay in recognising protection measures for vulnerable adults in Europe is regrettable, given that several million European citizens and their families are affected. Notaries very much hope that the European Commission will publish the expected draft regulation this year and that negotiations can proceed rapidly.

In a year's time, the European Parliament and the European Commission will be renewed. The notaries hopes that the campaign leading up to the elections on 6-9 June 2024 will truly be a time for constructive exchange, throughout Europe, between candidates and civil society, so that the future Strasbourg hemicycle is fully aware of the difficulties encountered by European citizens in exercising their rights, and so that the new MEPs are in a position to convey the right messages to the future European Commission. In this way, European law will continue to develop and it will be easier for European citizens to exercise their rights.

Laurence Leguil

Vice-President of the Conseil supérieur du Notariat

Publishing Director: Pascale JOANNIN
ISSN 2402-614X