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LEGAL AND PSYCHOLOGICAL PERSPECTIVES ON PARENTAL RESPONSIBILITY AND SHARED RESIDENCE AFTER DIVORCE

Abstract

The analysis of current trends in family dissolution indicates that the number of divorces has increased in the European Union in recent decades. And, as divorce rates are increasing year by year, so is the number of children affected. The courts, lawyers and parents themselves are faced with the dilemma of how to regulate family affairs, including relationships between parents and children so that they are most beneficial for the latter. One of the most important and challenging issues remains the habitual residence of the child after divorce. Today, shared residence is an increasingly popular solution among divorced parents and the courts in different European countries are starting to consider shared residence as a more viable option than before. The aim of the paper is to identify post-divorce parenting both from a theoretical and practical point of view. In the first part of the paper, the concepts of parental responsibility and shared residence are presented. Then, shared parenting after divorce is investigated in the relevant legal instruments supporting maintaining positive parent-child relationships. The last part of the paper is devoted to the advantages and disadvantages of shared residence in the light of psychological research.

KEYWORDS

divorce, parental responsibility, shared residence, child custody

SŁOWA KLUCZOWE

rozwód, władza rodzicielska, piecza naprzemienna, piecza nad dzieckiem.

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1. INTRODUCTION

The analysis of current trends in family formation and dissolution indicates that the number of marriages has decreased in the European Union (EU) in recent decades, while the number of divorces has increased. Since the 1960s, the crude divorce rate has doubled, increasing from 0.8 per 1000 persons in 1964 to 1.6 in 2020. The highest crude divorce rates were registered in Denmark, Latvia, and Lithuania. By contrast, divorce rates were lowest in Malta and Slovenia.¹ And, as divorce rates are increasing year by year, so is the number of children affected. The courts, lawyers, and parents themselves face the dilemma of how to regulate family affairs, including relationships between parents and children so that they are most beneficial for the latter. One of the most important and challenging issues remains the habitual residence of the child after divorce. Basically, there are two possibilities: either a child can live with one parent and have regular contacts with the other, or live with both parents. The former option is called sole physical custody. The latter one, joint physical custody, is an increasingly popular solution among divorced parents. Because of living in two houses alternately, it is also called shared residence. The aim of the paper is to identify shared residence both from a theoretical and practical point of view. In the first part of the paper, the concept of shared residence is presented. Then, shared residence is investigated in the relevant legal instruments supporting maintaining positive parent-child relationships. The last part of the paper is devoted to the advantages and disadvantages of shared residence in the light of psychological research.

¹ https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_fewer_divorces (accessed 19 January 2024).

2. TERMINOLOGY AND DEFINITIONS

After a divorce, the principle is that each spouse retains parental responsibility for the child, although it can be removed or restricted by a court. To give parental responsibility to only one of the parents, a special reason is required which must be proved during the trial. Joint parental responsibility takes place when both parents have full parental rights and duties with respect to the child. They are established by virtue of the law from the child's birth until they come of age. The joint parental responsibility concept is related to joint legal custody, which means that each parent has an equal, legal right to make major decisions concerning the child's life and upbringing. In joint legal custody, both parents participate in making long-term decisions concerning the child's living arrangements, administration of assets, medical treatment, citizenship, education, preparation for a future profession, religion and cultural matters.² This kind of custody does not include day-to-day decisions about simple things, such as what the child wears or eats. Such matters are decided by the parent with whom the child lives. Nevertheless, it seems that the residential parent should inform the other parent about all vital matters concerning the child. Examples would include a school play, a parent-teacher meeting, a school competition, tutoring or a special diet. The non-residential parent has the right to regularly receive information about the child. If the other parent ignores this issue, it is always possible to make a request to a court to impose an obligation in that regard. The exercise of parental responsibility is basically not possible without having legal custody. In most countries, joint parental responsibility is the preferred or default option after a divorce. For example, in 1983, Finland and Sweden adopted the presumption that the court should give priority to joint parental responsibility if one or both parents apply for it. A similar approach was adopted in England in 1989 and in Germany in 1998.³

The divorce of the spouses causes that they do not live together or will no longer be living together soon. The parents who are entitled to joint parental responsibility must reach a decision on the child's place of residence after divorce. Parents may agree, or a judge may order, that the child should live exclusively with one of the parents or alternately with both. Parents must also reach an agreement in the case of a change in the place of residence of the child. In Italian law, for instance, parents determine the child's habitual residence by mutual agree-

² J. H. DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, 'Hofstra Law Review' 2015, Vol. 43, No. 4, p. 1012.

³ K. Kurki-Suonio, *Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective*, 'International Journal of Law, Policy and the Family' 2000, Vol. 14, No. 3, p. 188.

ment.⁴ The residential parent is obliged to notify the non-residential parent within 30 days if they change residence. Failure to do so leads inevitably to a duty to pay damages.⁵ Overall, the national legislators allow shared residence after divorce, but this is not the rule. Shared residence was explicitly introduced, among others, in Denmark⁶, Finland⁷ and Norway⁸. By comparison, in Poland, the court may order shared residence, but its concept has not been regulated in the provisions of the Polish Family and Guardianship Code yet.⁹ Sole physical custody of a child has been traditionally granted to the mother, and visitation rights – to the father. However, recent studies have shown that shared residence is more beneficial for children (which will be discussed later in the paper) and the courts in different European countries are starting to consider shared residence as a more viable option than before.

Specifically, shared residence means that the child lives with each parent for an equal or substantial amount of time. In fact, it can be a symmetric care arrangement or not. There is no unambiguous answer to the question of what ‘substantial amount of time’ means, but it is accepted in the jurisprudence that under shared residence, a child spends at least 30% of his time with each parent.¹⁰ Some researchers report that shared residence takes place when children spend at least 104 nights a year in the residence of each parent.¹¹ Other researchers oppose the idea of specifying the time range when it comes to post-divorce parenting. J.H. DiFonzo thinks that it could not be established that X/Y allocation is the right amount for each child and each family; an individual approach is much more reasonable and practical than a one-size-fits-all idea. In his opinion, a mathematical formula cannot decide custody.¹² G.W. Hardcastle similarly considers that the doctrine has not determined the amount of contacts necessary to maintain close parent-child relationships after a divorce. It is obvious that not having any contact is harmful to the child, but it is impossible to state unequivocally whether X days

⁴ Article 316 of the Italian Civil Code (Act of 16 March 1942, initially promulgated in Journal of Statutes 1942, No. 262).

⁵ Article 337 *sexies* of the Italian Civil Code.

⁶ Section 18a of the Danish Act on Parental Responsibility (Act of 6 June 2007, initially promulgated in Journal of Statutes 2007, No. 499).

⁷ Section 9 of the Finnish Act on Custody and Access (Act of 1983, initially promulgated in Journal of Statutes 1983, No. 361).

⁸ Section 36 of the Norwegian Children Act (Act of 8 April 1981, initially promulgated in Journal of Statutes 1981, No. 7).

⁹ Act of 25 February 1964, initially promulgated in Journal of Statutes 1964, No. 9, item 59.

¹⁰ A.M. Berman, D.P. Kirsh, *Definitions of Joint Custody*, ‘Family Advocate’ 1982, Vol. 5, No. 2, p. 2.

¹¹ A. Masardo, *Managing shared residence in Britain and France: questioning a default ‘primary carer’ model*, ‘Social Policy Review 21: Analysis and Debate in Social Policy’ 2009, p. 198.

¹² J.H. DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, ‘Hofstra Law Review’ 2015, Vol. 43, No. 4, p. 1015.

per month is significantly better than Y days per month.¹³ It is worth noting that there is sometimes a fine line between shared residence and sole physical custody with significant contacts for the non-residential parent. When the non-residential parent is awarded a right to contact that equals half of the time spent with the child, the residence can, in practice, be shared as well.¹⁴ Furthermore, the frequency of contacts is important, but what is even more important is to have a close relationship with both parents and feel supported by them.¹⁵ The quality of parents' relationship can prevail over the quantity of time spent together.

3. PARENTAL RESPONSIBILITY AND SHARED RESIDENCE IN THE INTERNATIONAL CONTEXT

Shared residence is a growing trend affecting contemporary family law and child custody. This is now widespread in several European countries, such as Belgium, France, the Netherlands and Sweden.¹⁶ Particularly, Belgium and the Netherlands are considered leaders in the accommodation of new family forms after a divorce.¹⁷ However, national regulations do not operate in a vacuum. They are still affected by legal incentives under international and European law. It should be indicated that supranational legislation has now become an integral part of the national systems to which they apply.¹⁸ It is worth taking a closer look at some pieces of legislation relevant to the discussed issues.

The first international treaty to protect the rights of the family and the child was the International Covenant on Civil and Political Rights adopted by the United Nations in 1966 (ICCPR). The provisions of the ICCPR reflect the principle that children should maintain contacts with both parents before, during and after a divorce. Article 23 protects the bond between the parent and the child by

¹³ G.W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 'Family Law Quarterly' 1998, Vol. 32, No. 1, p. 210.

¹⁴ T. Sverdrup, The changing concept of 'family' and challenges for family law in the Nordic countries (in:) J.M. Scherpe (ed.), *European Family Law Volume II. The Changing Concept of 'Family' and Challenges for Domestic Family Law*, Cheltenham-Northampton 2016, p. 203.

¹⁵ F. Cyr, G. Di Stefano, B. Desjardins, *Family Life, Parental Separation, and Child Custody in Canada: a Focus on Quebec*, 'Family Court Review' 2013, Vol. 51, No. 4, p. 537.

¹⁶ M. Kreyenfeld, H. Trappe, *Parental Life Courses after Separation and Divorce in Europe*, Berlin-Rostock 2019, p. 17.

¹⁷ F. Swennen, *The changing concept of 'family' and challenges for family law in the Benelux countries* (in:) J.M. Scherpe (ed.), *European Family Law Volume II. The Changing Concept of 'Family' and Challenges for Domestic Family Law*, Cheltenham-Northampton 2016, p. 5.

¹⁸ G. De Baere, K. Gutman, *The impact of the European Union and the European Court of Justice on European family law* (in:) J.M. Scherpe (ed.), *European Family Law. Volume I. The impact of Institutions and Organisations on European Family Law*, Cheltenham-Northampton 2016, p. 46.

assuming that the family should be protected and kept intact to the highest possible degree. Article 24 of the ICCPR refers to the child's welfare. As having bonds with parents is considered to be beneficial for the child, these bonds should be protected by national legislators and courts.¹⁹ Relating the above to the shared residence order, it fully guarantees the child's right to bond with both parents, because they share the day-to-day care of the child and have a major role in the child's upbringing.

The rights expressed in the Convention on the Rights of the Child adopted by the United Nations in 1989 (CRC) can be viewed as supportive of shared parenting. Among these, it is worth mentioning the right to know and be cared for by parents – Article 7(1), and the right not to be separated from parents against their will, except when a court determines that such separation is necessary for the child's welfare – Article 9(1). The CRC provides that separation from parents may be necessary in a particular case, such as one involving abuse or neglect of the child by the parents or one where parents live separately and a decision must be made as to the child's place of residence. However, in accordance with Article 9(3), the child who is separated from one or both parents, has the right to maintain personal relationships and direct contacts with both parents on a regular basis, except if it would be contrary to their welfare. Moreover, the CRC requires a court to consider shared residence first, followed by sole physical custody, if that is what the child's welfare requires.

On the other hand, the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children concluded in 1996 (HCCH) was the first international binding instrument that uses the concept of 'parental responsibility' instead of the term 'parental authority'.²⁰ Parental responsibility under Article 1(2) of the HCCH includes parental authority or any analogous relationship of authority determining the rights, powers and responsibilities of parents in relation to the person or the property of the child. Basically, the scopes of these two concepts – 'parental responsibility' and 'parental authority' – overlap, although in certain situations, the former may have a broader meaning. For example, in accordance with Articles 95(1), 96 and 98(1) of the Polish Family and Guardianship Code, parental authority (*władza rodzicielska*) is the entirety of rights and duties of parents with regard to their child, whose purpose is to provide the child with due care and to protect its interests. The concept of parental authority in Polish law encompasses 3 elements: care of the person of the child, care of the child's

¹⁹ N. Nikolina, *Divided Parents, Shared Children*, Cambridge-Antwerp-Portland 2015, p. 9.

²⁰ J. Ferrer-Riba, *Parental responsibility in a European perspective* (in:) J.M. Scherpe (ed.), *European Family Law. Volume III. Family Law in a European Perspective*, Cheltenham-Northampton 2016, p. 287.

property and representation of the child by the parents.²¹ The German legislator uses the term of parental custody (*elterliche Sorge*), indicating the duty and the right to care for the child, particularly for the person of the child and their property.²² Similarly, the Danish legislator states that custody (*forældremyndigheds*) encompasses both the duty to take care of the child and the right to make decisions about the personal circumstances of the child based on the child's interests and needs.²³ Under Norwegian law, if the parents have joint parental responsibility (*foreldreansvaret*), they have the right and the duty to make decisions for the child regarding personal matters. Their statutory obligation is to bring up and maintain the child properly, as well as to ensure that the child receives an education adapted to his or her ability and aptitude.²⁴ For comparison, in the Principles of European Family Law regarding Parental Responsibilities, the Commission on European Family Law has developed a comprehensive definition of parental responsibility. Principle 3:1 stipulates that this is a collection of rights and duties aimed at promoting and safeguarding the welfare of the child, in particular: care, protection and education; maintenance of personal relationships; determination of residence; administration of property and legal representation. Parental responsibility is apparently a wider concept and underlines the essence of parenting, i.e. the ongoing care of the child, while the concept of parental authority is usually associated with the rights of parents and hence the child is subordinated to their parents' power.

4. PARENTAL RESPONSIBILITY AND SHARED RESIDENCE IN THE EUROPEAN CONTEXT

Bearing in mind the growing role of international organisations, such as the EU, and the impact of their instruments on national law, these organisations cannot be ignored in the legal discourse regarding shared parenting. In the first place, it is worth taking a look at the Brussels II bis Recast adopted by the Council of the EU in 2019.²⁵ The long-awaited revision of the Brussel II-bis Regula-

²¹ J. Slyk, *The Legal Content of Parental Authority in Polish Family Law*, 'Prawo w Działaniu' ('Law in Action') 2017, No. 32, pp. 86-87.

²² Section 1626 of the German Civil Code (Act of 15 August 1986, initially promulgated in Journal of Statutes 1986).

²³ Section 2 of the Danish Act on Parental Responsibility.

²⁴ Section 30 of the Norwegian Children Act.

²⁵ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

tion²⁶ entered into force on 1 August 2022. The Brussels II bis Recast, like the HCCH mentioned above, uses the concept of parental responsibility. It means, as defined in Article 2 para. 2(7), all the rights and duties relating to the person or the property of a child which are given to a natural or legal person by a decision, by operation of law or by an agreement having legal effect, including rights of custody and rights of access. The objective of the Brussels II bis Recast is to improve the rules concerning children, especially when it comes to their rights in cross-border family procedures.²⁷

Furthermore, it is worth discussing the Convention for the Protection of Human Rights and Fundamental Rights adopted by the Council of Europe in 1950, better known as the European Convention on Human Rights (ECHR). The ECHR set up the European Court of Human Rights (Court) whose judgements are binding on the countries concerned and have led governments to change their legislation and practice in a wide range of matters.²⁸ Article 8 of the ECHR protects the right to respect for private and family life, making it more difficult for the states to deprive parents of parental responsibility and contacts with the child. This provision is also the core of the Court's case law when it comes to divorce and child custody. In *Keegan v Ireland* (1994), the Court found that "a child has, as far as possible, the right to be cared for by his or her parents" and "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down".²⁹ In *Karrer v Romania* (2012), the Court noted that the mutual enjoyment by parent and child of each other's company is protected under Article 8 of the ECHR.³⁰ A longstanding line of case law has found that both parents are on equal footing with respect to their children. This includes the right to maintain a strong bond with the child during and after divorce. When discussing the Court's case law, it is worth mentioning *Kacper Nowakowski v Poland* (2017) case, where it was ruled that the Polish court's judgment to refuse the extension of contacts between father and child was in breach of Article 8 of the ECHR. "The Court underlined the importance of a child preserving and developing his or her ties with his or her family, and considered that, in principle, it was in the child's best

²⁶ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

²⁷ https://www.era.int/cgi-bin/cms?_SID=c6ae4a6cb553f4070ac21230ab7d473c2d-5c833000648348413759&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=129048 (accessed 19 January 2024).

²⁸ D. Lima, *The Concept of Parenthood in the Case Law of the European Court of Human Rights* (in:) K. Boele-Woelki and D. Martiny (eds.), *Plurality and Diversity of Family Relations in Europe*, 2019, p. 104.

²⁹ 18 EHRR 342 [1994].

³⁰ Application No. 16965/10.

interests to maintain contact with both parents”.³¹ The conclusion is that national courts must not violate the right to respect for private life and family life, and should promote and encourage healthy, meaningful parent-child relationships.

In this context, what comes to mind is the problem of a couple’s lack of agreement or one parent’s objection to joint parental responsibility and shared residence after divorce. The Court in *Buchs v Switzerland* (2014) considered that “the exclusion of shared parental authority where one of the parents opposes it also falls within the margin of appreciation, taking into account the lack of any consensus in this area, the fact that the experts, in any event, found that it was not desirable in the specific circumstances [...]”.³² It follows from this case that national legislators and courts can decide for themselves whether shared residence should only be ordered where both parents agree.³³ In Germany and the Netherlands, for example, this type of custody is not possible when one parent is opposed to that idea. In turn, in Belgium, England, and Wales, France, Ireland, or Sweden, the court can order shared residence without the mutual agreement between parents if it is justified by the child’s welfare.³⁴

Each parent may submit an application to the Court directly claiming to be a victim of a violation by the state of any of the rights set forth in the ECHR. However, the subject of the Court’s decision is not only the parent. Instead, the Court’s decisions often concern the rights and well-being of the child. Moreover, the child’s welfare is the guiding principle in family law that may override parental rights, even those prescribed in the ECHR. The cases examined by the Court include protection of the child’s family bonds and protection of the child from harm and from being abducted. The Court’s decisions emphasise the importance of the child’s wishes.³⁵ Similarly, the European Convention on the Exercise of Children’s Rights adopted by the Council of Europe in 1996 provides a number of procedural measures to allow children to exercise their rights either themselves or through other persons. Among them is the right to be informed and to express their views (Article 3). The application of the Convention in the proceedings concerning shared residence means that the court should take the child’s views and wishes into consideration. In fact, the person who alternates between residences is a child, not their parents.

³¹ Application No. 32407/13.

³² Application No. 9929/12.

³³ G. Willems, L. Cohen, *International Human Rights Law as a Basis for Reconstructing Legal Relationships between Adults and Children* (in:) J. Sosson, G. Willems, G. Motte (eds.), *Adults and Children in Postmodern Societies*, 2019, p. 691.

³⁴ K. Boele-Woelki, F. Ferrand, C. González-Beilfuss *et al.*, *Principles of European Family Law Regarding Parental Responsibilities*, Antwerpen-Oxford 2007, p. 133.

³⁵ D. Coester-Waltjen, *The Impact of the European Convention on Human Rights and the European Court of Human on European family law* (in:) J.M. Scherpe, *European Family Law Volume I. The Impact of Institutions and Organisations on European Family Law*, Cheltenham-Northampton 2016, pp. 52, 91.

A shared residence order is an organisational and logistical challenge which, in turn, raises the question about the conditions for its application.

5. ADVANTAGES AND DISADVANTAGES OF SHARED RESIDENCE

Joint parental responsibility is deeply rooted in the American family law. The first family law system that implemented joint custody preference was the Californian one. Since the 1980s, an active policy has been conducted to introduce legislation and force courts to give equal contact rights to both parents.³⁶ In the USA, there is now a common consensus that joint legal custody is the best alternative for children after a divorce. Such custody is granted in most cases, and in a majority of states it is encouraged and even required.³⁷ For years, there has been a great deal of interest in shared residence as well. That is also why most studies on this matter are published in the USA. In order to evaluate shared residence from a psychological point of view, it is worthwhile to use the experience of the Americans, but also the latest and equally important results of the research carried out by European scientists.

Shared residence has its supporters and opponents. However, most contemporary psychologists claim that children benefit from this kind of custody. This is confirmed by the research conducted by L. Nielsen who says that children in shared residence have better outcomes than those in sole physical custody.³⁸ By living alternately with each parent, a child has better relationships with both.³⁹ According to a study on the health and well-being of children whose parents were divorced, conducted by M. Bergström, a child in shared residence suffers fewer psychosomatic problems, including trouble sleeping, headaches, stomach aches, tension, concentration issues, decreased appetite, sadness and dizziness, than a child under single custody.⁴⁰ What is also noteworthy is the comparative work

³⁶ K. Kurki-Suonio, *Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective*, 'International Journal of Law, Policy and the Family' 2000, Vol. 14, No. 3, p. 187.

³⁷ M.A. Kipp, *Maximizing Custody Options: Abolishing the Presumption against Joint Physical Custody*, 'North Dakota Law Review' 2003, Vol. 79, No. 1, p. 60.

³⁸ <https://ifstudies.org/blog/10-surprising-findings-on-shared-parenting-after-divorce-or-separation> (accessed 19 January 2024).

³⁹ L. Nielsen, *Joint Versus Sole Physical Custody: Children's Outcomes Independent of Parent-Child Relationships, Income, and Conflict in 60 Studies*, 'Journal of Divorce' 2018, pp. 18-19.

⁴⁰ M. Bergström, E. Fransson, B. Modin et al., *Fifty moves a year: is there an association between joint physical custody and psychosomatic problems in children?*, 'Journal of Epidemiology & Community Health' 2015, No. 69, pp. 771-772.

of T. Bjarnason and A.M. Arnarsson, who studied shared residence and other family structures in 36 European, Mediterranean and North American countries. One of their conclusions is that shared residence leads to an increase in parents' involvement in parenting, to the distribution of parental duties equally between parents, to the improvement in the quantity and quality time spent together, and to the development of good communication with both parents.⁴¹ R. Bauserman has also come to similar conclusions, saying that joint custody (meaning joint legal custody and/or shared residence) results in more time spent together, better relationships with parents and, therefore, authoritative parenting.⁴²

In turn, opponents argue that "the child pays a price in order to have equal access to both parents".⁴³ They claim that due to shared residence, the child is shuttled back and forth between two homes, and this disrupts stability in their life.⁴⁴ However, in the context of stability, it would be worthwhile perhaps to refer to the opinion presented by C.S. Bratt who asserts that children need emotional stability rather than physical stability. Sole physical custody may give physical stability and continuity, but can also be detrimental to the child's emotional well-being. Children in single custody may feel unloved, rejected or ignored by the non-residential parent. Shared residence is more likely to provide a child with emotional stability and the feeling of safety.⁴⁵

In the literature, the potential benefits from shared residence outweigh the potential risks.⁴⁶ Nevertheless, shared residence is not preferable to sole physical custody in all cases. If one parent is abusive or neglectful, a single physical custody arrangement is a better solution. It seems that the high level of cooperation between parents is crucial to make shared residence feasible and beneficial for a child. They need to communicate often, see each other, agree on the style of upbringing and discipline, as well as coordinate household routines or rules. There is a wide range of tasks and activities that require ongoing contact. Under shared residence, both parents have the day-to-day care, according to the agreed schedule, but they should be as flexible as possible in the case of any unexpected, unforeseen situations. They

⁴¹ T. Bjarnason, A.M. Arnarsson, *Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries*, 'Journal of comparative family studies' 2011, No. 42(6), pp. 20-21.

⁴² R. Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 'Journal of Family Psychology' 2002, Vol. 16, No. 1, p. 98.

⁴³ A. Singer, *Active Parenting or Solomon's Justice? Alternating residence in Sweden for children with separated parents* (in:) K. Boele-Woelki (ed.), *Debates in Family Law around the Globe at the Dawn of the 21st Century*, Antwerp-Oxford-Portland, 2009, p. 63.

⁴⁴ L.E. Hawkins, *Joint Custody in Louisiana*, 'Louisiana Law Review' 1982, No. 43(1), p. 94; R. Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 'Journal of Family Psychology' 2002, Vol. 16, No. 1, p. 91.

⁴⁵ C. S. Bratt, *Joint Custody*, 'Kentucky Law Journal' 1978-1979, Vol. 67, No. 2, pp. 296-298.

⁴⁶ K. Kamińska, *Pieczka naprzemienna a władza rodzicielska rodziców żyjących w rozłączeniu* [*Joint physical custody and parental authority after divorce or separation of parents*], Warszawa 2022, p. 533.

should also be sensitive to the views and wishes of the child. It is necessary to remember that as the child grows, their needs change and it is possible that a shared residence order will no longer be suitable. The situation of parents may be changing at some point, too. Overall, one of the main prerequisites for shared residence is that the parents manage to avoid conflict. As explained by J.G. Taussig and J.T. Carpenter, it requires substantial adjustment, effort, imagination, cooperation, compromise and maturity.⁴⁷ On this basis, it can be concluded that the stronger the relationship between parents, the more frequently a shared residence order should be issued.

6. CONCLUSIONS

The divorce rate is increasing in today's society. Divorce impacts not only the spouses but also their child who has to adapt to a changing situation – new family dynamics, together with a new home, living situation, schools, friends, etc. All this affects children of every age. The rising number of family break-ups results in a need to find ways to mitigate, adapt, reduce, or prevent negative impacts on children. Currently, as a general rule, both parents keep parental responsibility if they later divorce. In recent years, shared residence has become more and more popular. Shared residence means that the child is in the physical care of both parents, the essence of which is that they share their time between two parents' homes. In the light of international and European law, the child has the right to be cared for by their parents even when the relationship between them has broken down. The child has the right to preserve the family ties and the life and habits they used to have before the divorce. This can be achieved by granting physical custody to both parents if the circumstances allow it. The instruments discussed in the paper, including the Court's case law, have a significant influence on law reforms across Europe and on the interpretation of national regulations. They create the minimum standard that the states should respect.

Shared residence has been given attention in the scientific, judiciary, and political environments for a while. A lot of studies have been conducted, but child psychologists do not agree with their results. Most researchers say that children benefit from a shared residence order, reporting better emotional well-being and social adjustment than children in exclusively or predominantly single-parent families. However, this usually relates to the divorced parents who are not involved in litigation. There is also evidence that shared residence may not work well for some families, particularly if parents cannot cooperate with each other and if they live far away from each other. Therefore, it is difficult to draw definite

⁴⁷ J. G. Taussig, J. T. Carpenter, *Joint Custody*, 'North Dakota Law Review' 1980, Vol. 56, No. 2, p. 234.

conclusions.⁴⁸ However, instead of asking whether the shared residence is good or not, one should inquire into situations when this arrangement works. First and foremost, it must take into account the child's welfare. Special attention should be paid to the age of the child as well as their wishes commensurate with age and maturity. Overall, shared residence works when parents cooperate after divorce, avoid conflict, and have a child-centred approach. As rightly observed by J. Carbone, "the parental model that produces the best outcomes for children is one of supportive partnership".⁴⁹

REFERENCES

- Bauserman R., *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 'Journal of Family Psychology' 2002, Vol. 16, No. 1
- Bergström M., Fransson E., Modin B. *et al.*, Fifty moves a year: is there an association between joint physical custody and psychosomatic problems in children?, 'Journal of Epidemiology & Community Health' 2015, No. 69
- Berman A.M., Kirsh D.P., *Definitions of Joint Custody*, 'Family Advocate' 1982, Vol. 5, No. 2
- Bjarnason T., Arnarsson A.M., *Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries*, 'Journal of comparative family studies' 2011, No. 42(6)
- Boele-Woelki K., Ferrand F., González-Beilfuss C. *et al.*, *Principles of European Family Law Regarding Parental Responsibilities*, Antwerpen-Oxford 2007
- Bratt C. S., *Joint Custody*, 'Kentucky Law Journal' 1978-1979, Vol. 67, No. 2
- Carbone J., *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 'Santa Clara Law Review' 1999, Vol. 39, No. 4
- Coester-Waltjen D., *The Impact of the European Convention on Human Rights and the European Court of Human on European family law* (in:) Scherpe J.M., *European Family Law Volume I. The Impact of Institutions and Organisations on European Family Law*, Cheltenham-Northampton 2016
- Cyr F., Di Stefano G., Desjardins B., *Family Life, Parental Separation, and Child Custody in Canada: a Focus on Quebec*, 'Family Court Review' 2013, Vol. 51, No. 4
- De Baere G., Gutman K., *The impact of the European Union and the European Court of Justice on European family law* (in:) Scherpe J.M. (ed.), *European Family Law. Volume I. The impact of Institutions and Organisations on European Family Law*, Cheltenham-Northampton 2016
- DiFonzo J.H., *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, 'Hofstra Law Review' 2015, Vol. 43, No. 4

⁴⁸ J. Miles, R. George, S. Harris-Short, *Family Law. Text, Cases and Materials*, 2019, p. 763.

⁴⁹ J. Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 'Santa Clara Law Review' 1999, Vol. 39, No. 4, p. 1095.

- Ferrer-Riba J., *Parental responsibility in a European perspective* (in:) Scherpe J.M. (ed.), *European Family Law. Volume III. Family Law in a European Perspective*, Cheltenham-Northampton 2016
- Hardcastle G. W., *Joint Custody: A Family Court Judge's Perspective*, 'Family Law Quarterly' 1998, Vol. 32, No. 1
- Hawkins L.E., *Joint Custody in Louisiana*, 'Louisiana Law Review' 1982, No. 43(1)
- Kamińska K., *Piecza naprzemienna a władza rodzicielska rodziców żyjących w rozłączeniu* [Joint physical custody and parental authority after divorce or separation of parents], Warszawa 2022
- Kipp M.A., *Maximizing Custody Options: Abolishing the Presumption against Joint Physical Custody*, 'North Dakota Law Review' 2003, Vol. 79, No. 1
- Kreyenfeld M., Trappe H., *Parental Life Courses after Separation and Divorce in Europe*, Berlin-Rostock 2019
- Kurki-Suonio K., *Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective*, 'International Journal of Law, Policy and the Family' 2000, Vol. 14, No. 3
- Lima D., *The Concept of Parenthood in the Case Law of the European Court of Human Rights* (in:) Boele-Woelki K. and Martiny D. (eds.), *Plurality and Diversity of Family Relations in Europe*, 2019
- Masardo A., *Managing shared residence in Britain and France: questioning a default 'primary carer' model*, 'Social Policy Review 21: Analysis and Debate in Social Policy' 2009
- Miles J., George R., Harris-Short S., *Family Law. Text, Cases and Materials*, 2019
- Nielsen L., *Joint Versus Sole Physical Custody: Children's Outcomes Independent of Parent-Child Relationships, Income, and Conflict in 60 Studies*, 'Journal of Divorce' 2018
- Nikolina N., *Divided Parents, Shared Children*, Cambridge-Antwerp-Portland 2015
- Singer A., *Active Parenting or Solomon's Justice? Alternating residence in Sweden for children with separated parents* (in:) Boele-Woelki K. (ed.), *Debates in Family Law around the Globe at the Dawn of the 21st Century*, Antwerp-Oxford-Portland, 2009
- Słyk J., *The Legal Content of Parental Authority in Polish Family Law*, 'Prawo w Działaniu' ['Law in Action'] 2017, No. 32
- Sverdrup T., *The changing concept of 'family' and challenges for family law in the Nordic countries* (in:) Scherpe J.M. (ed.), *European Family Law Volume II. The Changing Concept of 'Family' and Challenges for Domestic Family Law*, Cheltenham-Northampton 2016, p. 203
- Swennen F., *The changing concept of 'family' and challenges for family law in the Benelux countries* (in:) Scherpe J.M. (ed.), *European Family Law Volume II. The Changing Concept of 'Family' and Challenges for Domestic Family Law*, Cheltenham-Northampton 2016
- Taussig J.G., Carpenter J.T., *Joint Custody*, 'North Dakota Law Review' 1980, Vol. 56, No. 2, p. 234
- Willems G., Cohen L., *International Human Rights Law as a Basis for Reconstructing Legal Relationships between Adults and Children* (in:) Sosson J., Willems G., Motte G. (eds.), *Adults and Children in Postmodern Societies*, 2019