

IL DIRITTO DI FAMIGLIA E DELLE PERSONE

Adozione mite e piena: quale tutela per i minori?

The author, examining two judgements of the Italian Supreme Court, dwells on two adoption forms: plena and minus plena, especially on “mite” (mild) adoption. He censures the strictness of Italian law adoption for a wider protection of the best interest of the child, according to the EDU Court’s teaching.

di GABRIELE FAZZERI

Se il legittimario *in pectore* abbia il diritto di opporsi ad una liberalità “occulta” (previo esperimento, se del caso, dell’azione di simulazione).

The essay, taking a cue from an interesting decision of the Italian Supreme Court, analyses some of the instruments that may be invoked by the deceased’s close relatives before the opening of his succession. In particular, the sentence has the merit of rekindling the long-standing debate on the possibility to apply the institution of opposition pursuant to Article 563 Civil Code, also to indirect or disguised donations. The decision is also noteworthy because, for the first time, the Supreme Court has established that the rules of Article 563 Civil Code, reformed by Law No 80/2005, must be applied also to donations transcribed before the reform came into force.

di DENISE GUARNIERI

Vita familiare e minori. A trent’anni da “Diritto comunitario e legalità costituzionale” di Pietro Perlingieri

The essay applies what has been theorised by Pietro Perlingieri in “*Diritto comunitario e legalità costituzionale*” to the expansive capacities both of the right to respect for private and family life and the primary consideration for the best interests of the child, as set out in the Charter of Fundamental Rights of the European Union. The compatibility analysis is made aware of the circular integration between European Union law and domestic law within the limits of constitutional legality. Having particular regard to the recognition of *status* in family law established in a different EU Member States, the article highlights

the peculiarity of this legal matter and the necessity for indirect recognition of the *status familiae* in the light of the principle of supremacy of EU law and its limits.

di ROBERTO SENIGAGLIA

El art. 12 de la Convención sobre los derechos de las personas con discapacidad de Nueva York, de 13 de diciembre de 2006

The essay, starting from a historical analysis on the process that led to the approval of the Convention on the rights of persons with disabilities, intends to offer an interpretation of its article 12, in order to identify the concrete scope of the obligations posed to identify the necessary adaptations to legal systems of the Member States. It becomes essential to abandon the medical assistance logic of disability, in favor of the endowment of a social model based on human rights. The person with disability cannot be proved of his capacity and, in any case, it is necessary to move from a system of substitution in the taking of decisions based on the best interest of the person with disability to a system of support for the person based on his preferred interest.

di VINCENZO BARBA

La nozione di “disequilibrio” nell’assegno di separazione e divorzio (una rielaborazione concettuale da parte della giurisprudenza)

The paper analyzes the new jurisprudential interpretation of the art. 97 of the Spanish Civil Code; more specifically, it is evaluated the definition of “imbalance”, requirement needed for the recognition of an allowance in the event of separation or divorce.

di JOSÉ RAMÓN DE VERDA Y BEAMONTE

Responsabilità civile e pandemia

The essay proposes a reflection on the use of civil liability to deal with the damage from covid 19, questioning the role that, in the context of mass damage, can in fact play the institute, its functions and its limits. Starting from the analysis of the criteria that govern the formulation of the judgment of responsibility, the author dwells, in particular, on the clause of injustice, as a central junction for the affirmation of civil liability. The parameter of injustice is therefore placed in the perspective of the reasonable balance between fundamental rights which, in the name of a supreme principle of dignity, induces the Courts to seek a reasonable point of balance, which cuts off upstream any attempt at tyranny. After analyzing the types of damage produced by the pandemic, a civil liability function is envisaged that can overcome the screening of injustice through the use of indemnity techniques. Thus, on the basis of a principle of solidarity, a distinction between compensation and compensation is recovered which, as is well known, is difficult to find confirmation in positive law.

di GABRIELLA MARCATAJO

L'equilibrio instabile degli accordi a carattere solutorio e compensativo nella risoluzione della crisi coniugale tra interpretazione giurisprudenziale e scelte legislative

The author analyses the theme of the validity of private agreements between spouses made to regulate property aspects in divorce.

The essay analyses differences between the reorganisation of the Family Alternative Dispute Resolution and the recent jurisprudence of the Italian Supreme Court.

Issues such as the capacity of the agreements to transfer the ownership of the asset, the real or mandatory effectiveness of the commitment assumed in the court as well as the typical or atypical nature of the agreements are analyzed.

The aim of this work is to verify the effect between future regulatory prospects and the different evolution of the courts.

di RAFFAELLA GRISAFI

Il diritto di famiglia come diritto relazionale

Family law is today called to a paradigmatic turning point to understand and adequately deal with the complex reality of the family and its social transformations. The essay tries to clarify this turn from the perspective of a relational theory of society linking rights and social phenomenology. Relational thinking proposes to draw the necessary consequences from the observation that, despite all the changes, the family is a relational common good that has no functional substitutes. The author argues that this sui generis reality of the family is due to its specific social genome, which consists of the relational complex that interactively connects its fundamental elements, that is, the gift as motivation, reciprocity as the norm of one's own relationality, the sexuality of the couple. and generativity. Given this relational constitution of the family, the rights of persons must be combined with the rights of internal and external social relations to the family group / institution. A connected, even if distinct, right of relationships with respect to that of individuals must be recognized. Family rights are relational rights that have a specific dignity. If it is true that the family is a common good as a relational good, then it is completely reductive to treat it, from a legal point of view, with a mix of public and private law. A new relational law of a communitarian nature is required.

di PIERPAOLO DONATI

Istanze neoformaliste negli orientamenti della Cassazione Civile in tema di riconoscimento della nullità delle sentenze matrimoniali canoniche

The jurisprudence of civil Cassation United Sections following the historic sentence of July 17th 2014, n. 16379 seems to have consolidated the criterion of prolonged or "qualified" cohabitation, after the celebration of the marriage, as indispensable factor among the public order conditions impeding the civil resolution. The shared intention to inspire the decisions to verify the substantiality of the relationship and to avoid the instrumental recourse to the judge by the economically strong spouse, however, highlights evident contradictions.

In addition to the relativization of the dictates of the Villa Madama Agreements and the principle of *stare pactis*, we are witnessing the emergence of a formalist hermeneutics, towards which rethinking respectful

of logical and systematic coherence — on the other hand emerging from very recent orientations — would be desirable.

di FABIO VECCHI

Gli accordi preventivi della crisi coniugale: evoluzioni giurisprudenziali e riflessioni prospettive

This paper investigates the agreements aimed at preventively regulating a marital crisis. More specifically, it investigates the legal settlements by which a couple can agree the terms of their respective assets and economic interests after the dissolution of their marriage.

The enforceability of these agreements has to strike a balance between the will expressed by the parties and a series of inalienable rights. The analysis focuses on the evolution of the jurisprudence's stance on the subject, culminating with a systematic reflection on the admissibility of such agreements.

di JESSICA MINEO

I beni e le attività culturali come strumento di inclusione per le persone con disabilità

Culture is an indispensable element for the full affirmation of each individual's personality, both as an individual and within social formations. Therefore, it must be accessible to all and the enjoyment of cultural goods and activities by the community must be guaranteed without distinction of personal and social conditions.

di FABIO DELL'AVERSANA E FABRIZIA CESARANO

Il "compenso" all'ex coniuge, ovvero l'assegno divorzile avvolto dalle nebbie di stagione

The Author once again deals with the troubled issue of entitlement of the check post-married, this time taking the opportunity from change in the jurisprudence of legitimacy in relation to the effects that derive from the establishment of a stable de facto coexistence with each other partner, by the person entitled to the service. Rebuilding meticulously the logical steps and analyzing the different effectiveness extinct compared to the new marriage, the A. dwells on inconsistencies systematics of the hermeneutic landing sanctioned by the Supreme Court, with particular attention to the inseparable solidarity function dictated by norm, which does not tolerate further autonomous functional criteria. The study is aimed at demonstrating the objective incompatibility between the nature of the marriage relationship and the hypothesis of any correspondence of ordinary law for the time spent together manente affectio coniugalitatis, subjecting the main motive traits to criticism. Finally, the A. focuses on the aspects marked by social evolution and on the impact that today's family models assume, without neglect the trends and the worrying consequences that have emerged, with particular reference to the widespread uncertainty of the legal framework also for professional operators and judges of merit, precisely for effect of continuous overruling, showing its confusing effects through casuistry; the reference, however, turns to right consi-

deration of the positive norm, rather than its perennial rewriting directly by those who have to unravel the individual dispute.

di GIANCARLO SAVI

La crioconservazione umana verso il mercato non-regolamentato della vita. Una analisi giuridica ed “economica” fra Italia e sistema legislativo britannico

The practice of cryo-conservation has made its debut in the Italian legal system in its practical mode: conservation of cells, tissues and then embryos. The latter fall within the legal remit of Law no. 40 of 2004, which, additionally, aims at favouring the solution of procreative conundrums strictly connected with both sterility and human unproductivity. In doing so, the human activity interferes with the start of the life. From the opposite quarter of the end of life, more recently some private organisations, headquartered in both the USA and Russia, even provide human conservation services to the public. In this second circumstance, the goal is to ensure that the life of the human being is extended, once such existence coincides with the end of a degenerative illness. Based on such a background, where references to the correspondent legislation existing in the UK (the yardstick of this comparative analysis) are not missing, first and foremost the contribution discusses and analyses the latest rulings of the Italian Supreme Court, as far as the wills of embryos and post mortem fecundation are concerned. Second, also in order to peruse the subject from a broader perspective, the application of the cryonic in its final stages is dealt with: in this regard, the analysis unveils the more bizarre paradox. A theory is corroborated pursuant to which, in an even more progressive way and thanks to the techno-scientific evolution, the human being, via the technology, is stepping into the shoes of the nature, the “supremo” by definition of the human life, and this may sadly happen to the detriment of the latter. And the new murky scenario is far from being reassuring and uplifting.

di PIERRE DE GIOIA CARABELLESE E CAMILLA DELLA GIUSTINA

L’accesso agli atti *ex lege* 241/1990 tra rapporti fiscali e rapporti post-matrimoniali

The subject of the study is the right to access to documents pursuant to law n. 241 of 1990 against the so-called tax returns presented by the spouse or ex-spouse, when motivated by the aim of being able to reconstruct the financial and income situation in the event of marriage “crises”, which lead to separation and/or divorce. Contrasting jurisprudential applications are found in practice, while the scholar has not yet effectively addressed the issue. In this paper, the author attempts to evaluate the main hermeneutical coordinates, highlighting how the access to tax documents is essentially extraneous to matrimonial matters and can find some space only in the face of instances more than adequately motivated and in exceptional cases, since the ordinary judge competent to settle the matrimonial dispute is entrusted with the power to order investigations in this regard.

In the background, however, the real question, which is that of the resolution of the marriage, remains intact: according to a more modern approach defined by some doctrine as “intersectional”, because it considers a plurality of factors affecting the marital relationship being resolved (e.g.: gender, social class, occupation, length of marriage, age at the time of the wedding and at the termination of the marriage, race, etc.), in order to identify the point of possible balance between the (normal) individual self-responsibility and (residual and limited in time) post-marital solidarity, however, provided, that there is a (true) weak part.

di LORENZO IEVA