



European Court of Human Rights
Fourth Section
Council of Europe
67075 Strasbourg-Cedex, FRANCE

4 November 2014

Dear Sir or Madam:

RE: Gajewski v. Poland, Application no. 8951/11

Please find enclosed the Third Party written observations of Alliance Defending Freedom.

Yours faithfully,

Paul Coleman
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Une alliance consacrée à la défense juridique de la liberté

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EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

APPLICATION NO. 8951/11

GAJEWSKI

Applicant

v.

POLAND

Respondent

**WRITTEN OBSERVATIONS
OF THIRD PARTY INTERVENER:**

Alliance Defending Freedom

**Filed on
4 November 2014**

Introduction

1. Alliance Defending Freedom (“ADF”) is an international legal organization dedicated to protecting and defending fundamental freedoms, marriage, and the family. As a legal alliance of more than 2,200 lawyers dedicated to the protection of fundamental human rights, it has been involved in over 500 cases before national and international forums, including the Supreme Courts of the United States of America, Argentina, Honduras, India, Mexico and Peru, as well as the European Court of Human Rights and Inter American Court of Human Rights. ADF has also provided expert testimony before several European parliaments, as well as the European Parliament and the United States Congress. ADF has Special Consultative Status with the Economic and Social Council of the United Nations, as well as accreditation with the Organization for Security and Cooperation in Europe, the European Union (the European Union Agency for Fundamental Rights and the European Parliament) and the Organization for American States.
2. This brief is divided into two parts. The first part will analyze the Court’s case-law on the issue of divorce under Articles 8 and 12 of the Convention and will demonstrate that according to the European Convention on Human Rights and the case-law of this Court, there is no “right to divorce” that can be claimed under the Convention. Secondly, this brief will outline the wealth of social science evidence that identifies the harm of divorce on the children involved, thus providing support to national divorce laws that place the child’s best interests at their core.

I. Divorce and the Court’s Case-law

3. In adjudicating cases that centre on the issue of divorce, the role of the European Court of Human Rights has, historically, been extremely limited. In a consistent line of previous decisions, this Court has drawn on the travaux préparatoires and the language of the Convention in concluding that there is no right to divorce. Subsequent jurisprudence has developed this general principle to identify the limited situations in which national legislation on divorce may obstruct the right to marry.

Johnston and Others v. Ireland

4. In the case of *Johnston and Others v. Ireland*,¹ the first applicant sought a divorce from his wife so that he could marry the second applicant – a woman with whom he had been living for a number of years and with whom he had a child, the third applicant. Mr. Johnston complained that in being refused a divorce by the Irish courts, he was legally unable to remarry and therefore his rights under, *inter alia*, Articles 8 and 12, had been violated. The Court disagreed, and held by sixteen votes to one that “the absence of provision for divorce under Irish law and the resultant inability of the first and second applicants to marry each other do not give rise to a violation of Article 8 ... or Article 12 ... of the Convention.”²

¹ Judgment of 18 December 1986, Series A no. 112, p. 25.

² *Id.*, at § 86.

5. In reaching this decision, the Court first rejected the argument that the case was more about the right to marry rather than a right to divorce. In the view of the Court,

The issues arising [cannot] be separated into watertight compartments in this way. In any society espousing the principle of monogamy, it is inconceivable that Roy Johnston should be able to marry as long as his marriage to Mrs. Johnston has not been dissolved. ... Consequently, their case cannot be examined in isolation from the problem of the non-availability of divorce.³

6. The Court then assessed the case under Article 12 of the Convention and held that the “right to marry” could not be interpreted as including a right to divorce. Looking to the ordinary meaning of the words, the “right to marry” was clear “in the sense that they cover the formation of marital relationships but not their dissolution.”⁴ This interpretation was “consistent with its object and purpose as revealed by the travaux préparatoires.”⁵ The text of Article 12 was based on Article 16 of the Universal Declaration of Human Rights, paragraph 1 of which reads:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

7. The Court in *Johnston* pointed out that during his explanation to the Consultative Assembly as to why the draft of Article 12 did not include the words “and at its dissolution”, Mr. Teitgen, Rapporteur of the Committee on Legal and Administrative Questions, said: “In mentioning the particular Article of the Universal Declaration, we have used only that part of the paragraph of the Article which affirms the right to marry and to found a family, but not the subsequent provisions of the Article concerning equal rights after marriage, since we only guarantee the right to marry.”
8. Moreover, the fact that social developments had occurred since the Convention was drafted, namely the increase in marital breakdown, could not create a right in the Convention that was not included at the outset.⁶ Consequently, the Court held that a right to divorce could not be derived from Article 12.
9. The Court then assessed the case under Article 8 of the Convention – the right to respect for family life. It noted that the Article’s “somewhat vague notion of ‘respect’ for family life, might appear to lend itself more readily to an evolutive interpretation than does Article 12.”⁷ However, despite the looser wording of the term “respect”, this Court considered that it could not be interpreted in such a way as would render the Convention inconsistent. The Court therefore held that it:

³ *Id.*, at § 50.

⁴ *Id.*, at § 52.

⁵ Collected Edition of the Travaux préparatoires, vol. 1, p. 268.

⁶ *Johnston and Others v. Ireland* at § 53.

⁷ *Id.*, at § 57.

[D]oes not consider that a right to divorce, which it has found to be excluded from Article 12 ... can, with consistency, be derived from Article 8 a provision of more general purpose and scope. [Therefore], the engagements undertaken by Ireland under Article 8 cannot be regarded as extending to an obligation on its part to introduce measures permitting the divorce and the re-marriage which the applicants seek.⁸

Subsequent cases

10. The case of *Johnston and Others v. Ireland* was shortly followed by *F v. Switzerland*.⁹ The case challenged Article 150 of the Swiss civil code, which allowed the courts to fix a period of between one and three years during which the party at fault for the divorce is prevented from remarrying. The applicant argued that the three-year prohibition on marriage was incompatible with his right to marry under Article 12 of the Convention and by nine votes to eight the Court agreed.
11. However, the Court held that F's situation was quite distinct from Mr. Johnston's, since "what was at issue in the case of [Johnston] was the right of a man who was still married to have his marriage dissolved."¹⁰ The Court then re-affirmed that allowing divorce under national legislation "is not a requirement of the Convention."¹¹ However, where divorce is permitted, Article 12 secures for divorced persons the right to remarry without unreasonable restrictions.
12. The cases of *Johnston* and *F*. established this Court's case-law on divorce and this has not been departed from in the decades that followed. For example, in *Aresti Charalambous v. Cyprus*,¹² the applicant complained that his slow divorce proceedings had prevented him from remarrying, in violation of Articles 8 and 12 of the Convention. The Court ruled in that in the circumstances of the case, both arguments were manifestly ill-founded. By contrast, in *V.K. v. Croatia*,¹³ the Court held that in the circumstances the slow divorce proceedings did in fact violate the right to marry under the Convention. However, both cases dealt with the length of Court proceedings and not the issue of divorce *per se*. With regard to the issue of divorce, the Court re-iterated its previous case-law that "national legislation allowing divorce is not a requirement of the Convention"¹⁴ and that "a right to divorce cannot be derived from Article 12 of the Convention."
13. Thus, where divorce is legalized, actions that impair or prohibit remarriage – such as unduly long divorce proceedings or statutory time limitations – may give rise to a claim under the Convention. However, it is clear that there is no "right to divorce".¹⁵ Similarly, while Article

⁸ *Ibid.*

⁹ Application No. 11329/85, judgment of 18 December 1987.

¹⁰ *Id.*, at § 38.

¹¹ *Ibid.*

¹² Application No. 43151/04, judgment of 19 July 2007.

¹³ Application No. 38380/08, judgment of 27 November 2012.

¹⁴ *Aresti Charalambous* at § 56 and *V.K. v. Croatia* at § 99.

¹⁵ See A. Mowbray, "Cases, Materials and Commentary on the European Convention on Human Rights", *Oxford University Press* (2012), p. 786.

9 of the Charter of Fundamental Rights of the European Union declares the “right to marry and to found a family”, this does not include a “right to divorce” – which is still governed by domestic laws of the Member States.¹⁶

Margin of appreciation

14. In determining the margin of appreciation afforded to Member States on any given issue, the Court must consider a number of factors, including the subject matter of the case. Regarding matrimony cases arising under Article 12 of the Convention, the Court observed in *F v. Switzerland* that the issue is “closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit”¹⁷ – thus lending itself to a wider margin of appreciation. In *Johnston and Others v. Ireland* the Court noted that the “essential object” of Article 8 is to “protect the individual against arbitrary interference by the public authorities”. Thus, while there “may in addition be positive obligations inherent in an effective ‘respect’ for family life”, as far as positive obligations are concerned, “the notion of ‘respect’ is not clear-cut.”¹⁸
15. As the Court must consider the diversity of the practices followed and the situations arising in the Member States, the requirements attached to the notion of “respect” will therefore vary considerably from case to case. Accordingly, the Court held that “this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.”¹⁹ Moreover, in determining the margin of appreciation, the Court is invited to consider whether or not there is a “European consensus” or “common ground” on the issue in hand. A lack of European consensus is a critical factor in determining a wide margin of appreciation.²⁰
16. With regard to the issue of divorce, there is clearly no European consensus. National laws regulating marriage and divorce vary widely within the Council of Europe. Even within the European Union there is huge division, leading the EU to explore ways in which EU Member States can develop enhanced cooperation “in situations involving a conflict of laws.”²¹

¹⁶ See “Commentary of the Charter of Fundamental Rights of the European Union”, EU Network of Independent Experts on Fundamental Rights (June 2006), p.99. Available at <http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf>.

¹⁷ *F v. Switzerland* at § 34.

¹⁸ *Johnston and Others v. Ireland* at § 55.

¹⁹ *Ibid.*, Citing *Abdulaziz, Cabales and Balkandali* judgment of 28 May 1985, Series A no. 94, pp. 33-34, § 67.

²⁰ *Rasmussen v. Denmark*, Application No. 8777/79, judgment of 28 November 1984 § 40: “The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.”

²¹ In 2010 the EU passed Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. The optional Regulation, currently adopted by fifteen States, is designed to apply “in situations involving a conflict of laws” – *precisely because divorce laws within the region are so varied.*

17. Some countries within the Council of Europe have very liberal divorce laws. For example, divorce is permitted without the requirement to attribute fault to either party – commonly referred to as “no-fault divorce” – in a small number of countries, such as Russia,²² Sweden²³ and most recently, Spain.²⁴
18. On the other hand, several Member States strictly regulate the conditions under which divorce is permissible. For example, up until 2011, divorce was not lawful in Malta at all. Even with the change in law, divorce is only permissible in certain limited circumstances. The married couple must first file a joint petition with the court, or one spouse must file a petition for divorce from the other. At the time the divorce proceedings begin, the spouses must have lived apart for at least four years during the five years immediately preceding the petition, or at least four years must have elapsed from the date of legal separation. Moreover, the court must be satisfied that there is no reasonable prospect of reconciliation.²⁵ Ireland has a similarly family-oriented divorce law after legalizing divorce in 1996.²⁶ In some countries, permission may nevertheless be withheld by the courts if it is deemed to be in the best interests of the children of the spouses – such is the case in Poland.²⁷
19. Most other European countries fall within the spectrum detailed above: permitting divorce but only on the basis of certain limited grounds.²⁸ Thus, there is clearly no common ground amongst the Member States on the issue of divorce and accordingly, if a Member State chooses divorce laws that strengthen marriage, it is entitled to the benefit of a wide margin of appreciation.

II. Divorce and the Best Interests of Children

20. There is a growing amount of research into the impact of divorce on the children involved. Three major results arise out of the majority of studies: Firstly, divorce harms children. Secondly, the harms do not fade with time but rather, the impacts of divorce are felt well into adulthood. Thirdly, the most recent studies suggest that even divorces which are considered “amicable” may detrimentally affect children – as it is the separation itself that causes the harm. An analysis of the most relevant studies and these conclusions is detailed in the following paragraphs.

²² Russia is arguably the founder of “no-fault” divorce, with Decree of the Central Executive Committee and of the Council of People’s Commissars of 19 December 1917: “On Termination of Marriage”.

²³ “Divorce – Sweden”, *European Judicial Network in civil and commercial matters* (23 April 2014), Available at <https://e-justice.europa.eu/content_divorce-45-se-en.do?member=1>.

²⁴ “Divorce – Spain”, *European Judicial Network in civil and commercial matters* (27 August 2014), Available at <https://e-justice.europa.eu/content_divorce-45-es-en.do?clang=es>.

²⁵ “Divorce – Malta”, *European Judicial Network in civil and commercial matters* (14 May 2014), Available at <https://e-justice.europa.eu/content_divorce-45-mt-en.do?member=1>.

²⁶ “Divorce – Ireland”, *European Judicial Network in civil and commercial matters* (9 July 2013), Available at <https://e-justice.europa.eu/content_divorce-45-ie-en.do?member=1#toc_1>.

²⁷ For example, see Article 56 (2) of the Family and Custody Code of Poland.

²⁸ For a comparison of divorce laws within the European Union, see <https://e-justice.europa.eu/content_divorce-45-en.do>. For a detailed comparison of 18 countries, see See L. González and T.K. Viitanen, “The Effect of Divorce Laws on Divorce Rates in Europe”, *Institute for the Study of Labor* (March 2006), Discussion Paper No. 2023.

Wallerstein's study

21. In the 1970s, Dr Judith S. Wallerstein's began what was to become a ground-breaking and in-depth study into the effect of divorce on children. She began talking to a group of 131 children whose parents were going through a divorce. By meeting with them regularly, she earned their trust and over the next 25 years built a picture of the "children of divorce" through their adolescence and into adulthood. The results of this study have been widely reported, including in a New York Times bestseller, and her work is the most cited on this subject in academic journals the world over.
22. Wallerstein's well-known 25-year study on the effects of divorce on the children involved studied children who were 3-18 years old when their parents divorced in the early 1970s following the first "no-fault" divorce legislation passed in the United States.²⁹ Every child was seen at regular intervals over the 25-year period. By her own admission, the sample group was "relatively homogenous" but she explains that the purpose was "to look at divorce under the best of circumstances and to omit as far as possible issues of poverty and ethnic discrimination."³⁰
23. In addition, a comparison group was recruited from the same age range, neighbourhoods and high schools but who had grown up in intact families "some of which were idyllic, some chaotic and conflict ridden, with the majority in between."
24. In summarizing some early findings, she reports that:

Growing up was harder for most of the children during the post-divorce years. The lives of parents and children changed radically almost overnight, as parents struggled to re-establish economic, social, and parental functioning, while trying to rebuild the tattered social network of their lives. Children of every age struggled with bewildering, demanding adjustments in their contact with both parents. Often they faced relocation to a new neighbourhood and a new school, along with consequent disruptions and losses in their friendships and activities. At home, they confronted seriously diminished parenting just at the time when they needed their parents' help to make sense of what was happening...³¹

25. She notes that: "[H]ardly any of our subjects described a happy childhood; in fact, a number of children told us that 'the day they divorced was the day my childhood ended.'³²
26. Turning to another angle and contrasting the results between the two groups, it is reported that:

²⁹ J. Wallerstein & J. Lewis, "The Unexpected Legacy of Divorce", *Psychoanalytic Psychology* (2004) 21:3 at 353.

³⁰ *Id.*, p. 355.

³¹ *Id.*, p. 359.

³² *Id.*, p. 361.

One in five of the girls had her first sexual experience before age 14. Over half were sexually active with multiple partners during high school...By contrast, the great majority of girls from intact families postponed sex until late high school or early college, with most reporting have sex only within the context of an established relationship.³³

27. In terms of future attainment, the study finds that the:

[M]ajor difference between the two groups began at college entry. In high schools where 92% of seniors go on to attend college, only 80% of the divorced group entered college at all. The differences widened as the divorced group combined full-time work with their school studies or alternated semesters of full-time work with college attendance...Only 57% of the divorce group achieved their bachelor's degree as compared with 90% in the comparison group.

28. She concludes with the observation that:

[T]he central finding of this study is that parental divorce impacts detrimentally the capacity to love and be loved within a lasting, committed relationship... This 25-year study points to divorce not as an acute stress from which the child recovers but as a *life-transforming experience* for the child.³⁴

Subsequent research

29. In the years following Wallerstein's landmark study, even those critiquing her research have concluded that, although the effects of divorce may not be as strong as she believed, "[P]arental divorce increases the risk of experiencing psychological problems, having a discordant marriage, seeing one's own marriage end in divorce, and having weak ties to parents (especially fathers) in adulthood."³⁵

30. More recent studies have attempted to answer some of those criticisms by controlling for selection factors which influence children's skills and traits at or before the beginning of the divorce process. They too have identified the "negative effects of divorce" including "setbacks among children of divorce in math test scores during and after the experience of parental divorce...[and] a negative in-divorce effect on interpersonal skills."³⁶

31. Others have attempted to address the relatively small sample size in that early, but detailed qualitative study: in a meta-analysis of 92 studies which themselves compared children living in divorced single-parent families with children living in continuously

³³ *Ibid.*

³⁴ *Id.*, pp. 362, 367 (emphasis in original).

³⁵ P. Amato, "Reconciling Divergent Perspectives: Judith Wallerstein, Quantitative Family Research, and Children of Divorce", *Family Relations* (2003) 52:4 at 332.

³⁶ H. S. Kim, "Consequences of Parental Divorce for Child Development", *American Sociological Review* (2011) 76:3 at 487.

intact families found that children of divorced parents scored lower than children in intact families across a variety of outcomes.³⁷

32. A 2007 study seeks to broaden the perspective further by looking at the impact of divorce twenty years after its occurrence on the children involved but also the wider family. The findings demonstrate that the parental subsystem continued to impact the family 20 years after divorce by exerting a strong influence on the quality of relationships within the family system. Many of the children involved described the re-marriage of one or both of their parents as more stressful than the divorce. When a child's relationship with their father deteriorated after divorce, the study found a concomitant deterioration in the child's relationship with their paternal grandparents, stepmother and stepsiblings.³⁸
33. The differing impact of divorce as between the sexes has relatively recently been explored with a study published in 2006. This Finnish study compared a sample of 317 adults who had experienced parental divorce before 16 years of age with 1,069 adults who came from non-divorced two-parent families. It found that females from divorced compared to non-divorced families reported "more psychological problems and more problems in their interpersonal relations" which were not reflected amongst the males. However, in common with the studies detailed above and below, shorter education, high unemployment, higher risk of divorce themselves, negative life events and more risky health behavior were more common amongst subjects of both sexes with a background of parental divorce.³⁹
34. A more recent school of thought has contended that it is the conflict between the parents and not the separation itself that harms children and this has led a number of Council of Europe member States to invest in policies which promote inter-parental harmony. However, a 2014 study which studied 270 parents who were divorced between 1998 and 2004 concluded that the children of divorced parents were more likely than others to suffer with behavioural problems, drug abuse, anxiety and depression – but crucially, that these problems were no worse if their parents continued in a state of conflict even after the divorce: "[the] results...suggest that the direct influence of post divorce coparenting on children's adjustment may not be as robust as predicted in the literature."⁴⁰
35. This pattern is seen the world over with an Australian study spanning 50 years and with a sample size of 29,443 concluding that divorce in Australia costs seven-tenths of a year of education and has become even more damaging in recent years,⁴¹ and a 2012 study in the UK by 20 academics noting that "[people] who suffer stresses such as parental divorce in

³⁷ P. Amato & B. Bruce, "Parental divorce and the well-being of children: A meta-analysis", *Psychological Bulletin* (1991) 110:1 at 26.

³⁸ C. Ahrons, "Family Ties after Divorce: Long-Term implications for Children", *Family Process* (2007) 46:1 at 53.

³⁹ T. Huurre, H. Junkkari & H. Aro, "Long-term Psychosocial effects of parental divorce", *European Archives of Psychiatry and Clinical Neuroscience* (2006) 256:4 at 256.

⁴⁰ J. Beckmeyer, M. Coleman & L. Ganong, "Postdivorce Coparenting Typologies and Children's Adjustment", *Family Relations* (2014) 63:4.

⁴¹ M. Evans, J. Kelly & R. Wanner, "Education attainment of the children of divorce: Australia, 1940-90", *Journal of Sociology* (2001) 37:3 at 275.

childhood are at a higher risk of social and psychological problems later in their adult lives.”⁴² In particular, they discovered that: “[P]arental separation in childhood is consistently associated with psychological distress in adulthood during people’s early 30s. This seems to be true even across different generations...”⁴³

36. The harms they identify of parental divorce include an increased risk of asthma, behavioural problems and becoming overweight. They link a number of the health and behavioural problems to financial instability but note that “the research shows that households that experience instability tend to be worse off financially than households with stably married parents.”⁴⁴
37. This repeated pattern is not one which even the significant welfare provision of the Scandinavian countries towards single mothers would appear to offset. A 2006 study examined the common contention that the impact of divorce on American children would be more severe than the impact in countries with greater welfare provision. The results challenged the orthodoxy, finding that “...the many Norwegian welfare benefits do not seem to mitigate the association between divorce and negative outcomes for the children involved.”⁴⁵
38. It is equally clear that there are long-term effects of divorce on individuals that persist after the transition to adulthood with the negative effects continuing into the children’s twenties and thirties in a study of 11,759 individuals.⁴⁶
39. In addition to the social benefits attaching to the institution of marriage, research has also identified the economic benefit of such a union and the beneficial effect of State policies and programs to encourage and strengthen marriage.⁴⁷
40. Given the demonstrable harm caused by divorce to the children involved, a State policy restricting or otherwise minimizing the occasion of divorce would be rationally justifiable. This position is further supported by strong empirical evidence demonstrating that where “no-fault” divorce is created, there is a resulting change in marital behaviour.
41. In particular, divorce rates have increased well above their historical trends where unilateral divorce has been legalized.⁴⁸ Although the effect of no-fault divorce laws on the overall divorce rate does appear to fade with time, there is a continuing effect, in that

⁴² M. Bartley (Ed.), “Life Gets Under Your Skin”, *The Economic & Social Research Council: Lifecourse Studies in Society and Health* (2012), p. 17.

⁴³ *Id.*, p. 7.

⁴⁴ *Id.*, pp. 6-7.

⁴⁵ K. Brevik & D. Olweus, “Children of divorce in a Scandinavian welfare state: Are they less affected than US children?”, *Scandinavian Journal of Psychology* (2006) 47 at 61.

⁴⁶ A. Cherlin & P. Chase-Lansdale, “Effects of Parental Divorce on Mental Health Throughout the Life Course”, *American Sociological Review* (1998) 63:2 at 239.

⁴⁷ B. Scafidi, “The Taxpayer costs of Divorce and unwed Childbearing”, *Institute for American Values* (2008).

⁴⁸ D. Allen & M. Gallagher, “Does Divorce Law Affect the Divorce Rate?”, *Institute for Marriage and Public Policy* (2007)

couples respond to the increased risk from no-fault divorce by delaying or forgoing marriages.

42. Looking to Europe, a similar phenomenon can be observed. A 54-year stretch of time was analyzed across a panel of 18 European countries which included countries which had only recently legalized divorce and those which had introduced no-fault unilateral divorce. The study found that “the introduction of no-fault, unilateral divorce increased the divorce rate by about 0.6, a sizeable effect given the average rate of two divorces per 1000 people in 2002.”⁴⁹ There is therefore a doubly beneficial effect of restricting the availability of divorce in that children are protected from the proven harmful effects demonstrated above but that these laws also act to modify behaviour with wider societal benefits.

Social Science Conclusions

43. The majority of studies clearly demonstrate that divorce causes a decrease in an individual’s quality of life and puts some “on a downward trajectory from which they might never fully recover.”⁵⁰ The effect of divorce on the children involved ranges from mild to severe and can manifest itself in short term or long term ways. Not every child will be affected by every effect. However, while it is not possible to predict how divorce will affect any one particular child, it is possible to demonstrate the effect of divorce on society and on the large class of children affected. As shown above, these effects are numerous, serious and enduring.⁵¹

Conclusion

44. According to the case-law of this Court, in situations in which national law permits divorce, a divorced person’s ability to remarry cannot be inhibited. However, the Convention does not speak to whether or not a divorce can be obtained in the first place.⁵² On that question, it is clear that the Convention does not require a state to legislate to allow divorce in any or every circumstance. Rather, given the lack of a consensus between States, the margin of appreciation afforded should be wide and sensitive to the differing historical, cultural and religious reasons for the wide array of divorce laws in force across the members States of the Council of Europe today.
45. The law in countries such as Poland takes into account the best interests of the child when deciding whether a marriage that has produced children should be afforded a chance of reconciliation. Given the wealth of social science evidence demonstrating the harm of divorce to the children involved, the Intervener respectfully submits that this is a rationally justifiable policy on the subject of which the Convention is silent.

⁴⁹ L. Gonzalez & T. Viitanen, “The effect of divorce laws on divorce rates in Europe”, *European Economic Review* (2009) 53:2 at 127.

⁵⁰ P. Amato, “The Consequences of Divorce for Adults and Children”, *Journal of Marriage and Family* (2000) 62 at 1269.

⁵¹ P. Fagan & A. Churchill, “The Effects of Divorce on Children”, *Marriage and Religion Research Institute* (2012).

⁵² *V.K. v. Croatia* at § 99.

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