

CONSIDERATIONS REGARDING THE MINOR'S ALTERNATIVE RESIDENCE

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Abstract

If the parents do not live together, regardless of whether they are married or not, they will establish, by mutual agreement, the child's home. In case of disagreement between the parents, the guardianship court will decide, taking into account the conclusions of the psychosocial investigation report and listening to the parents and the child, if he has reached the age of 10 years. The present study aims to analyze the possibility of the court to establish an alternative residence for the minor, for equal periods of time, to each of the parents, taking into account the best interests of the child. The study uses the logical, historical and experimental method, analyzes the legal provisions currently in force, as well as the point of view of the doctrine and the solutions derived from the judicial practice. The conclusions are in the direction of expressing concrete proposals to amend the current regulations.

Keywords: *the parents, alternative residence, the minor, the best interests of the child.*

JEL Classification: K36, M59

1. Introductory considerations

The minor is a person in need of protection and is the holder of a legal domicile². Thus, in accordance with the provisions of Article 92 of the Civil Code, the domicile of the minor who has not acquired full exercise capacity under the conditions laid down by the law is with his parents or with that of the parents in which he resides in a steadfast manner. The child's home is with his or her parents, because otherwise it would not be possible to properly perform his or her parental duties as well as to exercise their rights with regard to the child's person as to exercise their rights with regard to the child's person³.

If the parents have separate residences and do not understand where the child will be domiciled, the court of guardianship, listening to the parents and the child, if the child is aged 10, will decide with due regard to the interests of the child.

Until the final decision remains, the minor is presumed to be domiciled in the parent in which he or she resides at a steadfast fashion.

However, in the case-law, admission solutions have been established in this respect, although part of the doctrine clearly positioned itself that such accommodation would create difficulties in a number of respects, including the establishment and enforcement of the maintenance obligation, and in matters of parental responsibility.

This study aims to examine the possibility of establishing alternative housing for the child, the conditions under which it could be achieved, and the possibility of regulating this option in accordance with the legislation of other Member States, but also with European regulations⁴.

This study aims to examine the possibility of establishing alternative housing for the child, the conditions under which it could be achieved, and the possibility of regulating this option in accordance with the legislation of other Member States, but also with European regulations. The logical, historical and experimental method will be used in this respect.

The legal text takes into account the situation in which parents have separate residence and do not agree on the child's home. However, the same is true of the assumption that parents live together, as the co-decision principle is fully applicable.

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² Marian Nicolae, Vasile Bîcu, George-Alexandru Ilie, Radu Rizoiu, *Drept civil. Persoanele*, Universul Juridic, Bucharest, p. 108.

³ Alexandru Bacaci, Viorica-Claudia Dumitrache, Cristina Codruţa Hageanu, *Dreptul familiei în reglementarea NCC*, C.H. Beck, Bucharest, 2012, p. 318.

⁴ Emese Florian, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația*, C.H. Beck, Bucharest, 2018, p. 532.

Exceptionally, in the circumstances provided for by law, the minor's domicile may be with grandparents, other relatives or trusted persons with their consent.

2. Determination of the home of the minor according to the current regulations in our legislation. The distinction between domicile and housing.

According to the provisions currently in force, the minor's home is necessarily with his or her parents, if they live together, there is naturally no distinction between whether they are married or not. For the hypothesis that the parents have separate residences, they will agree on the residence of the child.

The agreement of the parents may be given before the notary public at the time of the establishment of the divorce by agreement of the parties by notary in accordance with Article 375 (2) of the Civil Code or before the court with which the spouses' application for divorce is lodged.

In the latter case, the court will settle the ancillary application concerning the determination of the minor's dwelling according to Article 919, paragraph 1 of the Civil Procedural Code.

Where there is no express agreement of the parents, the legislator provides that the minor in question shall be domiciled in the parent in which he is resident, until the final decision of the court remains, in accordance with Article 92(2) of the Civil Code.

Consequently, the legislator deduces the existence of a tacit agreement of the parents from the fact that the minor is living with one of the parents.

If the parents do not understand about the child's dwelling, Law no. 272/2004 provides in Article 21 a series of criteria to be taken into account by the court, namely: the willingness of each parent to involve the other parent in child-related decisions and to respect the parental rights of the latter; the willingness of each parent to enable the other to maintain personal relationships; history of parental violence against the child or other persons; distance between the home of each parent and the institution providing the child's education.

All these criteria will, of course, be summed up by the principle of the best interests of the child which will prevail in all proceedings and decisions concerning children, including cases handled by the courts.

The notion of the best interests of the child is not defined in our legislation, but in Article 2, paragraph 6 of Law no. 272/2004, in determining the best interests of the child, a number of elements are listed which can be considered in this respect, namely: the needs for physical, psychological, educational and health development, security and stability and family membership; the opinion of the child, according to age and maturity; the history of the child, taking into account, in particular, situations of abuse, neglect, exploitation or any other form of violence against the child, as well as potential future risk situations; the ability of parents or those who are to care for the child to meet the child's specific needs; maintaining personal relationships with the persons to whom the child has developed attachment relationships.

It is to be noted that our legislator uses the concepts of the minor's residence and domicile in similar terms, although from a legal point of view they are distinct notions. Thus, the domicile of the natural person, for the purposes of exercising his civil rights and freedoms, is where he declares that he has his main residence⁵. The domicile is characterized by uniqueness⁶, and a natural person may have only one domicile at the same time but may have several residences.

This is because the place of domicile, being an identification of the natural person, is the place where it is presumed to live normally and where it can be found when sought⁷.

However, in the Civil Code, the legislator refers to the minor's domicile and to the

⁵ Art. 87 of the Civil Code, published in the Official Gazette, Part I no. 505 of 15.07.2011 and Art. 27, par. 1 from the Government Emergency Ordinance no. 97/2005 concerning the records, residence, residence and identity documents of Romanian citizens, republished in the Official Gazette, Part I no. 719 of 12.10.2011.

⁶ Art 86, par. 2 of the Civil Code and art. 26, par. 2 from the Government Emergency Ordinance no. 97/2005.

⁷ Ionel Reghini, Șerban Diaconescu, Paul Vasilescu, *Introducere în dreptul civil*, Hamangiu, Bucharest, 2013, p. 283.

establishment of the minor's domicile, and in Law no. 272/2004⁸ and in the Code of Civil procedure the notion of housing is used. The two notions seem to be used in the same sense, when the legislator determines the jurisdiction of the court to settle any misunderstandings regarding the establishment of the minor's domicile.

A distinction in this respect is contained in Article 498, paragraph 1, of the Civil Code, which states that a child who has reached the age of 14 may ask parents to change the kind of education or training or the housing necessary for the completion of his or her education or training. Therefore, a clear distinction is made between the concept of the minor's domicile, where the rule that this domicile is with the parents applies, and the notion of housing, which can also be in another place.

In considering the possibility of the minor having an alternating housing, the difference between the two concepts is important, and it is not possible to establish an alternative housing in circumstances where it is characterized by uniqueness.

3. The solution of establishing the alternative housing for the minor in judicial practice

Although not enshrined in law, the possibility for the minor to have alternative housing in each of his or her parents was embraced by judicial practice.

A decision taken by the Bucharest Court of Appeal made⁹ it clear that the ideal choice for the minor was that the two parents should get involved in the child's home and that the court should agree to that settlement.

The following version, applicable where the parents' homes are close to each other and to the educational establishments, is that the two parents can host the minor in the alternative, checking the situation of each of the two parents in terms of the possibility of providing care to the child during that period of time.

It was also argued¹⁰ that the parent-child relationship is the basis for its development as an individual. Any measure taken regarding the child, which does not take into account the fact that the child needs both parents has a direct negative effect on the child, increasing the period of time instability in his or her life and reducing the child's adaptability possibilities.

Establishing an alternative home for the minor, where it does not affect the child's regular program, is not able to create a feeling of non-membership, does not affect his or her sense of security and stability, when the minor is equally attached to both parents.

Other courts¹¹ have given a favorable ruling by way of an injunction on an application for the establishment of an alternative place of residence, considering that such a measure is not prejudicial to the child's relationship with his parents and ensures that the minor can adapt to the change that will happen in the future after the parents' divorce separation, when his home will be established.

According to the view expressed in some court rulings establishing an alternative housing for the minor is only possible if the parties agree¹².

To the contrary, the courts have ruled out that the idea of alternative housing is excluded, given the provisions of Article 400(2) of the Civil Code¹³.

It was also argued¹⁴ that, if such a measure were taken, it would mean that the minor could not benefit from a state of balance and stability and would not be able to have a determined space that would give him a sense of stability and balance plus security.

Thus, the life of the minor will be permanently affected by the lack of stability and by the

⁸ Published in the Official Gazette, Part I no. 159 of 05.03.2014.

⁹ See the decision no. 265/2015 of the Bucharest Court of Appeal, published on <https://legeaz.net/spete-civil-curtea-de-apel-bucuresti-2016/stabilire-domiciliu-minor-decizia-03-03-2015-re8>, consulted on 1.10.2020.

¹⁰ See Judgment of the Bucharest 4th District Court no. 4080/2013, published on <https://docs.google.com/file/d/0B-iOqOKLc35PLXByTHVaUzhXQ0k/edit>, consulted on 1.10.2020.

¹¹ See the Civil Sentence of the Argeş Tribunal no. 3032/2019, unpublished.

¹² See the Civil Sentence of the Satu Mare Tribunal, no. 368/2019, published on <https://docs.google.com/file/d/0B-iOqOKLc35PaTRpeIVVMmptbkk/edit>, consulted on 1.10.2020.

¹³ See the Decision of the Bucharest Tribunal no. 2897/2019, See Judgment of the Bucharest 6th District Court no. 3503/2017, unpublished.

¹⁴ See the Decision of the Bucharest Tribunal no. 917/2017.

belonging to a space which he or she considers to be his or her own and where he or she can grow according to his or her age.

4. The alternative housing solution in French law and practice

In the French Civil Code, the alternative housing solution is expressly enshrined in Articles 373-2-9, which provide that the child's home may be established in an alternative manner at the residence of each parent or at the residence of one of them.

The French legal practice¹⁵ has stressed that the establishment of alternative housing is a measure that must primarily protect the interests of the child¹⁶ and not of parents. This must enable children to receive a balanced education and the principle of co-parenting to work.

A number of factors also need to be met: the limited distance between the two residences, the willingness of each parent to ensure the continuity of the various activities of the child and to participate in their education, the dialog between parents.

Communication between parents was considered essential, as every week they should be able to communicate on health, schooling, different activities and to ensure continuity in education.

The alternative housing measure must be proven to be beneficial for the child and does not aim to achieve arithmetical equality, intended solely to ease a parental conflict and to share time with the child equally¹⁷.

5. The principles laid down at European Union level regarding alternative housing

On 2 October 2015, the Parliamentary Assembly of the Council of Europe debated and approved Resolution 2079 on "Equality and Joint parental authority: The role of fathers".

Within this Directive, point 5 Member States are required to:

- introduce into their legislation, in the event of parental separation, the principle of alternating residence, limiting any exceptions only to cases involving child abuse or neglect or domestic violence and adjusting the time spent with each parent to the needs and interests of the child;
- agreements on alternative residence should be taken into account when awarding social benefits.

In September 2001 an international group of scholars established the Commission on European family Law, having a very scientific initiative which is still independent of any organization or institution¹⁸.

This commission, in the principles of European family Law regarding parental responsibility, established the following¹⁹:

- If parental responsibilities are exercised jointly the holders of parental responsibilities who are living apart should agree upon with whom the child resides.
- The child may reside on an alternate basis with the holders of parental responsibilities upon either an agreement approved by a competent authority or a decision by a competent authority. The competent authority should take into consideration factors such as:
 - (a) the age and opinion of the child;
 - (b) the ability and willingness of the holders of parental responsibilities to cooperate with each other in matters concerning the child, as well as their personal situation;
 - (c) the distance between the residences of the holders of the parental responsibilities and to

¹⁵ See the Decision of the Riom Court of Appeal no. 03/03012/27.07.2004.

¹⁶ Ovidiu Ungureanu, Cornelia Munteanu, *Drept civil. Persoanele în reglementarea noului Cod civil*, Ed. Hamangiu, Bucharest, p. 239.

¹⁷ See the Decision of the Riom Court of Appeal no. 04/02456/ 21.06.2005.

¹⁸ Katharina Boele-Woelki, *The principales of European family law: its aims an prospects*, published on https://www.researchgate.net/publication/228236526_The_Principles_of_European_Family_Law_Its_Aims_and_Prospects, Ed. Igitur. 2015, accessed on 1.10.2020.

¹⁹ Principle 3:20 Residence published on <http://www.cej.mj.pt/cej/recursos/ebooks/GuiaDivorcioRespParent/anexos/anexo37.pdf>, accessed on 1.10.2020.

the child's school.

6. Conclusions

Equal responsibility for the child in the case of separated parents has undeniable advantages, which have been highlighted in the literature²⁰: Maintaining the relationship of the child equally with both parents, maintaining the relationship of parents with their children, reducing conflict between parents and preventing family violence, respect children's preferences and opinions on their needs and interests, improve the quality of the child-parent relationship, decrease parents' concentration in terms of time mathematics and reduce disputes, ensure clear and consistent guidance on court judgment and reduce the risk and incidence of parental alienation.

Although the Civil Code currently in force established, as a rule, the exercise of the joint parental authority, recognizing the essential role of each parent, in respect of the minor's residence did not proceed in the same manner.

For this reason, the vast majority of the courts remained dependent on the judicial practice prior to the entry into force of the Civil Code, having in most situations the establishment of the child's home with the mother and a visiting program from the father that allows him to spend much less time with the child.

The alternative residence solution needs to be regulated with a number of essential conditions, such as: the willingness of parents to communicate and cooperate in order to make the minor's transfer from one home to another in good condition, to care for his or her health, to physical, mental and emotional development, and to achieve professional education and training. The distance between parents' homes and the school unit is also an important factor that may make it impossible to establish an alternative housing for the minor.

We believe that an important factor in the choice of an alternate residence is the opinion of the child, the age of the child and the degree of attachment he or she has to each of his or her parents and the willingness to move between their homes. It could also be advisable, taking into account the concrete circumstances of the case, to establish an alternative housing for a limited period and to assess the situation further, even carrying out a psychological assessment is important from our point of view.

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²⁰ Edward Kruk, *Arguments for an Equal Parental Responsibility Presumption in Contested Child Custody*, „The American Journal of Family Therapy”, 2012, 40. 33-55. 10.1080/01926187.2011.575344.