

BRIEF CONSIDERATIONS AS TO THE JOINT EXERCISE OF PARENTAL AUTHORITY AFTER DIVORCE*

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Abstract: *The purpose of this study is to determine whether changes in the legislation on the exercise of parental authority brought positive changes in the lives of children whose parents have divorced. The methods used, i.e. comparison and observation, support the scientific approach in order to draw conclusions on the achievement of the ultimate aim of both legislative changes and study, respectively ensuring the best interests of the child. The rule of joint exercise of parental authority for children after the parents' divorce was introduced in the Romanian legal system at the time of the entry into force of the new Civil Code, respectively in 2011, taking also into account the fact that this rule applies in many other states of the European Union. The best interests of the minor require maintaining the child in a balanced family environment, in the presence of both parents, since the risk of breaking the child's spiritual balance is very high along with his or her giving to one of the two parents. Unfortunately, in most cases where the divorce or separation of parents occurs, the access of the non-resident parent to his/her own child becomes difficult to achieve, in which case it is useful to organize a program of personal relations meant to ensure the continuity of the non-resident parent's presence in the child's life. At this moment it is required the experience of the judge, who, taking into account all the aspects specific to each case, to find the best solution for ensuring the respect of the best interests of the child. The exercise of child joint custody may be beneficial for the child, sometimes not, depending on the attitude of each parent, and the judge will have to choose the best solution for each child, each case being different from the other case. And the parents should be advised and trained by specialized personnel so as to take upon themselves learnedly the new situations that they will face during the joint exercise of parental authority, in order to achieve the best interest of the child.*

Key words: *Private Law, Civil Law, Civil Code, joint exercise of parental authority, principle of the best interest of the child, mediation.*

The exercise of parental rights in Romania after divorce, during the last 30 years

In December 1989 the protection of the rights of the child in the family was carried out based on the *Family Code*, namely on the basis of Law no. 4/1953¹ (with

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the amendments and republishing related to the years 1956, 1966, 1970 and 1974). The Family Code was amended several times after the events of December 1989, respectively in the years 1990, 1993, 1997, 1999, 2004, 2007, 2010 and 2011. It was repealed by Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code².

Article 1 of the Family Code provided as follows: "In the Socialist Republic of Romania, the state protects marriage and family; it supports, through economic and social measures, the development and consolidation of the family. The state defends the *interests of the mother and the child* and shows great concern for the raising and education of young generation. The family is based on the freely agreed marriage between the spouses. In the relations between spouses, as well as in the *exercise of rights towards children, man and woman have equal rights. Parental rights are exercised only in the interests of the children.*"

In addition, Article 42 in the same Code stipulated that: "The court will decide, along with the divorce pronouncing, *to whom of the parents the minor children will be given ...*". According to Article 43 of the Code, "*the divorced parent, to whom the child has been given* exercises parental rights. In case the child has been given to another person or guardianship institution, the court will decide *which parent will exercise the right to administer his/her goods and to represent him/her or to consent to his/her acts...* The divorced parent to whom the child was not given, *keeps the right to have personal connections with him/her, as well as to watch for his/her growth, education and professional training*".

Therefore, based on the Family Code, the child whose parents were divorcing was given to one of the parents, *a parent who exercised parental rights alone.*

In 2004, by Law no. 272/2004 regarding the protection and promotion of the rights of the child³, there are made clarifications regarding the manner of exercising parental rights. This special law dedicated to the protection of the child's rights the has been amended several times and subsequently republished, in order to accommodate the national legal regulations to the current social situation, both in Romania and in the European Union. We can assume that a process of convergence of the European to the national regulations took place, as the previous national legislation could determine situations of parents' discrimination after divorce.

Thus, par. 4) from Article 17 of the law establishes the following: "In case of disagreement between parents as concerns the ways to exercise the right to have personal relationships with the child, *the court will fix a program depending on the age of the child, his /her needs of care and education, the intensity of the affective relationship between the child and the parent with whom the child does not live, the latter's behavior, as well as other relevant aspects in each case...*".

¹ Published in The Official Bulletin of Romania, Part I, no. 1 from the 4 January 1954.

² Published in The Official Journal of Romania, Part I, no. 409 from 10 June 2011.

³ Published in The Official Journal of Romania, Part I, no. 159 from 5 March 2014.

Within the paras. 3) and 4) of Article 18 of the law it is provided that *“The parent with whom the child lives has the obligation to support the keeping of the personal relations of the child with the other parent... In order to restore and maintain the personal relations of the child, the public service of social assistance and, as the case may be, the general directorates of social assistance and child protection from each sector of Bucharest have the obligation to provide guidance, given by specialists, to both the child and his/her parents, upon their request ”*. Para. (5) of the same article stipulates that: *“In case one parent interdicts or adversely affects the personal relations of the child with the other parent, by not observing the program established by the court or agreed by the parents, the other parent may request the public service of social assistance, or, as the case may be, to the persons with social assistance duties in the district of which the child's home is located, to monitor the personal relationships with the child for up to 6 months. Moreover, para. 7) establishes that: At the end of the monitoring period, the representative of the public service of social assistance or, as the case may be, the person with social assistance duties ... may propose the extension of the monitoring period by maximum 6 months, may recommend the psychological counseling of one of the parents or of both, as well as some measures to improve the personal relationship between the child and the parent with whom he/she does not live”*.

These legal provisions represent a step forward in the attempt to prevent the worsening of conflicts between the child's parents, after it has been established the minor's home to one of them. An early intervention of specialists within the public service of social assistance can cause a rebalancing of relations between parents and among parents and children, after divorce. Unfortunately, not all public services of social assistance in the local communities have available specialized staff, especially psychologists, and, consequently, rendering this specialized service is the responsibility of the general directions of social assistance and child protection, which are already overstrained as they take over the cases throughout the entire territory of a county.

Moreover, Article 36 of the same law provides that: *“(1) Both parents are responsible for raising their children. (2) The exercise of rights and the fulfilment of parental obligations must take into account the best interests of the child and ensure the material and spiritual well-being of the child, particularly by caring him/her, by maintaining the personal relations with him/her, by ensuring his/her raising, education and maintenance, as well as through its legal representation and administration of its heritage. (3) If both parents exercise parental authority, but do not live together, the important decisions, such as those relating to choosing the type of education or professional training, complex medical treatments or surgical interventions, the child's residence or the administration of the assets, shall only be made with the consent of both parents. (4) In the event that, for any reason, one of the parents does not express his/her will for taking the decisions provided in par. (3), these will be taken by the parent with whom the child lives, except when this is contrary to the*

best interests of the child. (5) Both parents, regardless of whether or not they exercise parental authority, have the right to request and receive information about the child from the school institutions, health units or any other institutions that get in contact with the child. (6) *A parent cannot give up parental authority, but can agree with the other parent upon the manner to exercise parental authority, according to Article 506 of the Civil Code.* (7) There are deemed *justified grounds* for the court to decide that the parental authority to be exercised by one parent *alcoholism, mental affection, drug addiction of the other parent, violence against the child or against the other parent, convictions for the offences of human trafficking, drug trafficking, sex life offences, violence offences*, as well as any other reason related to the risks for the child, which would derive from the exercise by that parent of the parental authority. (8) In case of disagreement between parents regarding the exercise of rights and the fulfilment of parental obligations, the court, after hearing both parents, decides according to the best interests of the child”.

The provisions of Law no. 272/2004 are supplemented by other regulations that refer to the rights of the child, including the provisions included in the international conventions and treaties to which Romania is a party.

From the national legislation it should be mentioned in particular the Civil Code⁴, which incorporated the old Family Code. The Civil Code, as subsequently amended and supplemented, contains important regulations as concerns the protection of the child whose parents no longer live together or have divorced. Thus, according to Article 396 of the Civil Code, *“The guardianship court decides, along with the pronouncement of the divorce, on the relations between the divorced parents and their minor children, taking into account the best interests of the children, the conclusions of the psychosocial investigation report, as well as, as the case may be, the agreement of the parents, who are heard”*.

Article 397 of the Civil Code establishes that: *“Following the divorce, the parental authority falls jointly on both parents, unless the court decides otherwise.”* However, *“if there are good reasons, given the best interests of the child, the court decides that the parental authority be exercised only by one of the parents.* The other parent keeps the right to watch over the child's raising and education, as well as the right to consent to his/her adoption. Exceptionally, the guardianship court may decide the child's foster care by a relative or other family or person, with their consent, or in a protection institution. They exercise the rights and duties that fall on the parents regarding the child. The court decides whether the rights regarding the child's assets are exercised by the parents jointly or by one of them”⁵.

In addition, the Civil Code provides that: *“In the absence of an agreement between the parents or if this is contrary to the best interests of the child, the*

⁴ Law no. 287 from 17 July 2009 regarding the Civil Code, republished in the Official Journal of Romania, Part I, no. 505 from 15 July 2011.

⁵ Article 398-399 of the Civil Code.

*guardianship court decides, along with the pronouncement of the divorce, the residence of the minor child to the parent with whom he or she lives constantly. If until the divorce the child lived with both parents, the court sets the home to one of them, taking into account his/her best interests. Exceptionally, and only if it is in the best interests of the child, the court may establish his/her home with grandparents or other relatives or persons, with their consent, or at a protection institution. They will exercise the child supervision and carry out all the usual acts concerning his/her health, education and learning.”*⁶

Article 401 of the Civil Code provides that “the parent or, as the case may be, the parents separated from their child have the right to have personal relationships with the child. In case of disagreement between the parents, the guardianship court decides on the manners of exercising this right. Hearing the child is mandatory...”⁷.

The Civil Code also gives us a *definition of the parental authority notion*, as follows: “*The parental authority is the entirety of rights and duties that concern both the person and the goods of the child and belong equally to both parents.*” The Civil Code also establishes the rules applicable to exercising the parental authority, as follows: “*The parents exercise parental authority only in the best interests of the child, with due respect to him/her, and associate the child with all decisions concerning him/her, taking into account his/her age and degree of maturity. Both parents are responsible for raising their minor children... Parental authority is exercised until the child achieves full exercise capacity.*”⁸.

Article 487 from the same Code also defines the *content of parental authority*, as follows: “*Parents have the right and duty to raise the child, taking care of his physical, mental and intellectual health and development, his education, learning and professional training, according to their own beliefs, and the peculiarities and needs of the child; they are responsible for giving the child the guidance and advice necessary for the corresponding exercise of the rights that the law recognizes to the child*”.

Therefore, according to the new regulation, the rule is that *parental authority falls jointly on both parents, following the divorce*, and only in well-founded situations, regarding the best interests of the child, *the court decides that parental authority be exercised only by one of the parents*.

⁶ Article 400 of the Civil Code.

⁷ According to Article 264 para. 1) of the Civil Code, “*in the administrative or judicial procedures concerning him/her, the hearing of the child who has reached the age of 10 years is mandatory. Nevertheless, a child who has not reached the age of 10 may be also heard, if the competent authority considers that this is necessary for the resolution of the case*”.

⁸ Article 483-484 of the Civil Code.

Arguments concerning the convergence at European level of the actions in relation to the protection of the rights of the children in the middle of litigations for the exercise of the parental authority

The national regulations mentioned above are part of the entirety of actions regarding the protection of the child whose parents have divorced, which we identify at European Union level.

Thus, the *Charter of Fundamental Rights of the European Union*, in Article 24, entitled *Rights of the Child*, stipulates in para. 3 that "Every child has the right to maintain regular personal relationships and direct contacts with both parents, except when they are contrary to his/her interest."

Also, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, titled *An EU Agenda for the Rights of the Child*, shows the following: "Family disputes can adversely affect the well-being of children. Children who are separated from one or both parents must have the right to maintain personal relationships and direct contact with both parents on a regular basis, except for the cases when this is in conflict with their best interests.⁹ Civil proceedings, especially transnational disputes, arising from the dissolution of marriage or legal separation may lead to the restriction of this right. Particularly during the procedures targeting to establish parental responsibility, children may get to be "captive" in long-standing cross-border disputes between former partners.

The EU legislation¹⁰ is already facilitating the recognition and enforcement of decisions regarding parental responsibility. *Informing adequately children and parents concerning the rights conferred on them by the EU and national law is a precondition that allows them to defend their rights in family disputes.* The information should be easily accessible and provide clear guidance as regards the relevant procedures. The Commission, in cooperation with the Member States, will draw up and update records concerning the EU and national legislation with regard to the obligations of maintenance, mediation and recognition and enforcement of decisions on the parental responsibility. As regards the *abduction of children by parents*, the Commission will pay particular attention to the information provided by the European Parliament Ombudsman for the international abduction of children by parents".¹¹

⁹ Article 24 (3) of the Charter of Fundamental Rights of the European Union.

¹⁰ *Regulation (EC) No. 2201/2003* of the Council dated 27 November 2003 on the jurisdiction, recognition and enforcement of court decisions in matrimonial matters and in matters of parental responsibility, for repealing Regulation (EC) no. 1347/2000 (CE), OJ L 338, 23.12.2003, p. 1-29.

¹¹ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, *An EU agenda for the rights of the child*, COM(2011) 60 final, Brussels, 15.2.2011, accessible on page <https://eur-lex.europa.eu/legal-content/RO/TXT/?qid=1573151593810&uri=CELEX:52011DC0060>.

Moreover, *Regulation (EC) No. 2201/2003* of the Council dated 27 November 2003 on the jurisdiction, recognition and enforcement of court decisions in matrimonial matters and in matters of parental responsibility, for repealing Regulation (EC) no. 1347/2000, provides within item 25 of the Preamble the following: "The central authorities should cooperate both in general and in special cases, including with a view to *encouraging the amicable resolution of family conflicts in the matter of parental responsibility ...*".

Conclusions regarding the procedures of the cases when it cannot be achieved the joint exercise of parental authority

Many times, the joint exercise of parental authority leads to conflicts between the child's parents, who, following the divorce, still keep resentments and refuse to find a way of communication in the child's interest. Thus, it occurs the refusal of a parent to express consent regarding certain decisions to be made in relation to the minor: registering to a certain family physician, enrolling in school, performing medical procedures, changing the child's domicile in another locality or in another country, etc. The absence of the consent must be substituted by a court ruling, which often cannot be obtained in due time, so that the child's life not be affected.

Therefore, can it be stated that this current manner of joint exercise of parental authority is beneficial for the child?

In the event that parents collaborate in the common interest of the child, this method is very useful. Together, the two parents will always find a solution in the best interests of their child. When the two parents do not cooperate, the best interests of the child are forgotten and different conflicts and accusations arise between the parents, each considering that he/she is right. In most cases, the other parent brings accusations of abuse and neglect of the child, in order to obtain a new judge's decision to exercise the parental authority, but this time, an exclusive one. However, in the fight for custody the child suffers the most, which is most often influenced by the parent with whom he/she lives, in the sense of refusing communication with the other parent or the visit to which he/she has the right.

The parent to whom is denied communication with the minor and exercising the right of visit most often appeals to a judicial executor, who can find the child's refusal to go to visit the other parent or even the refuse to communicate with that parent, and subsequently, may request the General Directorate of Social Assistance and Child Protection (DGASPC) to submit a request to the court to oblige attending psychological counselling sessions in order to re-establish the relations between the child and the parent with whom he or she does not live.

The court issues a sentence whereby the parent with whom the child lives is obliged to go with him/her to the DGASPC headquarters to participate in the counselling sessions with a view to renew the relationship with the other parent.

Some parents come with the child at counselling sessions, but some do not attend, motivating their attitude by the fact that the child also refuses these counselling sessions. The DGASPC notifies the judge of this refusal and it can decide to be paid of penalties for each day of delaying the execution of the court decision, for a period of maximum 3 months¹². If, within this three-month period, the debtor fails to fulfil his/her obligation or is of bad faith and hides the minor for non-execution, the legislator has regulated a severe legislative solution establishing a more drastic sanction than that of penalties, respectively the debtor is subject to obey the rigors of the criminal law, as the judicial executor will record this fact and will immediately notify the Prosecutor's office attached to the execution court in order to start the criminal prosecution, for committing the offence of failure to comply with the court decision.

In a decision from 2016, the *Constitutional Court of Romania* held that the legislator regulated several gradual measures in intensity, meant to bind the debtor to execute the obligation stipulated in the enforceable title, through the court. The enforcement of penalties represents a means of judicial constraint, a pecuniary sanction, which has the role to create an additional pressure on the debtor of the obligation, including by accumulating, for three months, the amounts due for the delay in execution. After this time limit, the legislator provided a much more serious sanction, namely the obligation of the debtor with the enforcement of a criminal sanction¹³.

All these steps sometimes mean years of wasted days for the child and his/her parents, worsening conflicts between parents and, in time, alienating the child from the parent with whom he/she does not live. This is why it is particularly important for all parents who are going through a divorce, and their children, to benefit, free of charge, from services of psychological counselling and mediation of relations between adults, in order to prevent the occurrence of a crisis situation.

Thus, *de lege ferenda*, it should be added to the Civil Code the *obligation of parents who have filed for divorce and have minor children, to participate in at least 4 sessions of psychological counselling or for mediating relations between parents*, in order to be informed about the consequences of the parents' divorce on the evolution of the child and to try to identify the best ways to maintain the relations with their own child, regardless of where the child's domicile will be established.

As a matter of fact, *Recommendation no. (98) 01 of the Committee of Ministers of the Council of Europe concerning family mediation*, shows that this can "improve communication between family members, reduce the proportions of the conflict between the parties in dispute, lead to an amiable resolution, ensure the continuity of the relations

¹² See article 903-913 of the Code of Civil Procedure.

¹³ Decision no. 299 of May 12, 2016 of the Constitutional Court of Romania, paragraph 19, published in the Official Journal of Romania, Part I, no. 552 from 21 July 2016.

between the parents and children, contribute to decreasing the economic and social costs incurred by separation or divorce, both for the parties and for the states.”¹⁴

Therefore, the joint exercise of parental authority is a step forward in reaching the convergence of the Romanian legislative provisions with the European regulations as regards the protection of the child's rights, and in particular the right of the child to maintain the relation with both parents.

¹⁴ Adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804ecb6e>.