EXTRA-JUDICIAL ADMINISTRATION OF JUSTICE IN CROSS-BORDER FAMILY AND SUCCESSION MATTERS

Comparative and Policy Perspectives

Edited by
Elena Bargelli, Anatol Dutta, and François Trémosa

in cooperation with
Paul Patreider and Elisa Stracqualursi

Lefebvre Giuffrè

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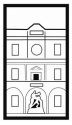

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FOREWORD

It is a long-standing prejudice among lawyers, but also among society as a whole, that the administration of justice is primarily a matter for the courts and that other authorities are called upon only in exceptional cases or for ancillary measures. However, this is nowadays no longer true in many Member States of the European Union. In family and succession law in particular, the administration of justice has, in numerous cases, been transferred in whole or in part to non-judicial bodies – notaries, civil status officers, child protection agencies, etc – to an extent that it is appropriate to speak of a 'de-judicialisation' of the administration of justice. The extent of this development varies greatly between Member States, and there is no uniform situation. These differences, which have left their mark on the case-law of the Court of Justice of the European Union, raise two fundamental questions. On the one hand, it is often unclear whether and to what extent existing European Union instruments on judicial cooperation in family and succession matters apply to proceedings and measures ('acts') of extra-judicial administration of justice in cross-border cases, and secondly, the question arises as to whether the EU should not make use of its competences to adopt legislation in order to create uniform rules or at least guidelines for this area of the administration of justice.

Answering these questions requires precise knowledge and a thorough analysis of the legal situation in the Member States of the Union. The European Law Institute's project 'Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters' (2020–2025), which has resulted in this book and was co-funded by the European Union, provides the foundation for this. Based on country reports that describe the legal situation in 16 Member States on the basis of a questionnaire, a Comparative Report analyses convergences and divergences in the course of the 'de-judicialisation' of the administration of justice, while at the same time providing a comparative overview of the main features of current family and succession law in representative Member States of the Union.

On this basis, policy recommendations have been formulated by the Project Group as the core element and pioneering achievement of the Project. They are addressed to the EU and the Member States and contain guidelines for the development of Union law and Member States' law when acts in family and succession matters are reserved to courts in at least one Member State but fall within the competence of other authorities, or the parties themselves, in other Member States. The proposals aim, *inter alia*, to strengthen non-judicial bodies, provide for compliance with minimum pro-

cedural standards and call for the extension of EU principles on jurisdiction and the recognition of effects between Member States. Also pointing to the future is the proposal to extend the jurisdiction of the Court of Justice of the European Union so that an authority of a Member State that participates in an act in family and succession matters is considered as a 'court or tribunal' for the purposes of Article 267 of the Treaty on the Functioning of the European Union. Indeed, the involvement of the Luxembourg Court would ensure the uniform application and interpretation of EU law provisions on the extra-judicial administration of justice and strengthen their constitutional safeguards. Thus, the outcome of the Project has the potential to give a new dimension to the administration of justice in family and succession matters in the EU.

CHRISTIAN KOHLER
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PREFACE

This volume collects the results of a collaborative research project on the extra-judicial administration of justice in cross-border family and succession matters led by the editors. The Project was conducted by the University of Pisa and the Ludwig Maximilian University of Munich under the auspices of the European Law Institute (between 2020 and 2025) and was funded by the European Union (between 2023 and 2025). Cornerstones of the Project were workshops in Pisa (July 2023) and Munich (September 2024) and a conference in Vienna (February 2025), where the results of the Project were presented and discussed. The main outcomes of the Project, 16 country reports, a comparative report and our policy recommendations, are published in this book.

We are indebted to many individuals and institutions for their support: the European Law Institute, in particular, Christiane Wendehorst for her valuable input as the Institute's Scientific Director; the members of the Council of the European Law Institute for their feedback on the drafts; Tomasz Dudek for guiding us smoothly through the jungle of the Institute's processes as the Senior Legal Officer in charge of our Project; our country reporters (1) for their insights into a dynamic and broad area of the law; the members of our Advisory (2) and our Consultative Committee (3) as well as the participants of our workshops for their ideas; Donna Stockenhuber for the language revision of the text; and our universities – the University of Pisa

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ABBREVIATIONS

Abbreviations and citations in the present volume follow the OSCOLA standards and references (<www.law.ox.ac.uk/oscola> accessed 1 June 2025). Any additional abbreviations are highlighted within the contributions.

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ITALY

by *Elisa Stracqualursi and Nicola Chiricallo*

I. Introduction and overall considerations

A. *Legal sources of family and succession law: Civil Code and relevant statutes*

Both Italian family and, more recently, succession law have undergone a significant de-judicialisation trend. **1**

To fully understand this trend, the relevant legal framework has to be borne in mind. **2**

Succession law, as well as marriage, separation, filiation and parental responsibility are regulated by the Civil Code (hereinafter: CC), while the related proceedings are enshrined in the Civil Procedural Code (hereinafter: CPC). Conversely, same-sex registered partnerships (referred to as civil unions), cohabitation (Law No 76 of 2016), divorce (Law No 898 of 1970), non-judicial proceedings of separation and divorce (Decree-Law No 132 of 2014), foster care and the adoption of children (Law No 184 of 1983) are regulated in special statutes. **3**

Some recent reforms concerning civil proceedings involving the family, the protection of vulnerable adults and minors as well as inheritance matters are also worthy of mention: Law No 206 of 2021 (Delegation to the Government for the efficiency of the civil process and for the revision of the discipline of alternative dispute resolution instruments and urgent measures for the rationalisation of proceedings in matters of personal and family rights as well as in matters of enforcement), and Legislative Decree No 149 of 2022 (Implementation of Law No 206 of 2021). [1] **4**

In particular, Lgs D No 149 of 2022 modified some rules on so-called assisted negotiation and provided notaries with competences previously **5**

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[1] For a comprehensive overview on the reform: Claudio Cecchella (ed), *La riforma del processo e del giudice per le persone, per i minorenni e per la famiglia* (Giappichelli 2021); Rosaria Giordano and Alessandro Simeone, *Riforma del processo per le persone, i minorenni e le famiglie* (Giuffré 2023); Claudio Cecchella, 'La riforma del processo in materia di persone, minorenni e famiglie dopo il d.lgs n. 149/2022' [2023] Questione Giustizia; Claudio Cecchella, 'Le nuove norme sul processo e il tribunale in materia di persone, minorenni, famiglia' [2023] Rivista diritto civile 1090; Giovanni De Cristofaro, 'Le modificazioni apportate al codice civile dal decreto legislativo attuativo della "Legge Cartabia" (D.lgs. 10 ottobre 2022, n. 149). Profili problematici delle novità introdotte nella disciplina delle relazioni familiari' [2022] Nuove Leggi Civ Comm 1407.

retained by judicial courts (see Article 21 of Lgs D No 149 of 2022) and, therefore, de-judicialised further matters.

6 In the field of private international law of the family and succession, a distinction must be made: in family law, except for matters where some specific European regulations are applicable, the rules are fully collected in L No 218 of 1995 (Articles 26 ff); on the other hand, the private international law of succession is fully regulated by EU Regulation 650/2012.

7 In addition to the legislative sources, the role of case-law has to be taken into account, especially as far as supreme courts are concerned, such as the Constitutional Court (hereinafter: C Cost) and the Court of Cassation (hereinafter: Cass).

8 The main examples of the influence that the Constitutional Court plays on the legislative developments in family law are the judgments of 14 April 2010, No 138 of 2010 and of 11 June 2014, No 170 on civil unions.

9 The 2010 judgment invited the legislator to recognise same-sex partnerships and, in doing so, to fill a gap in the protection of human rights.

10 In 2014, the Constitutional Court intervened again in matters of same-sex couples by declaring that the automatic dissolution of the marriage following one spouse's change of gender was unconstitutional.

11 Finally, Law No 76 of 2016 (Regulation of civil unions between individuals of the same-sex and the discipline of cohabitation) was enacted and, following the advice of the Constitutional Court, recognised homosexual partnerships as separate from marriage and admitted the possibility that marriage could evolve into a same-sex union if one of the spouses undergoes a gender change.

B. *The Constitution and international legal sources*

12 The Italian Constitution (Const) contains provisions on family law (Articles 29, 30, and 31). In particular, it recognises the equality between spouses (Article 29), the rights and duties of parents towards their children as well as the equality between children born in and out of marriage (Article 30), and the measures the State adopts for families (Article 31).

13 Another significant provision is Article 2, which acknowledges and guarantees the inviolable rights of individuals, as such and as part of a community. This provision serves as a general basis for any family relationship including de facto ones.

14 Worthy of mention is also Article 3, according to which, all citizens have equal social dignity and are equal before the law, regardless of gender, race, language, religion, political opinions, or personal and social conditions.

15 Finally, the fundamental principles and duties enshrined in international conventions have to be mentioned. Italy is a party to the following: the UN

Convention on the Rights of the Child of 1989, the European Convention on the Exercise of Children's Rights of 1996, and the European Convention on Human Rights (hereinafter: ECHR) of 1955. In particular, Article 8 ECHR establishes the right to respect for private and family life (as well as home and correspondence) and Article 12 the right to marry and establish a family. The ECHR holds significant weight in Italian family law, as evidenced by the fact that judges often refer to Articles 8 and 12 of the ECHR in their decisions.

C. *Main historical changes in family law (from 1942 to present) – an overview*

16 Constitutional principles were a driving force behind the greatest changes Italian family law has undergone in the 20th century. Law No 151 of 1975 radically transformed the concept of family, by shifting it from a hierarchical concept to a partnership of equals. The key principles underpinning the 1975 reform were, in particular, equality between spouses as prescribed by Article 29 Const and the equal treatment of children born within marriage and out of marriage, in line with Article 30 Const. After the 1975 reform, a residual difference between children born in and out of wedlock remained, as only the former had a legal relationship with the relatives of their parents. The *patria potestas* was abolished and the idea of the child's best interests as the rationale behind the parents' decisions came to the fore (see paras 167ff). In addition, the 1975 Law abolished fault-based separation (see para 67).

17 Any remaining differences between children were finally removed in 2012, by Law No 219 (Provisions on the recognition of natural children) and Legislative Decree 154 of 2013, when a unified legal status of 'child' was affirmed. Furthermore, the 2012 reform replaced the term parental authority with parental responsibility, in accordance with international wording and in the best interests of the child (see paras 167ff). The child's duty to honour their parents was replaced by the duty to respect them (Article 315-bis CC).

18 Both the constitutional principle of equality (Article 3) [2] and the right to respect for private and family life (Article 8 ECHR) [3] compelled the legislator to introduce same-sex unions (Law No 76 of 2016).

A further development which has featured in family law in recent years is the enhancement of the spouses' autonomy in divorce matters. Whereas consensual separation was provided for by both the 1865 and 1942 Civil Codes, a divorce based on the agreement of the parties was only introduced in 1987 for the first time, by amending the divorce law (Article 4, Law No 898 of

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[2] Constitutional Court, Judgments n 138/2010 and n 170/2014.

[3] *Oliari and Others v Italy* App no 18766/11 (ECtHR, 21 July 2015).

1970, as modified by Law No 74 of 1987). This provision allows the spouses to jointly submit a request for divorce to a tribunal, whose decision has a constitutive nature. Things were different in the case of consensual separation, a different procedure was necessary, where the tribunal examined the legal requirements and, in the case of fulfilment of such, ratified the parties' will. However, as a consequence of Lgs D No 149 of 2022, the judge's decision on separation is now constitutive (see paras 86ff). The role of private autonomy has been emphasised by Lgs D No 132 of 2014 by introducing extra-judicial forms of separation and divorce (see paras 97ff).

19 Over the years, the time in which a marriage can be dissolved has decreased. In particular, Law No 55 of 2015 reduced the length of the separation required to be granted a divorce from three years to six months (in the case of a consensual proceeding) or twelve months (in the case of a contentious proceeding). Pursuant to Lgs D No 149 of 2022, the spouses can file a joint application for separation and divorce with a single request.

20 A further trend to be pointed out is the growing emphasis on the autonomy of minors, grounded on Article 2 of the Constitution, Articles 8 and 12 ECHR and Article 24 of the Charter of Fundamental Rights of the European Union.

21 Before Law No 151 of 1975, the parent-child relationship was hierarchical and authoritative in nature, as the child was considered a passive beneficiary of the authority of the adult. The family itself was understood as being based on paternal authority as the father was regarded as the representative of the interests of the family as a unit. (4) Since 1975, the child has been recognised as a holder of rights towards their parents and the State. (5) Further rights have been recognised by statutes: for instance, the Adoption Law proclaimed the children's right to grow up in their family of origin, (6) and the adopted children's right to know their biological ties (Article 28, Law No 184 of 1983, as modified by L No 149 of 2001); the Constitutional Court recognised the right to maintain contact with some members of the family of origin, even in the case of full adoption. (7)

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(4) Antonio Cicu, 'Il diritto di famiglia nello Stato fascista' [1940] Jus 371; Francesco de Filippis, Corso completo di diritto civile italiano comparato, I diritti di famiglia (Leonardo Vallati 1881); Enrico Cimbali, La nuova fase del diritto civile nei rapporti economici e sociali (Unione tipografico editore 1885).

(5) Cesare Massimo Bianca, 'La legge italiana conosce solo figli' [2013] Rivista di diritto civile 1; Cesare Massimo Bianca, 'L'unicità dello stato di figlio' in Cesare Massimo Bianca (ed), La Riforma della filiazione (CEDAM 2015) 3.

(6) Cassazione civile n 23797/2021; n 21554/2021; n 16357/2018; n 23979/2015.

(7) Constitutional Court, Judgment n 183/2023; *Zhou v Italy* App no 33773/11 (ECtHR, 21 January 2014).

The Abortion Law (Law No 194 of 1978) authorises, under certain circumstances, women under 18 to terminate their pregnancy, even without parental consent (Article 12). In such cases, the decision is made by the judge, taking the woman's will into consideration. Moreover, certain choices affecting private life were left to children: for instance, children over the age of 16 may decide to marry without their parents' consent on the basis of a judicial authorisation (Article 390 CC); further, they may recognise their own child (Article 250 CC) or conclude an employment contract (Law No 977 of 1967). Children over the age of 14 are required to express their consent to being adopted (Article 7, Law No 184 of 1983) or recognised by a parent (Article 250 CC). **22**

Lgs D No 149 of 2022 emphasises the general right of children to be heard in all proceedings concerning them if they are over the age of 12, or even younger, if they are capable of discernment (Article 473-bis.4 CPC). Finally, Law No 219 of 2017 affirms the right of children to receive information about choices concerning health treatments, and to allow them to express their will. **23**

D. *Concept and role of 'judge' and 'judicial decision'. Voluntary jurisdiction*

No unified concepts of 'decision' and 'court' exist in Italy, whereas a 'judicial authority' includes whoever has passed the State exam as a *magistrato* (judge) and opted for judicial functions instead of the public prosecutor's office. Judges are subject to Article 111 of the Constitution, according to which: **24**

'Every trial takes place in a context of adversarial proceedings between the parties, under conditions of equality, before a third and impartial judge. The law ensures its reasonable duration.'

Judicial authorities still have exclusive competence as regards the resolution of contentious proceedings, the establishment of filiation without the parents' consent (Article 269 CC), the change of filiation (Article 250 CC), the loss of parental responsibility (Article 330 CC), authorisations concerning minors, and adoptions (Law No 184 of 1983, Articles 10 and 25). **25**

Further elements, however, have to be taken into account: the type of control, the procedural guarantees for the parties involved (such as adversarial proceedings) and the available remedies and/or the means of appealing. **26**

Certain functions have been shifted to professionals and authorities other than judicial authorities (see paras 97ff). From a functional perspective, they produce acts with the same effects as judicial decisions. Furthermore, they must comply with professional and ethical standards **27**

E. *Judicial authorities competent in family and succession matters*

28 As for the types of judicial authorities competent in family and succession matters, the following have to be mentioned.

29 Both family and succession matters basically fall under the jurisdiction of the ordinary tribunals (Articles 84, 90, 250, 251, 317-bis, 330, 332, 333, 334, 335, and 371 CC). The Minors' Tribunal is competent for matters of parental responsibility (in particular, those governed by Article 473-bis.39 CPC). Only if they are related to a pending legal action for separation or divorce between the same parties does the competence of the ordinary tribunal arise. (8) The Minors' Tribunal is further competent for preliminary authorisations required for carrying out acts of extraordinary administration regarding the property of vulnerable adults.

30 Since 2021, only the tutelary judge has had jurisdiction over these preliminary authorisations (Articles 320, (5); 374; 376; 394 (3); 397 (1 and 2); 424; 411 (1) CC). However, Law No 206 of 2021 introduced a new court 'for individuals, minors, and families', which will be competent for all family issues and matters relating to children, which currently fall under the jurisdiction of the ordinary court, the minor's court, and the tutelary judges. This court will be established two years after the publication of Lgs D No 149 of 2022, that is on 17 October 2024, but it is possible that more time will be needed.

31 This court will always be composed of a single judge (only appeals require a collegial court), while Minors' Tribunals were composed of four judges (two legally trained and two non-legally trained). There will no longer be any contribution from multidisciplinary experts, even if that was of great significance in family matters. On the other hand, Law No 206 of 2021 states that the 'court for individuals, minors, and families' must be composed of judges specialised in family law.

32 As for judges competent in guardianship matters (*giudice tutelare*), see below paras 173ff.

F. *Main extra-judicial proceedings in family and succession matters (overview)*

33 In family law, the extra-judicial procedures for separation and divorce were outlined by Article 6 (assisted negotiation) and Article 12 (procedure in front of the mayor) of Decree-Law 132 of 2014 (see below para 97ff).

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(8) Claudio Cecchella, 'Le nuove norme sul processo e il tribunale in materia di persone, minorenni, famiglia' [2023] Rivista di diritto civile 1101. The author admits Minors' court competence only if there is a proceeding ex Article 473-bis.39 CPC. and a proceeding for parental responsibility.

Article 6 of Decree-Law No 132 of 2014 applies to: **34**

- Divorce;
- Separation;
- Consensual resolutions concerning maintenance under Article 433 CC; and
- Mutual agreements pertaining to the custody and maintenance of children born to parents not in a marriage or civil union (including both minor children and non-self-sufficient adults).

Article 12 of the same Decree-Law provides the mayor with the competence **35** for consensual separation, divorce and modification of separation or divorce conditions if the spouses do not have minor, incapacitated, or otherwise non-self-sufficient children. As a consequence, parental responsibility arrangements are not included. As minors are not involved, the scope of party autonomy is broader, as the mayor engages in a primarily formal review (according to Article 12 of Decree-Law 132 of 2014, they merely verify the identities of the spouses). Conversely, wherever minors are involved, a more substantial control is required (see Article 6 of DL 132 of 2014) and, therefore, this proceeding is not available.

On the other hand, in cases of gender-based or domestic violence, no **36** extra-judicial procedures can be initiated. Indeed, in this pathological situation, any alternative dispute resolution (like mediation or conciliation, Article 473-bis.43 CPC) is excluded because it is unreliable.

Consequently, the assisted negotiation or proceedings before the mayor are clearly not possible.

In addition to the above-mentioned de-judicialised proceedings, measures to **37** decrease the conflict between the spouses or prevent them from initiating judicial litigation have been implemented in recent years. Parental coordination and family mediation are contemplated in the newly designed Articles 473-bis.43ff CPC, which allow a mediator to assist the parties in seeking an amicable agreement (including the formulation of a proposal for resolution that can be used in both extra-judicial and consensual judicial proceedings). Incentives for these roles can be found in Article 13 of the European Convention on the Exercise of Children's Rights of Strasbourg, 1996 and also in Article 473-bis.10 and Article 472-bis.22 of the Civil Procedure Code, which allows the judge to suspend certain decisions to await the parents' agreement.

G. *Figures on extra-judicial proceedings*

There are several reasons behind the de-judicialisation trend in family **38** matters. A primary role is played by the need to alleviate the courts' huge

workload. (9) Furthermore, extra-judicial procedures are, in some cases, less expensive (paras 39ff.) and faster (paras 43ff.). This is reflected in the increase in divorce figures, following the implementation of Decree-Law No 132 of 2014, with a remarkable 57.5% surge in just one year. (10)

1. *Cost-effectiveness of out-of-court procedures*

39 In terms of cost-effectiveness, the procedure before a mayor (Article 12 of Decree-Law 132 of 2014) is the best solution. To start the procedure, only stamp duty fees (amounting to €16) are to be paid.

40 Assisted negotiation (Article 6 of Decree-Law No 132 of 2014) is definitely more expensive, involving a lawyer for each party. The cost ranges from €500 to €3,000, depending on the number of meetings required to finalise the agreement. Thus, to encourage parties to opt for an assisted negotiation, economic incentive measures, including the expansion of legal aid, should be taken into account. Despite a prior proposal in this regard, the reform has extended the provision of legal aid exclusively for instances of mandatory assisted negotiation (Article 3 (1), Decree-Law No 132 of 2014), (11) excluding assisted negotiation in family matters.

41 In any case, assisted negotiations are less expensive than judicial proceedings, which range from €1,500 to €10,000.

42 Outside the domain of family law (in succession and matters relating to vulnerable adults), extra-judicial solutions may indeed be more expensive: the notary, following a complex preliminary investigation, will charge higher fees than lawyers in comparable authorisation procedures. Nonetheless, this higher cost is offset by significantly shorter processing times.

2. *Timing of out-of-court procedures*

43 In terms of time, extra-judicial procedures outperform the judicial solution.

44 As for the proceedings before the mayor, 'the agreement shall be completed and signed immediately upon receipt of the declarations' (Article 12 of

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(9) Francesca Rinesi, 'La recente evoluzione dei divorzi: uno sguardo ai numeri' [2021] Famiglia e Diritto 140; Filippo Danovi, 'Il P.M. nella procedura di negoziazione assistita. I rapporti con il presidente del tribunale' [2017] Famiglia e Diritto 69.

(10) ISTAT, Marriages, Civil Unions, Separations and Divorces: Year 2023 (National Institute of Statistics 2024).

(11) Eugenio Dolmotto, 'Riforma Cartabia: il nuovo processo civile (ii parte) – la negoziazione assistita nell'ultima riforma della giustizia civile' [2023] Giurisprudenza italiana 736; Luciana Breggia, 'Mediazione e patrocinio a spese dello Stato: la sentenza della Corte costituzionale n. 10 del 2022 nell'evoluzione dei sistemi di gestione dei conflitti' [2022] Questione Giustizia.

Decree-Law 132 of 2014). Then, the parties must re-appear no sooner than thirty days before the mayor to confirm the agreement. All in all, the timeframe remains quite short.

45 As for assisted negotiation, the agreement must be reached within one to three months (with the possibility of a one-month extension). Subsequently, the authorisation or the *nihil obstat* by the public prosecutor is needed. If the authorisation is denied, a further phase in which the parties appear before the president of the tribunal is scheduled.

46 The agreement must be submitted to the public prosecutor within ten days. However, there is no specific deadline for the public prosecutor to transmit the authorisation or *nihil obstat*. Conversely, if the agreement is found not to be in the best interests of the children, there is a five-day deadline within which the agreement has to be forwarded to the President of the Court. Therefore, the same deadline could apply in the first case as well.

47 The President of the Court is then obligated to schedule the parties' appearance within thirty days and must do so promptly.

48 Although several steps are required, the proceeding is faster than the judicial one, also as a consequence of the computerisation of the entire procedure (Article 6 (2-bis) of Decree-Law 132 of 2014).

49 As to the very recently introduced notarial authorisations (Article 21 of Lgs D No 149 of 2022; types are detailed below, paras 214ff), their implementation is still relatively limited and new. Predicting the success of this new measure is quite a difficult task. On the one hand, the notarial authorisation is likely to be quicker and less time-consuming, as it allows a single professional to handle multiple interconnected tasks. Notaries associations ensure that they will be dealt with faster than the corresponding judicial acts. (12) On the other hand, notaries themselves express concerns about the responsibilities they have, (13) particularly during the preliminary phase. Moreover, their duty to authorise often requires collaborations with other professionals, potentially leading to increased costs and time for these authorisations.

50 In the realm of family law, more data are available. Despite the potential benefits and the initial enthusiasm, extra-judicial procedures have never been able to compete with procedures before judicial authorities in terms of attractiveness (14).

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(12) Antonio Marrese, 'L'autorizzazione notarile di volontaria giurisdizione riflessioni sull'art. 21 del d. lgs 10 ottobre 2022 n. 149' (Conference, Florence, 24 March 2023).

(13) Ibidem.

(14) ISTAT, Marriages, Civil Unions, Separations and Divorces. Year 2023 (National Institute of Statistics 2024).

51 While judicial divorces and separations are more frequent, there are more procedures in front of a mayor than instances of assisted negotiation. This underscores the substantial attractiveness of that administrative proceeding and, at the same time, highlights some disadvantages of assisted negotiation. These are as follows.

52 Firstly, the assisted negotiation proceeding provides no strict time limit for the public prosecutor to provide a response. A further delay can take place if the President of the Tribunal is involved.

53 Secondly, the number of duties lawyers are burdened with is a disincentivising factor, given the risk of civil and disciplinary liability (15) in the case of errors.

54 Thirdly, assisted negotiation does not allow for an in-depth examination of arrangements concerning children and 'weaker' spouses. In fact, the public prosecutor lacks the expertise for such an examination of matters relating to children, where they act as a mere intermediary between the spouses and the President of the Court. As to maintenance between spouses, the public prosecutor does not seem to be equipped with the information concerning the economic situations of the spouses to conduct a substantive review of their agreement. For these reasons, some authors criticise this provision, arguing that the public prosecutor is not competent, heavily burdened with a huge workload, and, therefore, addressing the President of the Court would have been a more suitable solution. (16)

II. Family law

A. *Family law as a source of status. Marriage, same-sex partnerships, factual cohabitation*

55 Family law is a source of personal status, which is recorded in public registries.

56 The status of a spouse is a legal effect of marriage. The latter can be concluded in front of the mayor or their representative (Articles 79 ff) or, alternatively, religious celebrations are allowed. Because of an agreement between Italy and the Vatican State, the concordat marriage allows the

(15) Stefano Ciambotti, 'I profili deontologici dell'attività dell'avvocato nella negoziazione assistita familiare' [2017] Rivista AIAF 26; Alessandro Simeone, 'I procedimenti su accordo di parte' in Rosaria Giordano and Alessandro Simeone (eds), La riforma del diritto di famiglia: il nuovo processo (Giuffré 2023) 299.

(16) Giovanni Bonilini, *Trattato di diritto di famiglia* (UTET 2022) 13.

catholic priest to celebrate the marriage having civil effects, if registered. (17) On the basis of agreements with representatives of non-Catholic religions, the corresponding ministers are allowed to celebrate marriages (Article 8 of the Constitution).

57 The status of spouse is dissolved as a consequence of the divorce, the annulment of the marriage (see below paras 65ff) or death.

58 Marriage was the only recognised partnership until Law No 76 of 2016 (see above). The main differences between marriage and civil unions are as follows:

a) No requirement of fidelity is stated in civil unions (as in Article 143 CC for married couples).
b) Same-sex couples do not have access to adoption or assisted reproduction. Furthermore, unlike marriage, where children are considered the offspring of both parents, children born during a civil union are only recognised as children of the biological parent.
c) A separation is not possible for civil unions, which is a prerequisite for most divorces in marital relationships. Conversely, in the case of civil unions, there is a mandatory three-month reflection period following the initial declaration (addressed to the public authority and officially recorded on the certificate), and preceding the dissolution request. This system enforces a compulsory contemplative phase.

Some critical points remain unclear, particularly whether the three-month period results in any partial suspension of the effects of the civil union's formation. (18)

59 In addition, Law No 76 of 2016 regulates factual relationships between two adults who cohabit and share mutual, moral and material support.

Conversely, if the parties opt for drafting an agreement, this must be done in writing. It can be a public deed drawn up by a notary, or a private document drafted with the assistance of a lawyer and authenticated by a notary or a lawyer. Furthermore, both the notary and the lawyer are required to certify

(17) The term 'Concordat marriage' (Article 82 CC) derives its name from its introduction into the Italian legal system following the signing of the Concordat between the Italian State and the Holy See in 1929. Prior to this agreement, Catholic citizens were required to undergo two marriage ceremonies: one before the civil registrar, having purely civil implications, and the other before a religious minister, which held sacramental significance.

(18) Ilaria Speziale, 'Lo scioglimento dell'unione civile nel confronto con la crisi del matrimonio' [2021] Corriere Giuridico 1359; Alberto Figone, 'Divorzio e scioglimento dell'unione civile' [2021] Famiglia e Diritto 67; Giovanni De Cristofaro, 'Le "unioni civili" fra coppie del medesimo sesso. Note critiche sulla disciplina contenuta nei commi 1°–34° dell'art. 1 della l. 20 maggio 2016, n. 76, integrata dal d.lgs. 19 gennaio 2017, n. 5' [2017] Nuove Leggi Civ Comm 101.

that the contract complies with mandatory legal provisions. The professional must then submit a copy of the contract to the municipality where the parties reside for registration.

In particular, paras 36 of Article 1 Law no 76 of 2016 provide for certain rights to which a cohabitant is entitled, regardless of whether the cohabitation is registered or whether the parties have concluded a written agreement (eg, the right to stay in the family home after the other cohabitant's death, to be admitted in hospital, to be awarded damages in case of death, etc).

60 The parties are free to terminate their relationship without any formality. A maintenance obligation may arise if one of the parties is in a state of need. Any disputes will be resolved before the judicial authority, as no form of de-judicialisation is allowed.

61 As to the filiation status, see the following paras 131ff; 154ff; 167ff.

B. *Divorce, legal separation, nullity of marriage*

62 In Italian law, both separation and divorce are allowed.

63 Originally, only a fault-based separation was permitted (Articles 150ff CC) in case the spouses did not reach a consensual agreement. Proof of the violation of specific marital duties was required (Articles 151, 152, and 153 CC).

64 Law No 151 of 1975, in abolishing fault as a requirement for judicial separation, allowed spouses applying for separation to merely allege that the cohabitation had become intolerable or caused serious harm to the upbringing of their children. Nevertheless, slight relevance to the violation of marital duties is still given, as, according to Article 156 CC, the spouse who is responsible for a breach leading to the matrimonial crisis loses their right to maintenance and, according to Article 548 CC, their succession rights.

65 Legal separation, as a consequence of a contentious or consensual judicial proceeding or an extra-judicial proceeding, suspends all spousal duties, allowing the parties to live apart. However, each spouse retains their succession rights, unless the separation is due to their misconduct (see above). Furthermore, a maintenance right may be given to the spouse with a lower earning capacity.

66 Spouses who have been legally separated for at least six months or one year have a right to apply for divorce.

67 This was introduced by Law No 898 of 1970 and withstood the abrogative referendum of 1974. Like separation, divorce is not based on the violation of spousal duties, being rather grounded on objective reasons listed under Article 3 Law 898 of 1970 (including legal separation). Only if one of these grounds exists is the dissolution of the 'spiritual and material communion between the spouses' verified and the marriage is dissolved.

A further way to extinguish the marital status is its declaration of nullity or its annulment. In particular, the marriage is void if one of its mandatory requirements is not met: for example, if one of the spouses is a minor (Articles 84 and 117 CC); if one of the spouses is already married or in a civil union (Articles 86 and 117 CC). Annulment depends on the natural incapacity or interdiction of one of the spouses at the time of the wedding (Article 120 CC); violence or error (Article 122 CC); or due to 'simulation', as when one gets married to enable a foreign spouse to obtain Italian citizenship (Article 123 CC). **68**

The invalidity proceedings still have a predominantly inquisitorial nature, as the judge checks the grounds of nullity mostly irrespective of the parties' will, with the exceptions of vices of consent (ie error, fraud, moral violence of one party conditioning the will of the other party), which are brought in front of a tribunal by the spouse whose will was vitiated. **69**

Since the parties' agreement and will are generally irrelevant in such matters, the Court of Cassation has admitted the possibility of patrimonial agreements between spouses concerning the potential future annulment of their marriage since the 1990s, [19] as such agreements are held to be irrelevant to the annulment decision. **70**

1. *Judicial proceedings*

Judicial proceedings can be contentious or consensual: **71**

- Contentious judicial separation (Articles 150–157 CC; Articles 473-bis.47-50 CPC);
- contentious judicial divorce (Law 898 of 1970; Articles 473-bis.47–50 CPC); and
- contentious judicial dissolution of a civil union (Article 1, paragraphs 22ff, Law 76 of 2016).
- Consensual judicial separation (Article 158 CC; Article 473-bis.51 CPC);
- consensual judicial divorce (Law 898 of 1970; Articles 473-bis.47–51 CPC); and
- consensual dissolution of a civil union (Article 1 (25) of Law 76 of 2016).

Before Lgs D No 149 of 2022, the judicial proceedings differed in terms of procedures and type of decision. **72**

- Contentious legal proceedings and consensual divorces or dissolutions of civil unions were concluded with a constitutive judgment.
- Consensual separations followed the voluntary jurisdiction procedure and were concluded with a decree that lacked *res judicata* capacity.

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[19] Cassazione civile n 348/1993; Domenico Giovanni Ruggiero, Gli accordi prematrimoniali (ESI 2005) 187–190.

73 One of the objectives of the recent reform (Law No 206 of 2021 and Lgs D No 149 of 2022) was to unify the two procedures.

74 While at the beginning of the debate for the reform, the prevalent idea was to unify separation and divorce, by using the consensual separation proceeding, the legislator eventually opted for the pattern of a consensual divorce, which ends with a constitutive decision. [20] The reason why a divorce proceeding was chosen as that applicable to both was that its decision can have a constitutive effect (Cass No 21425 of 2022), whereas the decree is not subject to appeal and does not become a *res judicata*.

75 Despite the intention to create a unified procedure, the process differs slightly depending on whether it is contentious or consensual. Furthermore, the nature of the final decision (constitutive or declaratory) varies in the two cases.

a) *Contentious proceedings for separation and divorce*

76 The hearing in front of the court must be scheduled within 90 days from the petition (Article 473-bis.14 CPC).

77 Minor children (who are over the age of 12 or otherwise mature) will always be heard by the judge. Article 473-bis.4 CPC states:
The judge does not proceed with the hearing if it is contrary to the child's best interests or unnecessary, in cases of physical or psychological impossibility of the child, or if the child expresses the wish not to be heard.

78 Additionally, parents are required to describe the daily activities involving the minors to enable the judge to make decisions regarding custody.

79 Regarding the financial aspects between the spouses, the requests must be accompanied by certain financial information, including income declarations, documentation of property ownership, shares in companies, bank account statements, and financial records for the past three years.

80 The judge can issue temporary and urgent measures if necessary (Article 473-bis.22 and Article 473-bis.50).

81 The conclusive judgment is constitutive, as it changes the status.

82 The judgment is capable of becoming a *res judicata*. However, the *rebus sic stantibus* principle applies at the same time, as it can be modified in cases of unforeseen circumstances or justified reasons, such as in the case of a violation of mandatory rules (Article 473-bis.29 CPC). [21]

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[20] Some authors have criticised the solution: Claudio Cecchella, 'Le nuove norme sul processo e il tribunale in materia di persone, minorenni, famiglia' [2023] Rivista di diritto civile 1090.

[21] Cassazione civile n 22423/2023; n 6889/2023.

b) *Consensual judicial proceedings for separation and divorce*

When the procedure is consensual, the parties can appear before the judge with an agreement regarding their financial matters and a parenting plan for the custody of their children. **83**

In these cases, the children do not necessarily have to be heard, but only if the judge deems it necessary (Article 473-bis.4 (3) CPC). [22] **84**

The judge verifies that the plan is in the best interests of the child. If it is not, the judge proposes the necessary changes to the parties. If these adjustments are not made, the judge rejects the request.

The judge also ensures that the patrimonial agreements do not violate mandatory legal provisions, which include the protection of the economically weaker party (Cass No 16379 of 2014 and Cass No 5065 of 2021). If the agreements do not comply, the judge rejects the request (while, before Lgs D No 149 of 2022, the consensual proceeding turns into a contentious one).

If the agreements on both the children and financial matters pass the judge's scrutiny, the process ends with a (collegial) judgment.

It is constitutive for the modification of the legal status and declaratory in the part where it approves the agreements reached between the parties (Cass No 21761 of 2021). [23] **85**

This means that the patrimonial effects and those related to the custody of the children are directly generated by the agreement, not by the judge's decision. Consequently, contractual remedies can be used. **86**

However, the Civil Procedure Code allows the parties to appeal the judgment (Article 473-bis.30 CPC) and also provides that, in cases of supervening circumstances, the judgment can be modified (Article 473-bis.29 CPC). This can raise some issues, for example, (1) which proceeding should be used in each situation; (2) whether contractual remedies against the agreement apply, given that the judgment is a *res judicata*. [24] **87**

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[22] Doubts were expressed by Giovanni De Cristofaro, 'Le modificazioni apportate al codice civile dal decreto legislativo attuativo della "Legge Cartabia" (D.lgs. 10 ottobre 2022, n. 149). Profili problematici delle novità introdotte nella disciplina delle relazioni familiari' [2022] Nuove Leggi Civ Comm 1407.

[23] Ilaria Pagni, 'Vizi del consenso e annullabilità della separazione consensuale omologata: lo sfuggente rapporto tra autonomia negoziale e controllo giudiziale' [2022] Nuove Leggi Civ Comm 1407; Giovanni De Cristofaro, 'Le modificazioni apportate al codice civile dal decreto legislativo attuativo della "Legge Cartabia" (D.lgs. 10 ottobre 2022, n. 149). Profili problematici delle novità introdotte nella disciplina delle relazioni familiari' [2022] Nuove Leggi Civ Comm 1407; Geremia Casaburi, 'Separazione consensuale dei coniugi ed accordi patrimoniali atipici tra i coniugi: ammissibilità ed impugnazione' [2008] Famiglia e Diritto 446.

[24] Cassazione civile n 22700/2021; n 25861/2014.

88 When the agreement involves the transfer of real estate, in both contentious and consensual proceedings, the court's minutes are considered to be public deeds and they serve as a valid instrument for registration in the public real estate records (Cass No 21761 of 2021).

c) *Joint application for separation and divorce*

89 Furthermore, Lgs D No 149 of 2022 introduced the possibility of filing a joint application for separation and divorce. The divorce may be pronounced after six months and once the decision on separation has become a *res judicata*. ([25])

90 When the parties jointly and simultaneously file for separation and divorce, they present a comprehensive agreement to the judge. This agreement includes provisions that are valid for the period of separation, but also provisions for (the future) divorce.

91 Thus, even if the Court of Cassation for a long time denied the validity of any agreement in contemplation of divorce (Cass No 15064 of 2003; Cass No 5302 of 2006; Cass No 2224 of 2017), it has finally allowed such agreements on the basis of three different reasons (Cass No 28727 of 2023) ([26]): a) The provisions do not affect the legal status, since these are altered by the judge through a constitutive judgment; b) In any case, legal status modifications by negotiating autonomy are possible, as extra-judicial forms of separation and divorce are permitted; c) Provisions related to children and patrimonial matters are subject to judicial scrutiny, ensuring compliance with i) the best interests of the children and ii) mandatory legal provisions. Mandatory legal provisions also include the guarantee of non-waivable protection of the economically weaker party (Cass, ruling No 16379 of 2014 and Supreme Court, ruling No 5065 of 2021).

2. *Extra-judicial proceedings*

92 The extra-judicial procedures for separation and divorce include negotiated agreements (Article 6 of Lgs D No 132 of 2014) and agreements in front of a mayor (Article 12 of Lgs D No 132 of 2014).

93 To access these procedures, two conditions need to be met: 1) a mutual agreement regarding the terms of separation or divorce; 2) a shared willing-

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([25]) Mauro Paladini, 'Il cumulo delle domande di separazione e divorzio' in Claudio Cecchella (ed), *La riforma del processo e del giudice per le persone, per i minorenni e per la famiglia* (Giappichelli 2021) 75.

([26]) Criticised by Claudio Cecchella, 'Le nuove norme sul processo e il tribunale in materia di persone, minorenni, famiglia' [2023] Rivista di diritto civile 1090.

ness to opt for an extra-judicial proceeding (agreement may also be reached after one party invites the other).

a) *Requirements, procedure and competence in assisted negotiation*

Assisted negotiation is a procedure available for consensual separation or consensual divorce (only divorces following separation, among those listed in Article 3 of Law No 898 of 1970) and for the consensual dissolution of a civil union. **94**

Access to this procedure can result from an initial agreement or the invitation of one party. **95**

An agreement is established, in which the parties commit to engage in negotiations. They are facilitated by one lawyer for each party. **96**

This initial agreement has specific requirements: **97**

- It must be in writing (it is not necessary to follow the model of the Consiglio Nazionale Forense, the National Bar Association (27)).
- It must specify a time frame for the conclusion of the final agreement on separation, divorce or dissolution: this period should be no less than one month (although an agreement reached earlier is considered valid) and no more than three months, with the possibility of extending it by one more month.

At this stage, there is no provision for the hearing of a child. Additionally, the lawyers presiding over the negotiation are not public officials and thus it is not possible to ensure the procedures outlined in Article 473-bis.5 CPC for the hearing of children. However, it is presumed that the child has been heard by the parents, either before or during the negotiation, as a result of their parental responsibility. **98**

Once the final agreement is reached and written, it must be signed by the parties and their lawyers. **99**

The final agreement should contain financial and child custody arrangements. Moreover, the final agreement should recognise the effort of the lawyers to reconcile the parties and must include information about: 1) the availability of mediation and 2) the importance of children spending sufficient time with both parents.

Lawyers verify its compliance with mandatory rules and public order. (28) **100**

(27) See <https://www.consiglionazionaleforense.it/modulistica-negoziazione-assistita> (accessed 15 January 2025).

(28) Elena Bargelli, 'L'accordo dei coniugi nella negoziazione assistita e nel procedimento municipale: il divorzio per mutuo dissenso fa il suo ingresso nell'ordinamento' in Paolo Zatti (ed), *Trattato Diritto di famiglia. Le riforme* (Giuffrè 2018) 273.

Moreover, they have to check the fairness of the maintenance if it is a lump sum, but not if it is paid on a monthly basis.

101 This additional control was introduced by Lgs D No 149 of 2022. Previously, the verification was carried out only by the public prosecutor. This change has increased the level of control, with a notable increase in the involved lawyers' accountability.

102 In performing this role, lawyers may also use new forms of extra-judicial investigation. This includes the hearing of third parties (Article 4-bis of Law Decree 132 of 2014) ([29]) and confessions by the spouses (in written form, and, therefore, without cross-examination: Article 4-ter). ([30])

103 The agreement is then transmitted electronically to the public prosecutor at the competent court. The competence lies with the court that would have had jurisdiction if the spouses had chosen one of the judicial procedures, following the rules outlined in Articles 473-bis.47 and 473-bis.11 CPC.

104 The public prosecutor examines the agreement: the extent of its control depends on whether minor or handicapped children are involved.

a) If there are no minor or handicapped children, the public prosecutor checks the formal correctness of the agreement and eventually issue a *nihil obstat*. It is controversial whether the public prosecutor is required to ensure that the agreement complies with public order or mandatory rules. ([31]) The most convincing answer is in the affirmative, so that the scrutiny could be thorough and, therefore, the public prosecutor, as a third and impartial authority, could verify whether the agreement complies with mandatory legal provisions. ([32])

([29]) See Alessandro Simeone, 'I procedimenti su accordo di parte' in Rosaria Giordano and Alessandro Simeone (eds), *La riforma del diritto di famiglia: il nuovo processo* (Giuffrè 2023) 290–291.

([30]) Alessandro Simeone, 'I procedimenti su accordo di parte' in Rosaria Giordano and Alessandro Simeone (eds), *La riforma del diritto di famiglia: il nuovo processo* (Giuffrè 2023) 291, emphasises that this mechanism is likely to see limited use: in family law, confessions, whether extra-judicial or judicial, are often not admissible. Statements, at most, can be considered as indications.

([31]) Massimo Crescenzi, 'La degiurisdizionalizzazione nei procedimenti di famiglia' [2015] Questione Giustizia; Elena Bargelli, 'L'accordo dei coniugi nella negoziazione assistita e nel procedimento municipale: il divorzio per mutuo dissenso fa il suo ingresso nell'ordinamento' in Paolo Zatti (ed), *Trattato Diritto di famiglia. Le riforme* (Giuffrè 2018) 269; Mario Pio Calogero, 'Negoziaziazione assistita familiare: poteri del procuratore della repubblica e del presidente del Tribunale' [2018] Giurisprudenza Italiana 2108; Elena D'Alessandro, 'Fuori dal processo: trasferimento in arbitrato, negoziazione assistita e accordi sul matrimonio – la negoziazione assistita in materia di separazione e divorzio' [2015] Giurisprudenza Italiana 1257.

([32]) Elena Bargelli, 'L'accordo dei coniugi nella negoziazione assistita e nel procedimento municipale: il divorzio per mutuo dissenso fa il suo ingresso nell'ordinamento' in Paolo

There is no deadline for the public prosecutor to make a decision. Therefore, legal scholarship suggests applying the ordinary five-day time limit valid for transmitting the agreement to the President of the Court when children are involved (see below para 110). (33)

b) If there are minor children, the investigation is more thorough. In this case, the public prosecutor not only checks if the agreement complies with mandatory rules, but also verifies if the parental plan is in the best interests of the child.

Although some scholars argue that the public prosecutor lacks the resources for a substantive review, (34) the investigation may suffice and conclude with an authorisation if the parental plan is deemed to be in the child's best interests.

However, if the public prosecutor holds that the agreement is not in the child's best interests or that a hearing of the child is necessary, they forward the case to the President of the Court within five days.

Although the hearing of the child is a fundamental right and one of the key issues of the cross-border circulation of the agreement under EU Regulation No 1111/2019, it takes place only if i) the public prosecutor deems it appropriate, ii) and, without any justification, forwards the request to the President of the Court, iii) and, eventually, the President of the Court does not consider it contrary to the child's best interests.

105 If the President of the Court is involved, a proceeding for assessing the agreement starts. This procedure may lead to a decree of authorisation (potentially following suggested amendments) or not. In the latter scenario, the spouses have several options: they can choose to resubmit another agreement or pursue judicial consensual/contentious proceedings. (35)

106 If the agreement receives either a *nihil obstat* or an authorisation, the public prosecutor sends it to the lawyers. Within ten days, the lawyers should transmit it to the civil registrar's office of the town where the marriage was registered. This step is essential for it to take erga omnes effects. The

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Zatti (ed), *Trattato Diritto di famiglia. Le riforme* (Giuffrè 2018) 276; Mario Calogero, 'Negoziazione assistita familiare' in *Enciclopedia del diritto* (Giuffrè 2022) 930.

(33) Carlo Vittorio Giabardo, 'La "negoziazione assistita" e gli "accordi" coniugali nella gestione della crisi della famiglia' in Chiara Besso and others (eds), *Trasformazioni e riforme del processo civile. Dalla l. 69/2009 al d.d.l. delega 10 febbraio 2015* (Zanichelli 2015) 112; Procura della Repubblica presso il Tribunale di Roma, 'Protocol n 3164/222: Negoziazione assistita in materia di separazione e divorzio'.

(34) Giovanni Bonilini, 'La separazione personale tra coniugi' in Giovanni Bonilini (ed), *Trattato di diritto di famiglia* (UTET 2022) 13.

(35) Francesco Paolo Luiso, 'Le disposizioni in materia di separazione e divorzio' in Francesco Paolo Luiso (ed), *Processo civile efficiente e riduzione arretrato* (Giappichelli 2014) 33.

agreement is also conveyed to the Bar Association Council, which assumes responsibility for the safekeeping of the document as evidence.

b) *Requirements, procedure and competence in the proceeding before the mayor*

107 According to Article 12, Decree-Law 132 of 2014, the mayor of the town in which one of the parties resides or where the marriage certificate is registered can be involved in extra-judicial proceedings (Article 1 of Presidential Decree No 396 of 3 November 2000).

108 Access to this procedure is not granted in cases involving minors or otherwise non-self-sufficient children. The reason is that no judicial authority is involved and the mayor does not perform any substantial control. Furthermore, for the same reason, the agreement submitted to the mayor must not contain any provisions pertaining to the transfer of assets or a lump-sum maintenance (the agreement may also include monthly maintenance payments).

109 The mayor's role is limited to assessing the presence of all formal requirements and to hearing the will of the parties: moreover, in Italy, a mayor is responsible for the registration of civil status events (Article 54, Legislative Decree of 18 August 2000, No 267). The assistance of a lawyer is a mere option. The mayor's examination is confined to verifying the spouses' identities and the presence of the prerequisites for separation or divorce in accordance with Article 12, Decree-Law 132 of 2014.

110 Notwithstanding the lack of any competence to perform a substantial control of the agreement, the CJEU judgment of 15 November 2022 (C–646/20) defined the Italian mayor as a court for the purposes of the Brussels IIa Regulation ([36]). This decision underlined that, 'the registrar [...] examine[s] the content of the divorce agreement in the light of the legal provisions in force', and, therefore, concluded that 'a divorce decree drawn up by a civil registrar of the Member State of origin [...] constitutes a "judgment" within the meaning of Article 2(4)' of the Brussels IIa Regulation. ([37])

111 After the deed containing the agreement is drafted, it is signed. After 30 days, the spouses must appear again before the mayor for the confirmation of the agreement. The deed is then recorded in the civil registry.

([36]) The judgment has been criticised: see Elena D'Alessandro, 'Divorzio davanti all'ufficiale di stato civile – Il divorzio "all'italiana" supera il vaglio della Corte di giustizia' [2023] Giurisprudenza italiana 321; Elena Bargelli, 'La circolazione del divorzio degiurisdizionalizzato in Europa. Il problema del confine fra "decisione" e "atto negoziale"' [2023] Rivista di diritto civile 143.

([37]) In the same sense, Stefano Armellini et al, *La famiglia nel diritto internazionale* (Giuffrè 2019) 164.

c) *Maintenance dispositions and transfers of assets in extra-judicial proceedings*

In both extra-judicial proceedings, (38) no real estate transfers are allowed. **112**
However, agreements encompassing obligations to transfer immovables are **113**
allowed in an assisted negotiation. (39)

In the proceeding before a mayor, the question arises as to whether the **114**
agreement may contain maintenance obligations, as Article 12 excludes only clauses related to the transfer of assets. While a first ministerial directive (no 19/14) had excluded any clause disposing on financial issues, a subsequent one (no 6/15) (40) restricted the prohibition to real estate and lump-sum agreements. This interpretation has also been endorsed by the Council of State, the Supreme Administrative Court (*Consiglio di Stato*, 26 October 2016, no 4478). (41)

Conversely, assisted agreements in accordance with Article 6 can contain **115**
lump-sum contributions. In this way, the conditions between spouses are definitively established, (42) rendering any economic claims against each other untenable, even in the event of a substantial and/or drastic change in financial circumstances. Furthermore, rights to survivors' pensions, severance pay, and inheritance allowances are forfeited. (43) For this reason, in assisted negotiation procedures, a fairness control is required by lawyers and by the public prosecutor.

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(38) For assisted negotiation, this limit was introduced by Lgs D No 149 of 2022.

(39) A different interpretation is presented only by Alessandro Simeone, 'I procedimenti su accordo di parte' in Rosaria Giordano and Alessandro Simeone (eds), *La riforma del diritto di famiglia: il nuovo processo* (Giuffrè 2023) 296–297.

(40) <https://dait.interno.gov.it/documenti/circ-006-servdemo-24-04-2015.pdf> accessed 15 January 2025.

(41) Supportive of this view in legal doctrine: Michele Angello Lupoi, 'Separation and divorce' [2016] Rivista Trimestrale di Diritto e Procedura Civile 286; Elena Bargelli, 'La circolazione del divorzio degiurisdizionalizzato in Europa. Il problema del confine tra "decisione" e "atto negoziale"' [2023] Rivista di Diritto Civile 143.

(42) For this reason, in the past, some scholars considered these agreements to be amendable (Claudia Irti, 'L'accordo di corresponsione una tantum nelle procedure stragiudiziali di separazione e divorzio: spunti di riflessione sulla gestione patrimoniale della crisi coniugale tra autonomia delle parti e controllo del giudice' [2017] Nuove leggi civili commentate 812), while others excluded such a possibility due to the absence of judicial scrutiny (Michele Sesta, 'Negoziazione assistita e obblighi di mantenimento nelle coppie in crisi' [2015] Famiglia e diritto 295; Ferruccio Tommaseo, 'Separazione e divorzio: aspetti procedurali e de-giurisdizionalizzazione alla luce delle recenti riforme' [2015] Corriere giuridico 1142).

(43) Cassazione civile n 22434 /2018.

d) *Effects and remedies of de-judicialised agreements of separation and divorce*

116 In both extra-judicial proceedings, the agreement has the effects of a decision of a tribunal. More specifically, all legal consequences arising from the alteration of marital status, including those related to surnames (refer to paras 286ff) and marital property are the same.

117 The financial effects and those related to child custody also arise from the agreement. The authorisation granted by the public prosecutor (or the decree issued by the President of the Court) and the confirmation of consent before the mayor have purely declaratory value.

118 As a consequence, contractual remedies and legal concepts, such as 'simulation', (44) annulment due to vitiating factors (45) or because of the incapacity of parties, are applicable. It is noteworthy that the source of the effects is the same as in consensual judicial procedures, where patrimonial dispositions and those concerning maintenance and custody of children are considered to be the effects of the agreement of the spouses and not of the court's decision (refer to paras 86ff).

119 Regarding the timing at which the agreement takes effect, in proceedings before a mayor, the effects occur from the moment the agreement is signed. In assisted negotiations, Article 6, (3), DL No 132 of 2014 states that: 'The agreement reached following the agreement produces its effects and takes the place of judicial measures.' However, some legal scholars argue that effects only follow the authorisation of the public prosecutor or the President of the Court. (46)

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(44) Cassazione civile n 16909/2015; n 21839/2019 admitted actions of simulation in approved consensual separation agreements, particularly those involving real estate transfers between the parties. Nonetheless, the potential 'simulatory' nature of these separation minutes, according to Article 1415 CC, cannot be raised against third parties.

(45) Cassazione civile n 15169/2022; n 24621/2015; n 18066/2014; n 19304/2013. Francesco Alcaro, 'Realtà dell'apparenza nella simulazione (Nota a Cass 17607/2003)' [2004] Vita notarile 156; Carlo Basini, 'L'annullabilità della separazione consensuale omologata per vizi del consenso (Nota a Cass 17902/2004)' [2005] Familia 382; Virginia Busi, 'Il ruolo dell'accordo nella separazione consensuale e la ammissibilità della simulazione: il nuovo orientamento della cassazione (Nota a Cass, sez I, 20 novembre 2003, n 17607)' [2005] Nuova giurisprudenza civile 347; Ilaria Pagni, 'Vizi del consenso e annullabilità della separazione consensuale omologata: lo sfuggente rapporto tra autonomia negoziale e controllo giudiziale (Nota a Cass 17902/2004)' [2005] Nuova giurisprudenza civile 511; Giacomo Oberto, 'Simulazione della separazione consensuale: la cassazione cambia parere (ma non lo vuole ammettere) (Nota a Cass 17607/2003)' [2004] Corriere giuridico 309.

(46) Michele Sesta, 'Negoziazione assistita e obblighi di mantenimento nella crisi della coppia' [2015] Famiglia e diritto 295; Elena D'Alessandro, 'Divorzio davanti all'ufficiale di

e) *Interaction with other procedures*

Agreements in extra-judicial procedures adhere to the rules of private international law governing the circulation of public acts (ie, Regulation EC No 2201/2003, as replaced by Regulation EU No 2019/1111; Regulation EC No 1347/2000). **120**

These Regulations contain rules to solve conflicts between two proceedings issued in distinct States. For instance, Article 68(1) of EU Regulation No 1111/2019 allows the refusal of recognition if the act is incompatible with a prior decision or agreement involving the same parties in the Member State where recognition is invoked or issued in another Member State or in a third country. **121**

Before the agreement is reached and produces effects, there is no specific procedure for *lis pendens* matters. Nevertheless, such scenarios are relatively marginal, as extra-judicial proceedings can only be initiated jointly. (47) **122**

In particular, it seems unlikely for both parties to initiate the procedure for reaching an agreement through assisted negotiation while simultaneously pursuing other proceedings. It is even more challenging to use the procedure under Article 12 of Decree Law 132 of 2014 concurrently with other proceedings, given that the parties must present an already finalised agreement to the mayor. **123**

In cases where the initial agreement for assisted negotiation or the submission of the agreement before the mayor follows the initiation of the judicial proceeding, the judicial remedy prevails, in accordance with the general principle of temporal priority. Otherwise, the extra-judicial procedure takes precedence. **124**

C. *Parenthood*

The Italian legal system does not recognise forms of parenthood other than motherhood and fatherhood. The Civil Code only refers to 'mother' and 'father' and does not even consider the possibility of the child having two parents of the same sex. **125**

Furthermore, L No 76 of 2016 does not extend the provisions on filiation to same-sex couples. Law No 40 of 2004 on artificial procreation applies only **126**

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stato civile – Il divorzio "all'italiana" supera il vaglio della Corte di Giustizia' [2023] Giurisprudenza italiana 321.

(47) Elena D'Alessandro, 'Divorzio davanti all'ufficiale di stato civile – Il divorzio "all'italiana" supera il vaglio della Corte di giustizia' [2023] Giurisprudenza Italiana 321.

to heterosexual married and unmarried couples. (48) As a consequence, the recognition of birth certificates indicating same-sex parents is confined to birth certificates issued abroad and meets limitations if they are contrary to the international public order. This happens, in particular, in the case of children born out of surrogacy, whose birth certificate is recognised as far as the biological parents are concerned, whereas the non-biological parents are allowed to establish parenthood through simple adoption. (49)

127 The establishment of biological filiation does not usually involve courts either in cases of married or non-married parents, if the latter spontaneously recognise the child.

128 Conversely, a judgment of the Tribunal is needed for non-marital filiation in the absence of the recognition (see below para 143). A judgment of the Minors' Tribunal is also required to establish the status of adopted child (see below paras 154ff).

129 Biological filiation is regulated by the Civil Code, which was changed by two main reforms. First, the broader family law of 1975 abolished illegitimate filiation (a term which previously indicated children born to unmarried couples, when one of the parents was married to someone else) and almost all differences between children born to married and unmarried couples. The more recent 2012 reform (50) eliminated any further differences, while retaining differences for the establishment of filiation. (51)

130 Three ways of establishing filiation are contemplated by the Civil Code:

131 a) For children of married parents, the filiation arises *ex lege*. However, different rules apply to mothers and fathers. The former are subject to the *mater semper certa e*st principle. However, the automatic attribution of maternity to the woman who gave birth to the child is excluded by the

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(48) Moreover, two important decisions of the Constitutional Court have provided relevant exceptions to the prohibition on heterologous fertilisation: Constitutional Court, Judgments n 162 of 2014, by virtue of which heterologous fertilisation is allowed for couples who are absolutely sterile; Constitutional Court, Judgments n 96/2015, which allows fertile couples who are carriers of transmissible genetic diseases to have access to heterologous fertilisation.

(49) With regard to the compatibility of surrogacy with international public policy, see Cassazione civile n 12193/2019 and Cassazione civile n 38162/2022: these judgments affirm the impossibility of transcribing the birth certificate formed abroad – when surrogacy has been used – with reference to the non-biological parent. On the other hand, in the case of heterologous fertilisation performed abroad, the same Court of Cassation sees no obstacle to the recognition of a birth certificate issued in a foreign State with regard also to the non-biological parent.

(50) Legge n° 219 del 10 dicembre 2012.

(51) See Gilda Ferrando, 'Il matrimonio' in *Trattato di diritto civile e commerciale Cicu-Messineo* (Giuffrè 2015) 135; Piero Schlesinger, 'Il D. Lgs. N. 154 del 2013 completa la riforma della filiazione' [2014] Famiglia e diritto 443.

exercise of her right not to be named in the birth certificate (Article 30, PD No 396 of 2000). If the mother avails herself of this option, the mechanism of the presumptions laid down in Articles 231 and 232 CC will obviously also cease to apply and the father will only be able to recognise the child as if they had been born out of wedlock (see below, para 138). Conversely, her husband becomes a parent of the child born during the marriage through a system of legal presumptions (Articles 231 and 232 CC) and this may be challenged only through judicial actions (see below para 144).

b) For children born out of wedlock, the establishment of filiation requires an extra-judicial act of recognition (Article 250 CC). This is a unilateral voluntary act requiring a written form and, specifically, a declaration in front of a registrar, or a public deed, or a will; the required minimum age is 16. The validity of the act may be challenged by specific judicial actions if certain grounds are met (see below para 147). If one parent wishes to recognise the child after the other parent, the latter's consent is needed if the child is under 14. **132**

However, the parent's refusal may be challenged by the other parent in front of the ordinary tribunal (Article 250 CC). After hearing the child – if over 12 years old or capable of discernment – the judge may decide that the first parent's refusal is contrary to the minor's interest and issue a constitutive judgment taking the place of their consent. This judgment may be appealed to the competent court of appeal. **133**

Conversely, the child's consent is needed for the recognition to take effect if they are over 14 years old. Their refusal cannot be challenged by the parent wishing to recognise them. **134**

c) As far as children who have been born as a result of incest are concerned, the recognition by any parent (whether in good or in bad faith) has been permitted since 2012, but is not enough to establish the status filiationis, the authorisation by the Minors' Tribunal being another mandatory requirement (Article 251 CC). Before 2012, the recognition of children who have been born as a result of incest was allowed only to parents in good faith, ie, ignoring their biological relationship with the other parent. **135**

Alternatively, a number of judicial actions have led to the establishment of filiation under certain conditions. **136**

a) An action to claim the child's status (*azione di reclamo dello stato di figlio*) ([52]) may be brought in front of the ordinary tribunal only by the child and it is imprescriptible. Pursuant to Article 239 (1) CC, it must be **137**

([52]) On the claim action, see Giovanni Cattaneo, 'Filiazione legittima' in *Commentario al Codice Civile* (Zanichelli 1988) 154ff.

filed after the action to contest the child's status (for which, see below para 148) and leads to the establishment of the filiation relationship within a marriage. Both parents are necessary parties to the process, so a cross-examination is fully guaranteed. The judgment accepting the action to claim the child's status has *erga omnes* effects and retroactively establishes the filiation relationship between the parent and the child; this judgment can be appealed by both parents according to ordinary forms. The judgment denying the action to claim the child's status, on the other hand, can be appealed by the child, again according to the ordinary forms.

138 b) Judicial declaration of motherhood or fatherhood (*dichiarazione giudiziale di maternità o paternità*) may be brought in front of the ordinary tribunal if the child born out of wedlock is not spontaneously recognised. The action may be filed by a child over the age of 18, by their guardian or by the parent who has recognised them and exercises parental responsibility. ([53]) The judgment declaring maternity or paternity has retroactive and constitutive effects and is enforceable *erga omnes*; it can be appealed by the ordinary means of appeal.

139 Once established, the filiation relationship can only be removed judicially.

140 In particular, if the status filiationis is established via marriage the following actions are needed:

141 a) The action for disavowal of paternity (*azione di disconoscimento della paternità*) allows the removal of the paternity relationship that has arisen automatically on the basis of the legal presumptions set out in Articles 231 and 232 CC ([54]) The action can be brought in front of the ordinary tribunal by the child with no time limit; alternatively, under Article 244 CC, it can be filed by the mother within six months of the birth of the child or from the day she discovered that her husband was impotent at the time of conception; lastly, the action can be brought also by the father himself within a period of one year from the day of the child's birth or from the day he became aware of his own impotence at the time of his wife's conception or again from the day he discovered his wife's adultery. In this process, cross-examination is guaranteed to the highest degree, with mother, father and child having to participate; if the child is a minor, a special curator is appointed for them to protect their interests. The judgment has retroactive and *erga omnes* constitutive effects; it is appealable in the ordinary forms.

142 b) The action to contest child status (*azione di contestazione dello status di figlio*) allows the removal of filiation in special cases, such as when a

([53]) See Luigi Balestra, 'La dichiarazione giudiziale di paternità e maternità alla luce della riforma della filiazione' [2014] Rivista trimestrale di diritto e procedura civile 1223.

([54]) The rules governing the action for disallowance are set out in Article 243-bis CC.

birth is falsely assumed to have taken place (but it never did) or when the newborn was swapped for another, for example in a clinic. ([55]) The action can be filed in front of the ordinary tribunal by the parents resulting from the birth certificate and by any interested claimant (child included); it is imprescriptible. Even in this case, cross-examination is guaranteed, with mother, father and child having to participate in the process; if the child is a minor, a special curator is appointed to protect their interests. The judgment has retroactive and *erga omnes* constitutive effects; it is appealable in the ordinary forms.

c) As mentioned above, the act of recognition may be challenged on the following grounds: lack of truthfulness; ([56]) violence (Article 265 CC); and interdiction (Articles 265ff CC). No further grounds of challenge are allowed. Under Article 263 CC, these actions can be brought to the ordinary tribunal by the author of the recognition, by the person who has been recognised, and by anyone else with an interest (eg, the other parent or the spouse of the person who recognised the children in the case of lack of truthfulness). The action is imprescriptible only for the child; on the contrary, the parent must bring the action within one year from when the recognition was noted in the margin of the birth certificate (or from the day they became aware of their own impotence at the time of conception); for all other eligible persons, the action must always be brought within five years from when the recognition was noted in the margin of the birth certificate. The parent who made the recognition and the recognised child are always necessarily parties to the trial in order to ensure adversarial proceedings. As usual, the judgment has retroactive and *erga omnes* constitutive effects; it is appealable in the ordinary forms. **143**

The establishment and challenge of parenthood through artificial procreation entails some differences. **144**

Children born as a result of the application of medically assisted procreation techniques have the status of children born in wedlock or recognised children of, correspondingly, married and unmarried couples who expressed a willingness to use the techniques in accordance with Article 6 of Law No 40 of 2004. Couples who consented to artificial procreation automatically become parents of the children born thereby, even in the case of heterologous fertilisation (Article 8). **145**

([55]) Article 240 CC, which refers only to the first two paragraphs of the preceding Article 239, reducing the possibility of bringing such an action only to cases of supposed childbirth, substitution of a newborn child or erroneous registration as a child of unknown persons.

([56]) Article 263 CC.

146 This means that unmarried parents are not required to recognise children born through artificial procreation as the filiation is established ex lege and cannot be prevented. As a consequence, the mother cannot avail herself of the right not to be mentioned in the birth certificate. In the case of heterologous fertilisation, the unmarried father giving consent to the procreation of the child cannot challenge his status of parent by any action, whereas the gamete donor has no legal relationship with the child (Article 9(3), L No 40 of 2004). Correspondingly, the married husband who has consented to the aforementioned technique may no longer bring an action for disavowal of paternity (Article 9(1) L No 40 of 2004).

147 Finally, with regard to Private International Law rules, under Articles 33ff of L No 218 of 1995, the most important criterion for determining the law applicable to filiation is the nationality of the child; alternatively, the law of the State whose citizenship one of the parents has is applicable when it appears more favourable to the child.

D. *Adoption*

148 In the Italian legal system, adoption of children is established only by a decision of the Minors' Tribunal according to Law No 184 of 1983. Minors may reside in the national territory or abroad. In the latter situation, the rules on international adoption apply (Articles 29ff of Law 184 of 1983). (57)

149 Two forms of adoption are allowed:

150 a) Full adoption establishes a filiation bond identical to the biological one (see Article 6). This requires children to be declared adoptable as finding themselves in a condition of abandonment (Article 7). (58) Only married couples who have been married for at least three years (previous cohabitation periods are calculated) are eligible. Same-sex couples, single adults and cohabitants are not eligible for full adoption. In every step of the adoption procedure, biological parents are summoned and heard by the Tribunal, which may provide them with instructions whose compliance is checked by social services appointed by the judge. Concurrently, the hearing of a child over the age of 12 is always compulsory, whereas a child under the age of 12 may only be heard if they are already capable of discernment.

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(57) International adoption does not only refer to foreign children residing abroad, but also to Italian children residing in Italy who are adopted by persons residing abroad. See Alessandra Bisio, Ivana Roagna, *L'azione internazionale di minori. Normativa interna e giurisprudenza europea* (Giuffrè 2009).

(58) Abandonment means the complete lack of moral assistance from parents or relatives within the fourth degree. On this point, see Massimo Dogliotti, 'Adozione di minori' in *Enciclopedia giuridica* (Treccani 1988).

The full adoption procedure consists of three steps: **151**

1) The declaration of the state of adoptability: this is a declaratory judgment which presupposes the establishment of the state of abandonment. **152**
2) The pre-adoptive fostering: on the basis of a comparative assessment of the couples that have applied to adopt the child (whose state of abandonment has already been attested as described under 1), the Minor's Tribunal allocates the child to the couple that is deemed to be the most capable of guaranteeing the child's best interests. Children over the age of 14 must give their consent to the pre-adoptive fostering. The decision takes the form of a reasoned ordinance, which may be revoked at any time by the Minors' Tribunal and may be appealed to the court of appeal. **153**
3) The judgment of adoption: After one year of pre-adoptive fostering, if positive indications emerge from the social services and counselling services, the Minors' Tribunal declares the child's adoption. Also in this case, it is required that the child who has already reached the age of 14 expresses their consent to the adoption. The adoption judgment has retroactive constitutive effects and cannot be revoked, and it is able to become a *res judicata*; it may be appealed to the competent court of appeal. **154**

After the adoption judgment becomes a *res judicata*, it definitively establishes the adoption of the child by the adopting couple and must be annotated on the margin of the adoptee's birth certificate.

b) Adoption in special cases or simple adoption establishes a more flexible filiation, as children do not lose any relationship with their biological families, although the parental responsibility is given to the adopting parents (Article 44 (1) of Law No 184 of 1983). They retain their family name and add that of the adoptive parents. Simple adoption is allowed in the following situations: a) If the child is an orphan, to (married or unmarried) couples or single persons who are, alternatively, relatives of the child (up to the sixth degree) or have a pre-existing stable and lasting relationship with the child; b) If a child is adopted by the other parent's spouse; c) If the child is handicapped, to (married or unmarried) couples or single persons; d) If pre-adoptive fostering has been impossible, to (married or unmarried) couples or single persons. ([59]) **155**

([59]) It is precisely on the basis of a broad interpretation of the latter hypothesis, moreover, as mentioned above, that jurisprudence has constructed the possibility of adoption (in particular cases) also for same-sex couples who have availed themselves of MAP techniques: on this point, see Cassazione civile n 12962/2016, according to which, the impossibility of pre-adoptive fostering is not to be understood only in a material sense, but also in a legal sense. More generally, on the prerequisites for adoption in particular cases, see Liliana

156 After the Constitutional Court's judgment No 79/2022, (60) simple adoption has become a form of filiation largely coincident with that established via full adoption. In particular, children adopted via simple adoption have been granted a legal relationship with the adopting parents' relatives. Some important differences, however, persist: eg, the option to terminate the adoption (pursuant to Article 52 of Law 184 of 1983); the preservation of ties with the family of origin (Article 300, para 1, CC); the absence of legal usufruct in the adoptive parents (Article 48 of Law 184 of 1983).

157 The simple adoption procedure falls under the jurisdiction of the Minors' Tribunal and is much quicker than that for a full adoption, as the first two steps are missing, while the court, after hearing the child, the child's parents and the adopting parent(s), directly pronounces the adoption judgment. The consent of a child over the age of 14 as well as that of their biological parents and their spouse (if any) are required. If the biological parents do not consent to the simple adoption and their refusal is not held to be in the best interests of the child, the adoption judgment can nevertheless be issued, unless the refusal is voiced by a parent currently exercising parental responsibility, who can prohibit the adoption without being questioned. An adoption judgment has retroactive constitutive and *erga omnes* effects and becomes a *res judicata*: before that time, it can be appealed to the competent court of appeal in the ordinary manner. However, as noted above, the adoptee or the public prosecutor may request the same Minors' Tribunal to terminate a simple adoption. (61)

158 To conclude, adoption is a judicial procedure where the agreement of the adopting parents and adopted children play a role, whereas the consent of the biological parents is irrelevant in the case of full adoption and may be overcome under certain conditions in the case of simple adoption. General rules on declarations of intent and/or legal acts hardly apply. For instance,

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Rossi Carleo, 'L'adozione' in Pietro Rescigno (ed), *Trattato di diritto privato* (UTET 1985) 462.

(60) In particular, Judgment No 79 of 2022 stated the following: 'Article 55 of Law No 184 of 1983, insofar as it excludes, by means of reference to Art 300 (2) CC, the establishment of civil relationships between the child adopted in special cases and the relatives of the adopting party, infringes Articles 3, 31(2) and 117(1) of the Constitution, the latter in relation to Article 8 of the European Convention on Human Rights'.

(61) This is possible only in special cases: a) under Art 51, legge n° 184 del 4 maggio 1983, the adoptive parent may apply for revocation when the adoptee has committed or attempted to commit certain serious crimes that are exhaustively determined; under Art 52, legge n° 184 del 4 maggio 1983, the adoptee may apply for revocation when the adopter has committed towards the adoptee the same behaviour described in (a); c) under Art 53, legge n° 184 del 4 maggio 1983, the public prosecutor may apply for revocation when the adoptee has seriously violated the duties incumbent upon them.

the prospective parents' consent to full adoption may not be revoked, while simple adoptive parents can terminate the adoption.

159 The adoption of adults is regulated in the Civil Code in Articles 291 ff. Its main scope is patrimonial, as the adopted adult acquires the same inheritance rights as the adoptive parents' children. However, the adult adoptee maintains parental relations with their original family and does not establish any relationship with the adoptive parents' relatives (Article 300 (2) CC).

160 According to Article 38 of L No 218 of 1995, the law applicable to adoption is to be found in the common national law of the adopting parents; secondly, in the law of the State of common residence of them. Nonetheless, the law of Italy always applies when its application is necessary to attribute child status to the adopted child.

E. *Parental Responsibility*

161 As mentioned above, the term 'parental responsibility' was introduced by L no 219 of 2012 and replaced that of parental authority.

162 The establishment of parental responsibility is either an automatic effect of the establishment of filiation or a court's decision; therefore, the will of the parties plays no role. Conversely, the parents' agreement is required for its exercise.

163 In cases of conflict on matters of particular importance, each parent may ask the Ordinary Tribunal to allow one of the parents to take the decision, in derogation of the agreement rule pursuant to Article 316 CC. The Tribunal orders the summoning and hearing of both parents and the child (if under the age of 12, only if they are capable of discernment) and issues a motivated decree.

164 In the case of separated or divorced couples, see below paras 176ff.

165 Parental responsibility arises as soon as filiation is established, regardless of whether it is biological or adoptive. Adopting parents hold parental responsibility even in the case of a simple adoption.

166 Furthermore, parental responsibility may be awarded to foster couples or individuals or institutions, whenever the child's parents are not in a position to care for the child for temporary reasons (Articles 4ff L No 184 of 1983). In these cases, a decision by the Minors' Tribunal is needed.

167 Powers and duties related to parental responsibility include educational duties (istruire and educare), maintenance and moral assistance as well as the power to take all decisions concerning the care and protection of the child's person and the establishment and management of the child's patrimonial legal relationships. Furthermore, parental responsibility includes the power

to represent the child pursuant to Article 320 CC ([62]) The holders of parental responsibility are separately allowed to perform acts of ordinary administration on behalf of the children, whereas the consent of both is needed in the case of acts of extraordinary administration. Most of these (listed in Article 320 (3) CC) require the authorisation of the guardianship judge that is subject to the test of 'obvious necessity or utility'.

168 The removal or the limitation of parental responsibility is allowed only following a decision of the Minors' Tribunal (Articles 330 and 333 CC) according to Article 38 of the Implementing Provisions to the Civil Code.

169 These actions are brought before the Minors' Tribunal by the other parent, by relatives or by the public prosecutor (Article 336 CC). The court, after summoning and hearing the parents and the child (if under the age of 12, only if they have the capacity of discernment), issues a motivated decree. This is a *rebus sic stantibus* decree and cannot become a *res judicata*, as it can be modified or revoked by the issuing court at any time depending on the interests of the child. In any case, objections to the motivated decree can be submitted to the competent Court of Appeal within the following 20 days.

170 In the case of separation or divorce, both parents usually keep parental responsibility as a consequence of the joint custody of the child as the default model rule (Article 337-ter CC). This means that the day-to-day decisions may be taken by the parent with whom the child lives without the consent of the other; conversely, the most important decisions must be taken jointly.

171 However, the Tribunal is allowed to award the custody of the child only to one parent, who exercises the parental responsibility alone. The other parent is allowed to express their consent only in extra-ordinem situations in the child's best interests and must supervise education, upbringing and living conditions (Article 337 (3) CC).

172 As emphasised above, if one parent's parental responsibility is removed, the other is the only one who holds and exercises it. However, the former remains bound by the duties corresponding to the fundamental rights of children under Article 315-bis CC, which also have a constitutional basis (as said before, educational duties, maintenance, moral assistance). ([63])

173 If nullity of the marriage, separation or divorce are at stake, dispositions on the custody of children are provided by the Tribunal; in any other case, the competent authority is the Minors' Tribunal.

([62]) Giovanni De Cristofaro, 'Dalla potestà alla responsabilità genitoriale: profili problematici di un'innovazione discutibile' [2014] Nuove Leggi Civ Comm 796.

([63]) Michele Sesta, 'La filiazione' in Mario Bessone (ed), *Trattato di diritto privato* (Giappichelli 2011); De Cristofaro, 'Dalla potestà alla responsabilità genitoriale' (n 63) 794. In case-law, Cassazione civile n 15063/2000; Cassazione civile n 22678/2010.

Alternatively, dispositions on the custody of children may be included in the assisted negotiation agreement (see above paras 99ff) under the authorisation of the public prosecutor. **174**

A further de-judicialisation step has been taken by Article 21 of Lgs D No 149 of 2022 in matters of representation of children. (64) **175**

The cited provision states: **176**

> Authorisations for the stipulation of public deeds and authenticated private deeds in which a minor, an interdicted person, an incapacitated person or a person benefitting from the measure of supportive administration intervenes [on vulnerable adults, see below para 309], or concerning inherited assets, may be issued, upon written request of the parties, personally or through a legal representative, by the notary public rogatory.

These authorisations – required for the conclusion of most acts in which a minor or a vulnerable adult is involved, or for acts which concern inherited assets – were previously reserved for the guardianship judge. However, two general limitations apply: the deed must be a public deed or a notarised private deed and the deed must necessarily be performed at the same public notary. **177**

Moreover, to protect the public interest, the notary must notify the issuance of the authorisation to the registry of the court that would have been competent to issue the corresponding judicial authorisation and to the public prosecutor's office at the same court: this measure, in fact, may be challenged before the competent authority within the following 20 days by the interested parties as well as by the public prosecutor. In addition, for the purposes of issuing the authorisation, the notary is granted purely investigative powers (gathering of information, hearing of legatees, technical advice), which appear to be modelled on the summary evidentiary investigations carried out by the guardianship judge who is requested to issue the authorisation. **178**

Nonetheless, according to the legal scholarship, (65) the competence attributed to notaries is not of a jurisdictional nature: in other words, notaries are **179**

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(64) On Article 21 of Legislative Decree 149/2022, a comprehensive study by the Notaries national association (Consiglio Nazionale del Notariato): Ernesto Fabiani, Luisa Piccoli, 'L'autorizzazione notarile nella riforma della volontaria giurisdizione' at <https://notariato.it/wp content/uploads/StudioPCef_lp.pdf> accessed 15 January 2025; Giovanni Santarcangelo, 'L'autorizzazione notarile nella nuova normativa della volontaria giurisdizione' [2022] Notariato 592.

(65) Angelo Jannuzzi and Paolo Lorefice, *Manuale della volontaria giurisdizione* (Giuffrè 2004); Francesco Mazzacane, *La volontaria giurisdizione nell'attività notarile* (Stamperia nazionale 1986): according to this perspective, voluntary jurisdiction, even when exercised by judges, would be, subjectively, a jurisdictional but, objectively. an administrative

not attributed the function of delegated judges, nor can they be considered honorary judges in this field.

180 More specifically, with reference to vulnerable adults (more generally, on this point, see below paras 301ff), the notary's authorisation will replace, with reference to the interdicted person, the authorisation of the guardianship judge (or, when necessary, of the court) for the conclusion of all acts of asset disposition; for the incapacitated person, for the conclusion of acts of extraordinary administration; for the beneficiary of the supported administration, finally, for all acts for which the decree of appointment of the administrator requires authorisation.

181 As far as minors are concerned, notaries are required to assess the obvious necessity or usefulness of all acts pursuant to Article 320 (3) CC and, as this assessment is quite complex, they may avail themselves of advisors. (66)

182 Finally, with reference to inherited assets, the notary's new role seems to have a very significant impact, as it will prevent the judge from intervening in all those situations affecting the interests of third parties (creditors and legatees), which previously required the authorisation of the Tribunal of Succession (see below paras 214ff).

183 Article 36 of L No 218 of 1995 states that the law applicable to parental responsibility is the national law of the child. Nevertheless, the concrete relevance of this rule has been much reduced by the European private international law legislation adopted in this matter: reference is made to European Regulation 1111/2019, which regulates, among other things, jurisdiction, applicable law and the recognition and enforcement of decisions in matters of parental responsibility.

F. *Matrimonial Property Regimes*

184 Private autonomy governs matrimonial property regimes, which, however, cannot derogate from the rights and obligations arising from marriage

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activity; in case-law, Cassazione civile n 11860/1997, which notes that from the objectively administrative nature of voluntary jurisdiction derives the unsuitability of authorisations for *res judicata*.

(66) On this issue, Giovanni De Cristofaro, 'Le modificazioni apportate al codice civile dal decreto legislativo attuativo della "Legge Cartabia" (D.lgs. 10 ottobre 2022, n. 149). Profili problematici delle novità introdotte nella disciplina delle relazioni familiari' [2022] Nuove Leggi Civ Comm 1407, 1433, points out the critical nature of the decision to entrust an assessment of such complexity to notaries, pointing out how controversial the fate of the act performed in the absence of the prerequisite of necessity or obvious utility appears to be; moreover, according to the author, it is not clear whether the notary must proceed to hear the minor.

Moreover, the legislator's textual omission of emancipated minors from Article 21 of the reform text seems strange.

(pursuant to Article 160 CC). Unlike the past, judicial authorities play no role in establishing matrimonial property regimes.

185 The patrimonial regimes provided for by the Civil Code are the following: community of property; separation of property; contractual community of property and atypical contractual community of property regime.

186 In the absence of a different choice by the spouses, the community of property regime is established by law at the time of marriage. Spouses may opt for separation of property only, with a specific declaration to the officiant of the marriage or, after the marriage, through an agreement drawn up by a public notary in the presence of two witnesses, which will be recorded in the marriage certificate.

1. *Community of property regime and the role of judicial authorities*

187 Under the community of property regime, all acquisitions made individually by the spouses during marriage fall under the purview of the community regime (with some exceptions, articulated in Articles 177 and 179 CC).

188 This regime is completely regulated by the Civil Code in terms of the non-divisibility of shares, representation, administration (Articles 180ff CC), and the liability regime (Articles 186ff CC).

189 Judicial intervention is exceptional and primarily pertains to the administration of property: acts of extraordinary administration, requiring joint execution by the spouses, may prompt a judicial authorisation if one spouse withholds consent (Article 181 CC). Similarly, in exceptional scenarios, the judge may grant administration authority to only one spouse (in the case of hindrance or incapacity: Articles 182 and 183 CC). (67)

190 Procedures for dissolution are also regulated (Article 191 CC). In particular, the community property is dissolved ex lege in the event of divorce or separation: in the latter case, the community property terminates when the President of the Court authorises the spouses to live separately. The matrimonial community transforms into an ordinary community, and the shares can be separated, typically in equal portions, either by mutual consent or through judicial division.

2. *Optional patrimonial regimes*

191 The choice for other regimes can be made before, during, or after the marriage, without involving a judicial authority. For changes made after

(67) Article 163 CC also includes specific provisions. It states that if one of the spouses dies after giving consent by public deed to the modification of the agreements, those alterations take effect if the other parties subsequently express their consent, with the condition that court approval is obtained.

marriage, the Civil Code used to require a court authorisation, but this form of judicial control was abolished by Law No 142 of 1981.

192 a) Spouses can choose the separation of property regime. They agree that each retains ownership of property acquired individually during marriage (Article 215 CC). If, however, property is acquired jointly, the rules of ordinary community property apply.

193 b) Spouses have the option to choose a more tailored regime to suit their needs. They can partially amend the statutory framework of the community of property regime, through a marriage agreement in accordance with Article 162 CC ('contractual community'). However, private autonomy is not without constraints, as spouses cannot deviate from the rules concerning administration and share equality, nor can they introduce agreements in conflict with the provisions of Article 161 CC (as stipulated in Article 210 CC).

194 c) Alternatively, spouses may opt for an atypical contractual form of the community property regime, and in this case, they must specify the content in a precise and comprehensive manner (a reference to foreign law would not suffice, unless it is applicable under private international law).

3. *Fund for the family's needs*

195 For specific assets, spouses (or a third party with the spouses' consent) may opt to establish a fund for the family's needs (Articles 167ff CC).
The concept of 'family needs', for which the property fund is intended, was elaborated (68) to encompass not only those needs shared by all family members, such as housing, but also those needs specific to individual members of the family, for instance, education and child support. These needs must have arisen after the marriage and should be socially recognised. (69)

196 The rationale behind this institution is to ensure financial support for the family and create a mutually beneficial arrangement for all family members. (70)

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(68) Ferruccio Auletta, 'Il fondo patrimoniale' in Giovanni Bonilini and Giovanni Cattaneo (eds), *Il diritto di famiglia* (UTET 1997) 345.

(69) Further insights into this topic can also be found in the works of Franco Carresi, 'Del fondo patrimoniale' in Luigi Carraro and others (eds), *Commentario alla riforma del diritto di famiglia* (CEDAM 1992) 61; Alfio Finocchiaro and Mario Finocchiaro, *Diritto di famiglia* (Giuffrè 1984) 801; Fernando Santosuosso, *Delle persone e della famiglia. Il regime patrimoniale della famiglia* (Giappichelli 1983) 134. The Court of Cassation excludes only those needs motivated by extravagance or purely speculative intentions. This stance was evident in Cassazione civile n 11683/2001; n 134/1984.

(70) Cassazione civile n 17811/2014.

Due to its specific objective, there are some restrictions for the use and dissolution of the fund. **197**

Reasons for the dissolution of the fund are specific (Article 171 CC). In particular, the dissolution depends on divorce or annulment of the marriage. **198**

Moreover, a judge's intervention is required for certain acts, particularly those which aim to safeguard minors. **199**

a) In cases involving minor children, pursuant to Article 169 CC, property sales require the consent of the spouses and the judge's authorisation (or, according to Article 21 Lgs D No 149 of 2021, a notary's authorisation). Exceptions to this regime are permitted through specific clauses of the agreement. (71) **200**

b) Conversely, there are no exceptions for the regime governed by Article 171 CC concerning the dissolution of the fund. According to this provision, 'If there are minor children, the fund remains in effect until the last child reaches adulthood'. As a result, the minors have the right to claim the invalidity of the dissolution (Cass No 17811 of 2014). (72) Additionally, as long as the child is a minor, the court may (1) establish rules for the administration of the fund, or (2) allocate a portion of the fund's assets to the children, in order to enhance the safeguarding of their interests. (73) **201**

III. Succession law

Italian succession law is dominated by two sources (Article 457 CC): the testator's will and the law itself. (74) **202**

Succession agreements are prohibited without any exception (Article 458 CC). (75) **203**

Even the testator's will is limited by law granting mandatory succession rights

(71) Cassazione civile n 22069/2019; n 21184/2021. Contra, Cassazione civile n 13622/2010.

(72) The annulment action is reserved for minors and not for third parties, even if they are creditors involved in revocation (Cassazione civile n 3051/2019).

(73) Franca Galletta, *I regolamenti patrimoniali tra coniugi* (Jovene 1990) 146.

(74) *Ex multis*, on the particular rigidity of the discipline of succession in the Italian legal system, Giovanni Gabrielli, 'I legittimari e gli strumenti a tutela dei loro diritti' in *Tradizione e modernità nel diritto successorio dagli istituti classici al patto di famiglia, I quaderni della Rivista di diritto civile* (Cedam 2017).

(75) Among the authors who highlight the peculiarity of the Italian position in the European context, see Andrea Fusaro, 'Uno sguardo comparatistico sui patti successori e sulla distribuzione negoziata della ricchezza d'impresa' [2013] Riv dir priv 391; Maria Vita De Giorgi, *I patti sulle successioni future* (Jovene 1976); Vincenzo Barba, *I patti successori e il divieto di disposizione della delazione. Tra storia e funzioni* (Esi 2015); Salvatore Aceto di Capriglia, *I "divieti" di patti successori nel sistema di civil law* (Esi 2019).

to the spouse, the children and the parents of the de cuius. (76) Apart from the voluntary jurisdiction competences, the role of judicial authorities is, therefore, quite limited in this matter, being restricted to the following cases:

a) declaration of nullity and annulment of wills;
b) remedies related to the violation of reserved shares;
c) declaration of the unworthiness to inherit;
d) action of petition of the estate;
e) division of the estate in the absence of an agreement between the parties involved;
f) other specific competences: eg, to receive declarations of acceptance of an inheritance with the benefit of an inventory or declarations of waiver, the appointment of the administrator of an *eredità giacente* (vacant inheritance, ie an estate not yet accepted by the heirs).

204 Apart from the competences under a), the others are related to extraordinary situations, which do not occur frequently in practice.

205 Conversely, the notary plays an important role as a public official in many aspects. Indeed, the notary is always involved in testamentary successions, where their role is necessary, as will be seen, for the execution of testamentary dispositions. Moreover, again in accordance with the Civil Code, the notary is competent in matters of acceptance with the benefit of an inventory, with regard to waivers of inheritance and the division of the estate.

206 This role has been further empowered by Lgs D No 149 of 2022. Before the introduction of this Law, the Tribunal of Succession, that is the district Tribunal of the place of the deceased's last domicile, was the only competent court to grant the authorisations necessary for the transfer of inherited property under Articles 747 and 748 of the Code of Civil Procedure. (77)

207 According to the aforementioned Article 21 of Lgs D No 149 of 2022, notaries are also currently competent to issue authorisations for all public acts concerning inherited property.

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(76) Consider the possibility for them, under certain conditions, not only to reduce testamentary dispositions – and donations – detrimental to their own reserved share, but also to recover by an action *in rem* (so-called *azione di restituzione*) property which in the meantime has been transferred to a third party.

(77) A very controversial question is when the inherited property is, at the same time, property owned by minors and therefore subject to the regime of authorisations under Article 320 CC: in such cases, in fact, one must ask whether the authorisation under Article 747 CPC of the Probate Court replaces the authorisation of the guardianship judge under Article 320 CC, or whether they should both be necessary for the performance of acts of extraordinary administration, or whether, ultimately, only the authorisation of the guardianship judge is necessary: in legal writings, see Lodovico Genghini, *La volontaria giurisdizione e il regime patrimoniale della famiglia* (Cedam 2020).

Therefore, a 'double track' is at the disposal of the parties: a judicial or a notarial authorisation. (78) **208**

To sum up, authorisations (notarial or judicial) are needed to sell inherited property in the following situations: **209**

a) acceptance with the benefit of an inventory (see below paras 221ff);
b) call to inherit (*chiamato all'eredità*) and *hereditas iacens* (*eredità giacente*) (see below paras 263ff);
c) executor of the will (see below para 265);
d) institution of an heir under a condition (Article 641 CC);
e) institution of an unborn heir (Article 643 CC).
f) subsequent succession (*sostituzione fedecommissaria*).

A. *Devolution of the estate*

1. *Acceptance of the inheritance*

An inheritance can be accepted expressly or tacitly. **210**

An express acceptance can be provided in two ways: **211**

a) simple acceptance, which can be made in writing without any further formalities;
b) acceptance with the benefit of an inventory requires the separation of the heir's assets from the estate. This can be done by a notarial act or by a declaration received by the clerk of the Tribunal of Succession (Article 484 CC).

Whichever way is chosen, an acceptance of the inheritance has retroactive *erga omnes* effects, so that the person who has accepted the inheritance is considered an heir from the death of the deceased. Under Article 482 CC, the act of acceptance can be challenged in front of the Tribunal of Succession on the ground of moral violence or fraud, but not on the ground of error. **212**

Furthermore, the act of acceptance, although it is unilateral, is unanimously considered to be irrevocable, it cannot be made for a part of the inheritance, nor subject to a condition or term. **213**

If the acceptance with benefit of an inventory is chosen by the heirs, the creditors of the inheritance take priority over the heirs' creditors and can be paid by selling the assets of the de cuius. **214**

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(78) This appears to greatly reduce the scope of the problem of authorisations for the disposition of the assets of minors: in fact, in such cases, the most logical solution is that the notary drawing up the deed – having the competence to issue both authorisations – can fulfill this function with a single authorisation: in this sense, see Ernesto Fabiani, Luisa Piccoli, Ernesto Fabiani, Luisa Piccoli, 'L'autorizzazione notarile nella riforma della volontaria giurisdizione' at <https://notariato.it/wp content/uploads/StudioPCef_lp.pdf> accessed 15 January 2025.

215 As a consequence, in the case of b) above, heirs may not sell the inherited goods, unless an authorisation is given by the Tribunal of Succession or by a notary (Article 747 CPC).

216 The inventory may alternatively be drawn up by the notary or a clerk of the Tribunal of Succession.

217 Once the inventory is completed, the payment of the creditors of the estate and legatees will take place.

218 Payment may take place in three ways:

219 a) Individual payment, which does not require a notarial activity and leads to the payment of creditors without any formality in the order in which they claim for performance; therefore, this is the easiest way of liquidation.

220 b) Collective payment, which is managed by the notary and is inspired by the principle of *par condicio creditorum*. A particular phase of the procedure (that is, the formation of the distribution plan of inherited property) is subject to judicial supervision: creditors and legatees may file a claim to the Tribunal of Succession against the distribution plan; furthermore, at the request of heirs and legatees, the Tribunal of Succession may also set a term within which to form the distribution plan.

221 c) Release of inherited property to creditors, which does not require a notarial activity and is carried out by a liquidator appointed by the Tribunal of Succession, who will liquidate the estate in accordance with the rules of collective liquidation.

2. *Waiver of inheritance*

222 The waiver of inheritance requires a declaration of intent made in a notarial deed or a declaration received by the clerk of the Tribunal of Succession. The waiver may only be challenged by the same renouncers (the people entitled to inherit by law or by a will), in front of the Tribunal of Succession, on the ground of fraud or moral violence, whereas error has no relevance (Article 526 CC).

223 The waiver has retroactive effects (Article 521 CC) and the renouncer is considered as never having been called to the inheritance.

224 After the waiver, certain mechanisms for the subsequent devolution of the estate come into play: [79] all these steps take place ex lege, without the need for court intervention.

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[79] In particular, regarding legitimate successions they are: a) representation (*rappresentazione*); b) the mechanism of Article 524 CC; c) called to inherit in the second degree; in testamentary succession, instead: a) voluntary substitution; b) representation; c) accrescimento; d) legitimate succession.

According to Article 524 CC, 'the renouncer's creditors, if the waiver of the succession causes them damage, may request the court to authorise them to accept the succession in the name and place of the renouncer for the sole purpose of satisfying themselves out of the estate's property to the extent of their claims'. **225**

According to legal writings, this is not a true authorisation that falls within the scope of voluntary jurisdiction, but a judgment. ([80]) **226**

Finally, the waiver is revocable until another person called to the succession has accepted it (Article 525 CC). **227**

3. *Unworthiness to inherit and disinheritance*

Unworthiness to inherit requires a judgment of the Tribunal of Succession as a cause of exclusion from the de cuius's succession. ([81]) Of course, this is allowed under strictly determined circumstances listed in Article 463 CC ([82]) and grouped into: **228**

a) Attacks on the physical or moral person of the testator (eg. murder or attempted murder of the de cuius or of a close relative of the de cuius);
b) Infringement of the testator's freedom (eg, formation of a false will or alteration of an authentic will);
c) Loss of parental responsibility.

The judgment of unworthiness has retroactive constitutive effects similar to the waiver of inheritance (see above paras 230ff) and it can be appealed in front of the territorially competent Court of Appeal. **229**

On the other hand, disinheritance, which is a provision contained in a will removing a future legitimate heir from the list of legal heirs, has a very limited role, as forced heirs may not be excluded. ([83]) **230**

4. *Legal succession and mandatory succession*

In the absence of a will, the succession shall be governed by law in Articles 556ff CC, which dictate the shares in which the estate shall be divided. **231**

Forced heirs are the spouse, descendants and, in the absence of the latter, ascendants, who may challenge the will violating their mandatory succession **232**

([80]) Guido Capozzi, *Successioni e donazioni* (Giuffrè 2015) 329.

([81]) In this sense, Pietro Schlesinger, 'Successioni (diritto civile), Parte generale', in *Novissimo Digesto Italiano XVIII* (Utet 1957) 755; Coviello, *Delle successioni, parte generale* (Torella 1935) 78. In case-law, for all, Cassazione civile n 3096/2005.

([82]) They are not susceptible to analogous interpretation: in this sense, Guido Capozzi (n 81) 186.

([83]) Cassazione civile n 8352/2012. See Bin, *La diseredazione. Contributo allo studio del contenuto del testamento* (Giappichelli 1966).

rights before the Tribunal of Succession. To calculate their reserved share, all gifts made during the lifetime of the de cuius must be taken into account. The will infringing the reserved shares is neither void nor ineffective, being rather subject to the heirs' action of reduction.

233 More specifically, they have three actions at their disposal:

a) an action for reduction (*azione di riduzione*, *in personam*), aimed at rendering testamentary dispositions (and donations) detrimental to the reserved share ineffective;

b) an action for restitution against the beneficiaries of the dispositions adversely affecting the reserved share (*azione di restituzione*), *in personam*, seeking the restitution of the property covered by the dispositions adversely affecting the reserved share;

c) restitution action against third-party beneficiaries, in rem, aimed at recovering the res even when it has already left the estate of the beneficiaries of the testamentary dispositions (or donations) which are detrimental to the legitimate share. Because of its critical impact on the circulation of wealth and legal transactions, certain special conditions for its exercise are required. (84)

234 A trend to prevent judicial actions by seeking settlement agreements between the parties (known as *accordi di reintegrazione della quota di legittima*) can increasingly be noticed in practice. These are held to be valid by legal scholars (85) and case-law. (86)

5. *Testamentary succession*

235 A will in the Italian legal system is a formal act that does not require judicial intervention for its execution and may be drafted in three different ways:

236 a) a holographic will, which requires a handwritten document signed by the testator and does not require a notarial deed;

b) a public will, which is drafted in full by a notary who puts the testator's will in writing and requires the presence of two witnesses; and

237 c) a secret will, which is drafted by the testator even in typing and, then delivered to a notary in a closed envelope in the presence of two

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(84) In particular, Article 563 CC requires as prerequisites the *res judicata* of the reduction judgment and the unsuccessful execution on the beneficiary's estate of the dispositions detrimental to the reserved share; the third party, however, has the option of releasing itself from the obligation to return the asset in kind by paying a pecuniary equivalent.

(85) See Francesca Salvatore, 'Accordi di reintegrazione della quota di legittima: accertamento e transazione' [1996] Rivista del Notariato 211; Alberto Azara, *Accordi sulla legittima* (Giuffrè 2018).

(86) Cassazione civile n 2554/1979; Cassazione civile n 6235/1981.

witnesses; immediately afterwards, the notary drafts the record of receipt of the secret will in the presence of two witnesses.

A will, regardless of its form, is immediately effective upon the death of the testator (it cannot be in any way effective before death, and thus, it is qualified as *atto di ultima volontà* – a *mortis causa* act). Nonetheless, in the case of holographic and secret wills, the designated heirs have no action to demand the execution of the will unless they arrange the publication of the will, which consists of a public act performed by the notary in the necessary presence of two witnesses. **238**

Grounds of invalidity of a will may be formal or substantial ([87]) and, as in contractual matters, a distinction is drawn between nullity and avoidance. ([88]) **239**

Furthermore, a will is revocable until the death of the testator. **240**

6. *Action of petition of the estate*

The action of petition of the estate (*petizione dell'eredità*) is an *in rem* action which may be brought by any heir in order to reclaim inheritance property possessed by third parties not entitled to do so. **241**

The competent authority is once again the Tribunal of Succession. In terms of proof, the heirs will only have to prove their status as heir and the fact that the property belonged to the estate of the deceased. **242**

The judgment unequivocally declares the status of heir and orders the possessor to return the unlawfully possessed property to the heir. **243**

Moreover, the judgment is only partially enforceable *erga omnes*: under Article 534 CC, onerous purchases made in good faith by third parties from an apparent heir are not affected by the petition of the estate. **244**

7. *Legacy*

The legatee succeeds only to specific assets of the de cuius, but not to all (or a share) of their estate. **245**

([87]) Among these, the vices of consent (moral violence, fraud and error) have an important place: however, in testamentary matters, vices of consent must be ascertained with regard to the testator alone, the protection of third parties being superfluous, as clarified by Capozzi, *Successioni e donazioni* (n 81) 914.

([88]) Nevertheless, this difference in testamentary matters is less clear-cut: on the one hand, a will may be annulled at the request of any person having an interest (absolute legitimation); on the other hand, testamentary nullity may be exceptionally avoided by the institution of confirmation. In particular, Francesco Santoro Passarelli, *Dottrine generali del diritto civile* (first published 1954, Jovene 2012), qualifies confirmation as a true emendation of a null and void will, in derogation of Article 1423 CC; in case-law, Cassazione n 2800/1984.

246 The legacy is necessarily a positive asset and, as a result, the legatee can only be liable for the debts of the estate to the extent of the value of the assets they have received.

247 In the Italian legal system, a legacy may be *per vindicationem*, whereby the right is automatically transferred to the legatee with retroactive effects; alternatively, it may be *per damnationem*, so that the burdened parties (who, normally, are the heirs) are obliged to make the legatee acquire the property.

B. *Certificate of succession*

248 Despite some proposals by the National Council of Notaries, (89) in the Italian legal system, a national certificate of inheritance has never been adopted, with the exception of specific geographical areas. (90)

249 In this regard, the Italian legislature has identified the notary as the competent authority to issue the European Certificate of Succession. (91) In particular, the competence of the Italian notary, according to Article 4 of Regulation 650/2012, exists when the de cuius had their habitual residence in Italy, or in the other cases regulated in Articles 7, 10 and 11 of the same Regulation.

250 The notary, in accordance with the provisions of Article 66 of the Regulation 650/2012 and Article 32 of L No 161 of 2014, in order to verify the existence of the prerequisites for the issuance of the certificate, is granted investigative powers that bring them close to the notion of 'court': (92) the notary, in fact,

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(89) For a brief summary of the arguments used by Italian notaries in support of a national certificate of inheritance, see the following link: <https://notariato.it/it/notariato/certificato-di-successione/> accessed 15 January 2025.

(90) Some localities have a certificate, in particular, those that were formerly part of the Austro-Hungarian empire (eg, South Tyrol). See Articles 13ff Regio Decreto 28 marzo 1929, n. 499.

(91) Article 32, Legge No 161 of 2014.

(92) Moreover, Regulation 650/2012 of 4 July 2012 supports a broad reading of the notion of 'court' (Recital 20): 'For the purposes of this Regulation, the term "court" should therefore be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given succession by delegation of power by a court. All courts as defined in this Regulation should be bound by the rules of jurisdiction set out in this Regulation'; according to Article 3(2): 'For the purposes of this Regulation, the term "court" means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be

may, even ex officio, carry out the necessary investigations to verify the information and statements, as well as the documents and other means of evidence provided by the applicant (Article 66(1)); in addition, the notary may request that the applicant's statements be made under oath or in the form of affidavits (Article 66 (3)). Nevertheless, the Court of Justice has disregarded this interpretation, denying the possibility of qualifying the notary issuing the European Certificate of Succession as a court (C–658/17, May 23, 2019, WB) ([93]).

251 If the notary refuses the application for the Certificate, the applicant may appeal to the territorially competent court (Article 72, Regulation 650/2012), which may also order rectification, amendment or revocation when the content of the certificate does not correspond to the truth.

252 The elements ascertained and the subject of the certification are presumed to be accurate (Article 69(2), Regulation 650/2012): it is therefore presumed that the person named as heir, legatee, executor or administrator of the estate possesses the qualities indicated in the certificate and/or the powers set forth therein, without any other condition and/or restriction in addition to those specifically mentioned.

C. *Administration of estate*

1. *General remarks. The one 'called to inherit' and the 'hereditas iacens'*

253 The administration of the estate is primarily a duty of the heirs who have accepted the inheritance and who may freely dispose of the assets of the estate. In the case of acceptance with the benefit of an inventory, the limits of the heirs' faculty of disposal mentioned above apply (see above paras 221ff).

254 Prior to accepting (or refusing) the inheritance, the person entrusted with the administration of the estate is the party entitled to make the acceptance ('called to inherit', 'chiamato all'eredità'). The person who is called to inherit ex lege acquires possession of the property of the deceased, so that they may:

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heard and provided that their decisions under the law of the Member State in which they operate: a) may be made the subject of an appeal to or review by a judicial authority; and b) have a similar force and effect as a decision of a judicial authority on the same matter': in this regard, see Carlo Rusconi, 'Il certificato successorio nell'ordinamento italiano, da diritto secondo a diritto primo?' [2020] Europa e Diritto Privato 393.

([93]) Here the CJEU clearly stated that: 'The first subparagraph of Article 3(2) of Regulation No 650/201 Regulation 650/2012 of 4 July 2012 2 must be interpreted as meaning that a notary who draws up a deed of certificate of succession at the unanimous request of all the parties to the procedure conducted by the notary, such as the deed at issue in the main proceedings, does not constitute a "court" within the meaning of that provision (...)'.

a) exercise possessory actions (without a need for the material appropriation of the goods);
b) perform acts of conservation, supervision and temporary administration of the goods;
c) may be authorised by the Tribunal of Succession (or notary) to sell inheritance goods that cannot be preserved or whose preservation involves considerable expenses (Articlse 460 CC, 747 CPC).

255 If none of the called accepts the inheritance and is not even in the material possession of the estate (situation known as 'hereditas iacens'), at the request of one of the interested parties or even of its own motion, the Tribunal of Succession has to appoint an administrator of the estate, who will make an inventory of the estate and manage it in accordance with the same rules as for an acceptance with the benefit of an inventory (Article 747 CPC).

256 However, the de cuius may assign a particular person – the 'executor of the will' – the role of managing their succession. The executor of the will (who may be a third party or even an heir) will be responsible for carrying out all acts of preservation and administration of the estate, thus applying the same rules as those already provided for in respect of the benefit of an inventory (Article 747 of the Code of Civil Procedure).

2. *Other cases where an authorisation is required*

257 Authorisation for the transfer of inherited property (Article 747 CPC) is also required in the following cases:

a) Subsequent succession (*substitutio fideicommissaria*): the will designates as heir a vulnerable child, descendant or spouse with the obligation to preserve the estate. Therefore, at the death of the vulnerable heir, the estate will be transferred to the person or entities that have taken care of them (Article 692 CC): until this time comes, the transfer of the assets is subject to authorisation.
b) The will designates the heir under the condition that something will happen (or something will not happen) (Article 641 CC). As long as the event has not occurred, the transfer of the assets is subject to authorisation.
c) The will designates an unborn heir (Article 643 CC). Until the child is effectively born, again, the transfer of the assets is subject to authorisation.

3. *Division of the estate*

258 In the presence of several parties called to the estate who accept the inheritance, in the absence of a division implemented directly by the testator

(Article 734 CC), a situation of joint ownership (*comunione ereditaria*) is automatically established. (94)

259 The joint ownership can be terminated, first of all, by a contract of division: this contract, when the estate also consists of immovable property, necessarily requires the written form.

260 In the absence of the co-heirs' agreement, each co-heir has the right to apply for the division of the joint ownership at any time by a judicial action brought before the Tribunal of Succession. The division proceedings are mainly regulated by Articles 784ff of the Code of Civil Procedure and are articulated differently depending on whether or not conflicts arise between the parties involved:

a) if the division is contentious, the procedure is more complex and leads to a judgment;
b) if the division is not contentious, part of the procedure may be delegated by the judge to a notary. In this case, the division is established by ordinance.

261 Finally, L No 98 of 2013 added the possibility to jointly apply for the division. In this case, the proceedings for the division of the estate must be fully delegated to a notary or a lawyer based in the same district of the Tribunal of the Succession; as a result, the Tribunal of Succession itself plays only a subsidiary role, restricted to deciding on any objections against the proposed division filed by the parties involved in the proceedings.

IV. Status of natural persons

262 The legal status of natural persons is not established by private autonomy or judicial acts, being rather the legal effects of certain facts, such as birth, death, or the age of majority. They are typically non-disposable.

263 The status of a natural person is established by birth and ceases upon death. A child has a name, chosen by the parents, and a gender, corresponding to the biological sex. Both identify the individual (Article 2 of the Constitution). Private autonomy has a role in changing one's name and surname while the modification of one's gender is subject to a judicial decision.

264 At birth, a person acquires full legal capacity, ie the capacity to have rights and obligations. Upon reaching the age of 18, one acquires legal capacity to

(94) In general, on the division of the estate, Giovanni Bonilini, 'La divisione' in *Digesto delle discipline privatistiche* (Utet 1990) vol 6; Capozzi, *Successioni e donazioni* (n 81) 1287ff. Moreover, unless dispensed by the testator or the donor, the so-called *collazione* must be carried out before the division: under this institution, all donations made during the lifetime of the testator to particular persons (spouse and descendants) are returned to the estate. Because of this institution, the gift is said to be an advance on succession. On *collazione*, see Ugo Carnevali, 'Collazione' in *Digesto delle discipline privatistiche* (Utet 1988).

act, ie the capacity to perform legal acts. Once acquired, only the judge can revoke or reduce legal capacity to act.

A. *Change of name*

265 The Constitutional Court (95) affirmed that one's first name and surname constitute the initial distinctive markers of a person and a central component of personal identity. The right to one's name is inviolable, safeguarded by the Constitution under Articles 2 and 30, as well as by Article 8 ECHR and Article 7 of the Charter of Fundamental Rights of the European Union. (96)

266 The first name and surname, recorded in civil registers, are also fundamental elements for personal identification. Consequently, there is a significant public interest in preserving the stability of these attributes, (97) as well as in ensuring alignment with an individual's gender identity.

267 There are indeed circumstances under which a name can change. Sometimes, the change is voluntary (paras 268ff), sometimes it is not mandatory but possible (paras 271ff), and finally, it could be mandatory (paras 276ff).

1. *Voluntary (but limited) change of name*

268 D No 396 of 2000 governs how an Italian citizen can voluntarily modify their given name and surname. This constitutes an extra-judicial proceeding. Foreign citizens living in Italy, on the other hand, can change their name or surname in accordance with the laws of their home country. Once they have obtained a certificate from their consulate, which confirms that the old and new identities correspond, they can proceed to submit the name change request to the authorities in their place of residence.

269 The application must allege that the name is ridiculous, shameful, or revealing one's origins (Article 89, PD No 396 of 2000).

270 The prefect, ie, the representative of the government, (that of the district where the person lives or, alternatively, that of the civil registrar's office holding the birth certificate) is competent to deal with the application (Article 89, PD No 396 of 2000). If it is considered to be justified by

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(95) Constitutional Court, Judgment n 120/2001; Constitutional Court, Judgment n 286/2016; Constitutional Court, Judgment n 131/2022.

(96) In addition, the principles outlined in Article 24 of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, which entered into force on 23 March 1976, and Arts 7 and 8 of the New York Convention on the Rights of the Child (CRC) of 20 November 1989, which was ratified by Law 176 on 25 July 1991, provide further legal foundations for the protection of these rights.

(97) Giovanni Di Rosa, 'Attribuzione del prenome e dignità della persona' [2009] Famiglia, Persona e Successioni 101.

objectively relevant circumstances, the prefect can order the application to be published for 30 days (Article 90) and can order, at the same time, the application to be notified to counter-interested parties. In this way, interested parties have the possibility to object to the name change, by submitting an official objection to the prefect (Article 91). If no objections are raised, a decree for the change may be obtained (Article 92). The decree must be noted in the birth and marriage registers (Article 94).

2. *Opportunities for Name Changes*

A person has the option of changing their surname without adhering to the procedure described in (a.1) under two circumstances: when an adult is acknowledged by their biological father; or when their parents undertake a surname change. **271**

In these cases, the possibility to alter one's surname is based on the preservation of a familial connection. Nevertheless, given that the person has reached the age of majority, the surname is a component of their personal identity, and therefore it is up to the individual to decide whether or not to change their surname. **272**

Therefore, if a parent undergoes a surname modification or acknowledges their child after birth, the latter has the option to modify their surname (by either appending, preceding, or substituting it to/for the previous one; Article 262 CC). Such a choice must be communicated to the civil registrar of the municipality of birth within one year from the date on which they became aware of the modifications (Article 33, PD No 396 of 2000). **273**

On the contrary, if the child is a minor and the parent undergoes a surname change, the child's surname is automatically modified. **274**

If a minor child is acknowledged, the judge determines the assumption of the parent's surname, after discussing it with the minor child, who is over the age of 12 or even younger if they possess discernment (Article 262 CC). **275**

3. *Mandatory Name Changes*

Surname change is required in cases of divorce or dissolution of a civil partnership (a.3.1), when an adult is adopted (a.3.2.). After a gender recognition decision, a name change is required(b). **276**

However, alterations to civil status must consider the importance of preserving one's name as an essential aspect of personal identity. (98)

(98) Constitutional Court, Judgment n 13/1994.

a) *Changes in Surname Usage Within Marriage and Civil Unions*

277 Article 143-bis CC allows a wife to add her husband's surname to her own. The addition, however, does not entail any registry variations but is merely a 'surname in use'. (99)
It was initially mandatory, as evidence of the family union; subsequently, with Law No 151 of 1975, it became optional. (100)

278 In the case of separation, Article 156-bis CC stipulates that the judge has the authority to either forbid a wife from using her husband's surname or grant her permission not to use it, depending on whether it is detrimental to either party.

279 In the case of divorce, a wife automatically loses the added surname, and only the judicial authority that grants the divorce can authorise its retention (Article 5 Law No 898 of 1970). This authorisation depends on her interests or those of her children.

280 For same-sex civil unions, partners can adopt a shared surname, selected from their own surnames. Law No 76 of 2016 did not explicitly state whether the 'common surname' should be officially registered, leading to uncertainty about whether it should be treated as an official name change or if it is merely a 'surname in use' without formal registration.

281 Article 3(c)(2) of Legislative Decree No 5 of 2017 considered the common surname a mere 'surname in use'. Constitutional Court decision No 212 of 2018 affirmed that this provision adequately guarantees the identity of the couple.

282 The effect of this agreement expires upon the dissolution of the civil union (Article 10 (1) of Law 76 of 2016), without exception. This solution raises concerns about its constitutionality, as it potentially infringes upon personal identity.

b) *Adult Adoption and Surname Modification*

283 The addition of the adopter's surname is a consequence of the adoption of an adult, as a formal recognition of the newly established familial bond.

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(99) DPR n 223/1989, art 20(3). Massimo Paradiso, 'I rapporti personali tra coniugi' in Francesco Donato Busnelli (ed), *Il codice civile. Commentario* (Giuffrè 2012) 153; Francesco Finocchiaro, 'Del matrimonio' in Francesco Galgano (ed), *Commentario al Codice civile* (Zanichelli 1993) 270; Gilda Ferrando, 'I rapporti personali tra coniugi: principio di uguaglianza e garanzia dell'unità della famiglia' in Pietro Perlingeri and Michele Sesta (eds), *I rapporti civilistici nell'interpretazione della Corte costituzionale* (ESI 2007) 317; Enrico Al Mureden, 'Cognome e identità personale nella complessità dei rapporti familiari' [2022] Famiglia e diritto 871.

(100) Alessandra Arceri, 'Art 143-bis cc' in Michele Sesta (ed), *Codice della famiglia* (Giuffrè 2015) 475.

The balance between this requirement and the individual's personal identity is evidenced in the position of surnames. Indeed, the adoptee can select the placement of their new surname, as outlined in Article 299 CC (after the Constitutional decision No 135 of 2023). [101] **284**

More specifically, the adoption of an adult is granted through a judgment (Article 313 CC), after the court's meticulous evaluation of several criteria (see above, paras 154ff). This includes the suitability of the adoption for the adoptee, as well as the consent of both the adopting party and the adoptee, as specified in Article 296 CC. Such consent must be voluntary and it must be given with full awareness of the effects, including the determination of the adoptee's surname. [102] **285**

B. *Gender recognition*

The procedure for gender recognition remains entirely judicial (Article 31 (1) of Legislative Decree No 150 of 2011). **286**

The initial regulatory framework dates back to 1982 (Law No 164 of 1982). With the introduction of Lgs D No 150 of 2011, the process underwent a transformation. This proceeding now needs a constitutive judgment rendered by an ordinary court, in a collegial composition. **287**

The competence is determined by the applicant's place of residence, as outlined in Article 2 of Law No 164 of 1982, and Article 31 (of) Lgs D No 150 of 2011.

The court's role is to ascertain the factual changes in sexual characteristics and, based on this verification, to assign a different gender identity (pursuant to Article 31 of Lgs D No 150 of 2011). Notably, the court no longer grants authorisation for a gender change but, rather, recognises a change that has already occurred in reality. **288**

Moreover, surgery is no longer a requirement. In any case, if it is requested, for personal identity reasons related to gender identity issues, an additional and separate judicial authorisation was required until Constitutional Court decision 143 of 2024.

These changes have implications for relationships with other individuals: ie, they lead to the automatic dissolution of marriage or a civil partnership, in accordance with Article 4 of Law No 164 of 1982 and Article 31 of Lgs D No **289**

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[101] Previously, according to Article 299 CC, the adoptee took the surname of the adopting party, placing it before their own.

[102] Gabriele Salvi, 'Note in tema di poteri di verifica del tribunale nel procedimento di adozione dei maggiori di età: la validità del consenso e l'utilizzo abusivo dell'adozione ordinaria' [2012] Nuova Giurisprudenza Civile 10529.

150 of 2011. For this reason, it is necessary to notify one's partner and children.

290 Moreover, spouses have the opportunity to express their consent to continue the union in an alternative form, such as transitioning from marriage to civil partnership. If, on the other hand, the couple was formed by persons of the same sex and one of them changes sex, Constitutional Court decision No 66 of 2024 declared the rule unconstitutional because it did not allow the parties to remain united. It therefore provided for a period of 180 days after gender recognition judgment in which to marry: during this period, even if the couple consists of persons of different sexes, the couple remains civilly united. If they do not marry within this period, the couple is automatically divorced.

Thus, the automatic dissolution of the previous union can only be avoided in specific circumstances and with the mutual agreement of the parties involved.

291 Furthermore, gender recognition has implications related to an individual's name. Although not explicitly required by law, changing one's name ([103]) is regarded as a necessary consequence of gender recognition, ([104]) for consistency between an individual's name and gender identity. ([105]) In any case, this requirement does not allow a judge to impose a specific gender rendering of the former name (eg Bruna with Bruno). Instead, the judge must respect the individual's wishes in this regard. ([106])

([103]) Cassazione civile n 12638/2015; n 3877/2020; Tribunale di Torino, 15 September 2022.

([104]) The responsibility for obtaining a new name lies with the individual. In the same proceeding for gender recognition: App Florence 23 November 2007, App Genoa 23 April 1990, App Benevento 10 January 1986, App Messina 5 December 1985, App Macerata 21 December 1985, App Macerata 12 November 1984, App Pisa 20 January 1984, App Monza 5 December 1983, App Rome 9 April 1983, App Rome 3 December 1982, and App Milan 2 November 1982 have supported this approach. However, contrary decisions were made by Treviso Court, Section I, 18 September 2015, and Ancona Court 4 November 1990. These contrary decisions require the activation of a separate subsequent application for changing one's name. The request for name change may also be made directly to the civil registrar. It is important to mention the decision of *SH v Italy* App no 5521/08 (ECtHR, 11 October 2018), which condemned Italy for not allowing a change of name even before surgical intervention and, at the time, after the initial registry change.

([105]) Cassazione civile n 20385/2012; n 3877/2020. Additional arguments are drawn from textual evidence, including Article 35, paragraph 1, of PD No 396 of 2000. Furthermore, Article 5 of Law No 164 of 1982. An exception arises when the original name can be used interchangeably for both masculine and feminine names (Cassazione civile n 20385/2012).

([106]) Cassazione civile n 3877/2020.

C. *Protection of adults*

292 Three protection procedures for vulnerable individuals are provided for by the Civil Code. When a mental illness is of such magnitude that the individual is not able to manage any business at all, an 'interdiction' can be issued (Article 414 CC). This prevents the interdicted person from performing any legal acts, and, therefore, a representative (a 'tutor') must be appointed (Article 424 (1) CC) by the same interdiction decree.

293 Conversely, where a mental illness is not as severe as above, the incapacitation (*inabiliatazione*) may be chosen, with the consequence that the adult retains the full capacity to perform acts of ordinary administration, being rather assisted by a curator for acts of extraordinary administration. The curator is appointed by the decree of incapacitation as well.

294 Both interdictions and incapacitation require a constitutive judgment by a judicial authority and must be registered in the civil registers.

295 Not only vulnerable persons, but their spouse, partner or cohabitant as well as certain relatives and the public prosecutor are allowed to file the claim (Article 417 CC). Given the public interest involved in the proceeding, the public prosecutor is an essential party to the process.

296 The President of the Court then names a reporting judge by decree and sets a hearing date. This decree is then communicated to the public prosecutor.

297 The reporting judge gathers all relevant information to assess the need for a guardianship or incapacitation measure. For this purpose, it is mandatory to examine the recipient of the protective measure, and if necessary, a guardian or provisional custodian may be named (Article 419 CC).

298 Interdiction and incapacitation take effect from the day of the judgment's publication (Article 421 CC, with the exception of cases provided for in Article 416 CC for measures concerning minors, which take effect when they reach legal age).

299 The decision can only be revoked upon the request of an entitled party (Article 429 CC), not by the incapacitated individual.

300 Law No 6 of 2004 introduced a third and more flexible protective measure referred to as 'supportive administration' (*amministrazione di sostegno*). Its main feature is tailored to the specific needs of the individual, with the consequence that it may be temporary and based on mere physical weaknesses.

301 Both the public prosecutor's intervention and the hearing of the individual are required (Article 407 CC).

302 The judge is required to decide within 60 days from the date of the application, by decree, which is immediately enforceable (unless the individual was under interdiction or incapacitation: see Article 405 CC). In any case, the registration of the decree in the birth registry is required.

303 The supervisory judge may, at any time, modify, even *ex officio*, the decisions made in the decree.

304 The adult's autonomy plays a role in the choice of the administrator, as emphasised by Article 408 CC ('the choice of the support administrator [...] may be made directly by the interested party in anticipation of their potential future incapacity, through a public deed or private document. In the absence or in the presence of significant reasons, the judge may appoint a different support administrator'). (107)

305 No extra-judicial appointment is currently allowed, while the United Nations Convention on the Rights of Persons with Disabilities (CRPD) of 13 December 2006, and the Council of Europe Recommendation No R (99) 4 of 23 February 1999 recommend fully negotiated solutions.

306 In practice, the representation (*procura generale*) is used to allow a third party to act on behalf of the beneficiary at least in the realm of property law. Nevertheless, whenever the person is no longer capable of overseeing the representative's acts, these remain valid and effective, (108) while no revocation can take place. In this case, relatives can only apply for an *amministratore di sostegno*, who will be able to revoke the previous authorisation. (109) Legislative proposals (110) to introduce a protective mandate have been presented in recent years (according to solutions already prevalent in France, Germany, Austria, and Spain).

307 Acts of extraordinary administration on behalf of vulnerable adults may require prior judicial authorisations (Articles 372, 374, 424, and 425 CC). These have been de-judicialised by Article 21 of Lgs D No 149 of 2022, which allows notaries to issue authorisations according to the same rules described above (see above paras 214ff), while – as an alternative solution – Article 1 (13), letter a, Law No 206 of 2021 has given the guardianship judge (*giudice tutelare*) the competence to issue protective measures and preventive authorisations.

V. Overall conclusions

308 The Italian legal system has embarked on a process of de-judicialisation in the area of family and succession law. This trend is particularly evident in the

(107) Cassazione civile n 1667/2023.

(108) Matilde Girolami, 'Dalla crisi dell'amministrazione di sostegno al mandato di protezione: un bilancio de iure condendo' [2021] Rivista di Diritto Civile 854.

(109) Matilde Girolami, 'La procura degli incapaci' [2019] Rivista di Diritto Civile 1395.

(110) Matilde Girolami, 'Dalla crisi dell'amministrazione di sostegno al mandato di protezione: un bilancio de iure condendo' [2021] Rivista di Diritto Civile 854.

areas of divorce, separation and dissolution of civil unions, where, since 2014, agreements between spouses can have the same legal effects as a court decision. However, these agreements are not simple private agreements, but the result of a process involving professionals and administrative authorities, whose control varies according to the case. For example, the procedure before a mayor involves less substantive scrutiny than assisted negotiation and for this reason it excludes couples with children and limits the possibility of concluding agreements on lump-sum maintenance and property transfers. However, probably because of the sensitive interests at stake, the trend seems to be different in parenthood matters, where most competences are still attributed to the courts. **309**

On the contrary, since the entry into force of the Civil Code, Italian inheritance law has always assigned to the courts a marginal role, limited to extraordinary situations and to matters of voluntary jurisdiction, such as the granting of authorisations to carry out some specific acts. As regards the latter, however, the aforementioned Article 21 of Lgs D No 149 of 2022 has attributed also to notaries the competence to issue authorisations of voluntary jurisdiction, thus further reducing the competences reserved to the Court of Succession. **310**

In other areas, such as voluntary changes of name or surname, there are administrative procedures. Where such a change is necessary, for example, in the case of divorce, adoption of an adult or gender recognition, issues relating to the change of name and surname are dealt with by a judicial authority. **311**

Areas such as gender recognition and the protection of vulnerable adults do not yet provide for extra-judicial proceedings. Although these procedures are currently under judicial authority, legal scholarship and some legislative proposals advocate a gradual shift towards an administrative approach, in line with the wider trend towards simplifying and rationalising legal procedures in the family and succession context. **312**

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